IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA
ON FRIDAY THE 6TH DAY OF MARCH 2020
BEFORE HIS LORDSHIP: HON JUSTICE O. A. ADENIYI
SITTING AT COURT NO. 14 APO – ABUJA

SUIT NO: FCT/HC/CV/753/2017

BETWEEN

MATHAN NIGERIA LIMITED... ... ...CLAIMANT

AND

1. THE HON. ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE
2. HON. MINISTER OF FINANCE
3. THE ACCOUNTANT GENERAL OF THE FEDERATION
4. ASSOCIATION OF LOCAL GOVERNMENT OF NIGERIA

} DEFENDANTS

JUDGMENT

The Claimant, at all times material to this suit, carries on business of building and engineering construction and related activities throughout the Federal Republic of Nigeria. Upon securing approval of the Federal Executive

Council of Nigeria, the 4th Defendant, sometime in February, 2007, contracted the Claimant for the construction and equipment of one comprehensive healthcare centre in each of the ***774*** Local Government Councils of Nigeria on contract-finance basis with a repayment on long term basis and be deducted at source from the Local Government Accounts with the 2nd Defendant for a period of ten months at the cost of **₦46,106,692.05 (Forty-Six Million, One Hundred and Six Thousand, Six Hundred and Ninety-Two Naira, Five Kobo)** only.

It is the case of the Claimant that in the course of executing the contract, the *National Economic Council*, under the Chairmanship of the Vice President of Nigeria at the material time, sometime in December, 2007, unilaterally cancelled the contract between the 4th Defendant and the

Claimant; a decision which the Claimant successfully challenged at the Federal High Court, which, after three years of litigation, purportedly declared the action of the Federal Government as unconstitutional, null and void.

The Claimant further contends that due to lag of time and other economic variables, the contract had to be re-evaluated twice and the final cost of completion, after the input of the *National Bureau of Statistics (NBS)* was sought and obtained by the 4th Defendant, was approved by the 4th Defendant, as at September, 2017, as the sum **₦61,552,350,716.16 (Sixty-One Billion, Five Hundred and Fifty-Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira, Sixteen Kobo)** only, which was communicated to the 2nd Defendant

to be paid to the Claimant to enable her complete the project.

The Claimant further contends that the 2nd Defendant failed and refused to release the variation sum to the Claimant for continuation of the project as directed by the 4th Defendant as a result of which the Claimant has been caused untold hardship, financial embarrassment and humiliation, especially as many of her sub-contractors and other stakeholders were of the believe that the Claimant had been paid but refused to pay them.

Being aggrieved by the continued refusal of the Defendants to perform their obligations under the said contract, the Claimant the instituted the instant action *vide* *Writ of Summons and Statement of Claim* filed in this Court on 30/01/2017; and by *Amended Writ of Summons and*

Statement of Claim, filed on 19/01/2018, pursuant to order of this Court made on 16/01/2018, claimed against the Defendants, jointly and severally, the reliefs set out as follows:

1. ***A Declaration that the Plaintiff is entitled to the sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) being the accrued and approved variation which had been communicated to the 1st to 3rd Defendants by the 4th Defendant, the same having arisen from the contract between the Plaintiff and the 4th Defendant for the construction and equipment of Comprehensive Health Centres in 774 Local Government Councils in the Federation, in view of the letter of the 4th Defendant dated 8th September, 2017.***

2. ***A Declaration that it is unlawful for the 1st, 2nd and 3rd Defendants to withhold and or refuse to pay and release to the***

Plaintiff the sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) being the accrued and approved variation that arose from the contract between the Plaintiff and the 4th Defendant for the construction and equipment of Comprehensive Health Centres in 774 Local Government Councils in the Federation in view of the 4th Defendant letter dated 8th September, 2017.

3. ***A Declaration that the 1st, 2nd and 3rd Defendants acted in excess of their powers and in breach of the Constitution of the Federal Republic of Nigeria, 1999 (As amended), when they withheld and refused to pay the sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) due and payable to the Plaintiff, the 4th Defendant having approved the variation and communicated same in its letter dated 8th September, 2017.***

4. *An order directing the immediate deductions at source from all the members of the 4th Defendant and pay forthwith directly to the Plaintiff the total sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) being the accrued and approved variation that arose from the contract between the Plaintiff and the 4th Defendant for the construction and equipment of Comprehensive Health Centres in 774 Local Government Councils in the Federation, the same having been due and payable to the Plaintiff.*

5. *An order of Perpetual Injunction restraining the 1st, 2nd and 3rd Defendants, their agents, officers, servants, agents, privies and or anyone or body taking instruction from them from interrupting and interfering with the deductions at source the sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) being the accrued and*

approved variation that arose from the contract between the Plaintiff and the 4th Defendant for the construction and equipment of Comprehensive Health Centres in 774 Government Councils in the Federation and the payment of same forthwith to the Plaintiff.

6. ***An order awarding ₦10,000,000,000 (Ten Billion Naira Only) as general damages for the humiliation, the embarrassment and financial losses suffered by the Plaintiff as a result of the unjust and illegal refusal and failure to release to the Plaintiff the approved sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira Seventeen Kobo) by the 4th Defendant.***

IN THE ALTERNATIVE

7. ***An order directing the immediate payment of the sum of ₦61,552,350,716.17 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred***

and Sixteen Naira Seventeen Kobo) being the accrued and approved variation that arose from the contract between the Plaintiff and the 4th Defendant for the construction and equipment of Comprehensive Health Centres in 774 Local Government Councils in the Federation and the payment of same forthwith to the Plaintiff, from the sum of $3,188,078,505.96 (Three Billion, One Hundred and Five Dollars, Ninety Six Cent) being the judgment sum obtained in suit No. FHC/ABJ/130/2013 between LINAS INTERNATIONAL LTD & 235 ORS. V. FEDERAL GOVERNMENT OF NIGERIA & 3 ORS.

The Defendants respectively joined issues with the Claimant. The 1st Defendant's *Statement of Defence* was filed on 09/05/2019. The 2nd Defendant's *Statement of Defence* was filed on 19/04/2017. The 4th Defendant's operative *Statement of Defence* was filed on 27/03/2018.

On his part, the 3rd Defendant failed to file a defence to the action even though the records of Court bear out that he was represented by learned counsel at various times in the course of proceedings in the suit.

It is pertinent to place on record that parties explored possibilities of resolving the issues in dispute in this suit amicably amongst themselves; but that the settlement efforts failed the Claimant was unable to get all the Defendants to endorse the Terms of Settlement drawn up.

The matter nevertheless proceeded to trial. For the Claimant, one **Chief Athan Nneji Achonu,** her Chairman/CEO, testified. He adopted his *Statement on Oath* and further tendered **nine (9)** sets of documents in evidence as exhibits in support of the case of the Claimant.

On her part, the 4th Defendant equally called one witness by name **Evan Enekwe (Mrs.),** who claimed to be its Director of Administration, also supervising legal services for the 4th Defendant. She adopted her *Statement on Oath* as her evidence-in-chief in support of the 4th Defendant's defence. She tendered no documents in evidence as exhibit.

Even though the 1st and 2nd Defendants filed Statements of Defence, they nevertheless failed to call witnesses in support of the defence filed respectively.

Upon conclusion of plenary trial, parties filed and exchanged their written final addressed in the manner prescribed by the **Rules** of this Court.

In the final address filed on 09/12/2019 by learned counsel representing the 1st Defendant, **Oyin Koleosho,**

Esq., three issues were formulated as having arisen for determination in this suit, namely:

1. ***Whether the contract between the Claimant and the 4th Defendant can be enforced against the 1st Defendant herein?***

2. ***Whether the Honourable Court can order the deduction of funds at source to the Claimant from funds due to Local Government Councils in the Federation Account in the absence of appropriate approval and authorization?***

3. ***Whether having regards to the evidence adduced before this Honourable Court, Claimant has proved its case so as to entitle it to the reliefs being sought herein.***

The 2nd Defendant's final address was filed on 09/12/2019, wherein her learned counsel, **Paul Ogbu, Esq.,** equally raised three issues as having arisen for determination in this case, namely:

1. ***Whether by virtue of section 162 of the Constitution of the Federal Republic of Nigeria, 1999 (and contrasting same with Claimant's prayers 1, 2, 3, 4, 5 and 6), the Claimant can ask this Honourable Court to order the 1st, 2nd and 3rd Defendants to violate the clear provision of the Constitution of the Federal Republic of Nigeria?***

2. ***Whether by virtue of s. 176(d) cum Ss. 131, 132 and 133 of the Evidence Act, 2011 as amended, the failure of the Claimant to produce before this Honourable Court, a Written Agreement varying the terms of Exhibit "H" is not fatal to the Claimant's case.***

3. ***Whether having regards to: (1) the binding judgment of the Supreme Court in the case of CBN Vs. Igwillo [2007] All FWLR (Pt. 379) 1391 - par. 7; (2) paragraph 16 of the Claimant's Statement of Claim, Exhibit "H" which is the original Contract Agreement for the construction and***

equipping of Health Care Centres across all the 774 Local Government Councils in Nigeria between the Claimant and the 4th Defendant can be varied without another written agreement (like Exhibit "H") to that effect?

The 4th Defendant in turn filed her final address on 19/11/2019, wherein her learned counsel, **Wale Balogun, Esq.,** formulated a sole issue for determination set out as follows:

Whether in view of the totality of the pleadings and evidence before this Honourable Court, the 4th Defendant has not fulfilled its obligations under the Agreement dated 16th February, 2007 to the Claimant?

The Claimant equally filed her final address on 06/12/2019, wherein her learned senior counsel, **K. C. O. Njemanze, Esq., SAN** formulated a sole issue as having arisen for determination in this suit, namely:

Whether, having regard to the pleadings and evidence led, the Claimant established entitlement to the reliefs sought in this suit.

Having regard to the pleadings of parties, evidence led on record and the totality of the circumstances of this case, it is the view of this Court that issues that have arisen in this case, without prejudice to the issues already formulated by learned counsel in their respective written addresses, as set out in the foregoing, can be succinctly distilled as follows:

1. ***Whether or not there was a valid and enforceable contract agreement between the Claimant and the 4th Defendant; if so, whether or not there was a valid and effective variation of the said contract agreement?***

2. ***If issue one is resolved in the affirmative, whether or not the contract is enforceable against the 1st – 3rd Defendants?***

3. ***Considering the state of affairs with respect to the contract in issue, what remedy(ies) is(are) available to the Claimant in the totality of the circumstances of this case?***

In proceeding to resolve these issues, let me state that I had taken account and due benefit of the totality of the arguments canvassed by learned counsel in their respective written submissions and oral adumbrations; and of which I shall make specific reference as I deem needful in the course of this judgment.

Before proceeding to resolve the issues in contention, let me, as a preliminary point, address the point made by the Claimant's learned senior counsel with respect to the failure of the 1st and 2nd Defendants to call evidence in support of the defence they filed respectively. The trite legal implication of this state of affairs, as correctly submitted by

the Claimant's learned senior counsel, is that the 1st and 2nd Defendants are deemed to have abandoned their defence to the action and the said pleadings are liable to be struck out. Furthermore, the 1st and 2nd Defendants are deemed to have rested their defence on the case made out by the Claimant. See *Ifeta Vs. SPDC Nigeria Limited [2006] LPELR-1436(SC); Cameroon Airlines Vs. Otutuizu [2011] LPELR-877(SC)*.

In the circumstances, the *1st Defendant's Statement of Defence* filed on 09/05/2019 and the *2nd Defendant's Statement of Defence* filed on 19/04/2017 are hereby accordingly struck of the proceedings in this suit.

With regards to the 3rd Defendant, he filed no defence whatsoever to the action. The trite legal implication of the 3rd Defendant's failure to file defence to the claim of the

Claimant, as required by law, is that facts constituting the cause of action, if there are any against him, are deemed as admitted and therefore established against the 3rd Defendant. I so hold. See *Futmina & Ors. Vs. Olutayo [2017] LPELR-43827(SC)*.

As it stands therefore, the suit shall be determined on the basis of the admissible and credible evidence led on record by the Claimant in support of her case; the evidence led in rebuttal by the 4th Defendant to support her defence; and the applicable law thereto.

RESOLUTION OF ISSUES

ISSUE ONE:

IS THERE A VALID AND ENFORCEABLE CONTRACT BETWEEN THE CLAIMANT AND THE 4TH DEFENDANT?

This issue, ordinarily ought to have been deemed as a non issue, considering the state of uncontroverted evidence on record. The **CW1** tendered in evidence as **Exhibit C1**, which is the contract agreement made between the 4th Defendant, **Association of Local Governments of Nigeria (ALGON)** and the Claimant, **Mathan Nigeria Limited**, on 16th February, 2005. By the said contract agreement, the 4th Defendant, which is a registered association of the entire constitutionally recognized 774 Local Government Councils in Nigeria, engaged the Claimant to build a health care centre in each of the said 774 LGAs, in accordance with the specifications approved by the Federal Ministry of Health; and thereafter to equip the health care centres with equipment to be vetted by the **National Primary Health Care Development Agency**. The **Federal Ministry of Housing** is also, by the contract agreement, required to

provide the bill of quantities for the works to be undertaken by the Claimant.

According to clause 6 of the contract agreement, **Exhibit C1**, each health care centre shall be built at the cost of **₦48,060,824.13 (Forty Eight Million, Sixty Thousand, Eight Hundred and Twenty Four Naira, Thirteen Kobo)** only.

It is further agreed between the parties, by clause 7 of the contract agreement, that the contract sum shall be paid by monthly deduction for a period of **ten (10) months** at the sum of **₦4,806,082.41 (Four Million, Eight Hundred and Six Thousand, Eighty Two Naira and Forty One Kobo)** only, *per* local government *per* month from the Local Government accounts from the Federation Account of Local Governments in Nigeria.

Again, by clause 8 of **Exhibit C1**, the 3rd Defendant, Accountant General of the Federation, is authorized to make the deductions and pay same to the contractor, that is the Claimant, provided the contractor presents to the Accountant General of the Federation, bank guarantee on performance from **Platinum Habib Bank Nigeria Plc** or any other reputable bank.

Now, the uncontroverted evidence adduced by the **CW1**, pursuant to the execution of the contract agreement, **Exhibit C1**, are summarized as follows:

1. That the said project received the blessing and approval of the **Federal Executive Council** of Nigeria at the instance of the 4th Defendant.

2. That the contract had been part-performed and that all the parties, including the 1st – 3rd Defendants,

initially kept to the terms of the contract by fulfilling the roles assigned to them by the contract; and that by the end of 2007, the contract had been performed up to almost **50%**.

3. That sometime in December, 2007, the **National Economic Council**, under the Chairmanship of the then **Vice President** of Nigeria, unilaterally cancelled the contract between the 4th Defendant and the Claimant.

4. That the Claimant challenged the said action of the National Economic Council at the Federal High Court in *Suit No. FHC/ABJ/CS/690/2007 – Mathan Nigeria Limited Vs. Attorney General of the Federation & 4 Ors.*; which Court, after about three (3) years of trial, ruled in favour of the Claimant in judgment

delivered on 16th March, 2010 (tendered in evidence by the **CW1** as **Exhibit C3**).

5. That by the said judgment, **Exhibit C3**, the Federal High Court declared the action of the Federal Government in seeking to cancel the said contract as unconstitutional, null and void.

6. That, in view of the said judgment, the Claimant remobilized to site to re-commence work on the outstanding portions of the contract which were at different stages of construction, having been abandoned for about three (3) years as a result of the Court action.

7. That the time lag having apparently occasioned astronomical rise in the cost of building materials, the

Claimant, inevitably, had to approach the 4th Defendant for upward review of the contract sum to accommodate the changes in prices.

8. That after a thorough examination and review of the Claimant's proposal to the 4th Defendant for contract review, the 4th Defendant approved the sum of **₦18,505,112,761.08 (Eighteen Billion, Five Hundred and Five Million, One Hundred and Twelve Thousand, Seven Hundred and Sixty One Naira and Eight Kobo)** only as total variation cost for the outstanding portion of the project.

9. That the 1st – 3rd Defendants however refused to honour the requests of the 4th Defendant to cause the said sum to be deducted at source from funds due to the Local Governments from the Federation Account,

as was done previously before the unlawful cancellation of the same in 2007 by the **National Economic Council.**

10. That by her letter of 24th April, 2014, (admitted as **Exhibit C2**), the 4th Defendant sought the intervention of the then President and Commander In Chief of the Armed Forces of the Federal Republic of Nigeria, **Dr. Goodluck Ebele Jonathan, GCON**, to prevail on the 2nd Defendant to pay to the Claimant the approved variation claims as stated in the foregoing; which representation yielded no fruitful result.

11. It turned out that after seven years of the contract variation, the Claimant was still not mobilized to continue with the contract; as a result the 2010 variation was no longer realistic and a further

variation again became inevitable. The Claimant indeed by letter dated 10th October, 2016, demanded from the 4th Defendant a further upward review of the contract to the sum of **₦61,552,350,716.16 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira and Sixteen Kobo)** only.

12. That after due consultations with the **Statistician-General of the Federation,** *vide* letter dated August 24, 2017 (admitted as **Exhibit C6**); and response received thereto from the **Statistician-General of the Federation,** *vide* letter dated 7th September, 2017 (admitted in evidence as **Exhibit C7**), the 4th Defendant approved the sum of

₦61,552,350,716.16 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira and Sixteen Kobo) only, as the re-valued contract sum with respect to the completion of the contract in **Exhibit C1**.

13. That by letter dated 8th September, 2017, admitted in evidence as **Exhibit C8**, the 4th Defendant conveyed her request and prayers to the 2nd Defendant to pay the Claimant, the said approved variation sum as stated in the foregoing.

14. The Claimant reiterated that even though the 1st – 3rd Defendants made payments to her for the portions of the contract she had already executed, through the office of the 3rd Defendant and the

Central Bank of Nigeria, in the manner stipulated in the contract agreement, before and after the judgment of the Federal High Court, **Exhibit C3** was handed down; but that they had refused and neglected to accede to the request of the 4th Defendant to pay the variation sum.

It is to be noted that the 4th Defendant admitted and corroborated all of the foregoing pieces of evidence adduced by the **CW1** in her *Statement of Defence* and by the testimony of her sole witness, **Mrs. Evan Enekwe** – the **DW1**.

On the basis of the uncontroverted evidence adduced on record as elicited in the foregoing, the Claimant has clearly and satisfactorily established that the contract between her

and the 4th Defendant is indeed valid and enforceable. I so hold.

The uncontroverted evidence on record is further that the contract was already part performed as between the parties thereto; which further underscores its validity.

IS THERE A VALID AND ENFORCEABLE VARIATION OF THE CONTRACT, EXHIBIT C1?

The abounding uncontroverted and credible evidence on record is that as between the Claimant and the 4th Defendant, they are *ad idem* as to the necessity for an upward review of the initial contract sum, for reasons already clearly captured in the testimonies of the **CW1** and **DW1**, as elicited in the foregoing.

The unchallenged evidence on record is further that parties agreed as to the quantum of the upward review of the contract sum, in the sum of **₦61,552,350,716.16 (Sixty One Billion, Five Hundred and Fifty Two Million, Three Hundred and Fifty Thousand, Seven Hundred and Sixteen Naira and Sixteen Kobo)** only.

The only defence the 4th Defendant seemed to have put forward to the totality of the case of the Claimant is that she is not responsible for the delay in the payment of the approved variation for the completion of the project; that it was the 1st – 3rd Defendants who were responsible for the delay.

I have noted the contention of the 1st Defendant's learned counsel that failure of the Claimant to call the author of the document, **Exhibit C7**, to give expert evidence of the

variation which both the Claimant and the 4th Defendant relied upon rendered the document incredible and lacking in probative value and that the Court ought to discountenance the same.

But then, this argument is clearly beside the point. The crucial consideration, with respect to variation of contract, is for the party claiming same to establish that the variation was arrived at by mutual consent of parties to the agreement. This position of the law was succinctly upheld by the Court of Appeal in *Unity Bank Plc Vs. Olatunji [2015] 5 NWLR (Pt. 1452) 203 @ 242*, cited by the 4th Defendant's learned counsel, where the Court, relying on the Supreme Court decision of - *Ekwunife Vs. Wayne (WA) Ltd [1989] 5 NWLR (Pt. 122) 422*, and held as follows:

"For a variation to be upheld, there must be a valid and subsisting contract on foot between the parties; there must be some form of consensus between the parties as to the obligations which are to be altered; and the parties must have acted in some way to their benefit or detriment in either agreeing the variation or as a result of the variation. A mutual abandonment of the existing rights of the parties under the agreement between them is sufficient consideration to support variation of the agreement - Ekwunife Vs Wayne (WA) Ltd (1989) 5 NWLR (Pt. 122) 422 and Prospect Textile Mills Ltd Vs Imperial Chemical Industries Plc England (1996) 6 NWLR (Pt. 457) 668. Also, consideration will be said to have been provided where a party would derive a superadded benefit from the contract by reason of the variation - Williams Vs Roffrey Bros & Nicholas (Contractors) Ltd (1991) 1 QB 1."

In the present case, all the conditions set out in this authority is shown by evidence to have been present and as such the Court is satisfied that the Claimant has established the presence of valid variation of **Exhibit C1** by mutual consent of both the 4th Defendant and the Claimant in this case.

There is no condition in the contract agreement, **Exhibit C3,** that requires or compels parties thereto to seek the approval or consent of the **Federal Executive Council** or the **National Bureau of Statistics** in order to review the cost of the contract. As such, the contention of the 1st Defendant's learned counsel that failure to call the author of the letter, **Exhibit C7**, to give evidence as to how he came about the variation quantum, is of no moment since the 4th Defendant had no obligation under the contract, **Exhibit C1**, to seek the consent or opinion of the **National Bureau of Statistics** or

the **Statistician-General** of the Federation in order for her to decide on the quantum of variation of her contract with the Claimant. I so hold.

In other words, **Exhibit C7**, as the content indicates, is a mere advisory which was only meant to be a guide to the 4th Defendant but not binding on her. I further so hold.

The 1st Defendant's learned counsel again contended that neither the Claimant nor the 4th Defendant adduced evidence to establish that members of the 4th Defendant approved the payment of the variation sum.

Again, this argument is lacking in substance for the simple reason that the 4th Defendant, as has been demonstrated by evidence, is, at all material times, the mouth piece of the totality of the ***774*** Local Government Councils in the Federal Republic of Nigeria recognized by the **Constitution** of the

Federal Republic of Nigeria as far as the contract in issue was concerned. The evidence of the **CW1** that the 4th Defendant is a registered association is not challenged by any of the Defendants. Furthermore, the contract agreement, **Exhibit C1**, shows in its face the capacity of the 4th Defendant, as representing all the said **774** Local Government Areas of Nigeria. As such, whatever steps or actions the 4th Defendant took with respect to the contract are deemed in law as the direct steps and actions of the totality of the **774** Local Government Areas of Nigeria. I so hold.

Again, the letters **Exhibits C2, C6, C7** and **C8,** written respectively by the National President of the 4th Defendant further shows that the 4th Defendant is indeed the mouth

piece of all the Local Government Areas in Nigeria in so far as the contract in issue is concerned. I further hold.

The 2nd Defendant's learned counsel, in his own arguments, also contended that the contract between the 4th Defendant and the Claimant, **Exhibit C1**, can only be varied by a separate written agreement, relying on the Supreme Court authority of *CBN Vs. Igwillo [2007] All FWLR (Pt. 379) 1391.*

This indeed is the trite general principle. Nevertheless, the overriding consideration, in determining the validity of an agreement for variation of contract is the presence of consensus ad idem of parties as I had earlier on held. This position was again underscored by **Tobi, JSC** (of blessed memory) in *B.M.N.L. Vs. Ola Ilemobola Ltd. [2007] All FWLR (Pt. 379) 1340 @ 1366* where His Lordship held as follows:

"But if the parties by their ad idem agree by oral agreement to change part of the written agreement, the court will not reject the oral agreement."

Again, in *BFI Group Corporation Vs. Bureau of Public Enterprises [2012] LPELR-9339(SC)*, the Supreme Court held that a Court must consider series of correspondence exchanged between parties to an agreement in order to determine their real intentions. See also *Nneji Vs. Zakhem Con. (Nig.) Ltd. [2006] 12 NWLR (Pt. 994) 297*.

In the present case, the contents of the letters, **Exhibits C5** and **C8** are conclusive on the c*onsensus ad idem* of the 4th Defendant and the Claimant for the upward review of the contract sum to the sum of **₦61,552,350,716.16** as aforestated. I so hold.

This Court is therefore not in doubt that the Claimant clearly established that as between the 4th Defendant and her, there was a valid and enforceable variation of the consideration of the contract, **Exhibit C1**. I so hold.

On the basis of the foregoing analysis therefore, I herby resolve issue, as set down, in favour of the Claimant.

ISSUE TWO:

CAN THE VARIED CONTRACT BE ENFORCED AGAINST THE 1ST – 3RD DEFENDANTS?

Now, the more crucial issue raised by the 1st Defendant's learned counsel in his written submissions is as to whether there was privity of contract as between the Claimant and the 1st Defendant, as indeed the 2nd and 3rd Defendants, to entitle the Claimant to any reliefs against them in the present suit?

The 1st Defendant's learned counsel, in his arguments, correctly defined the age old doctrine of privity of contract, which donates the principle that a contract cannot confer rights or impose obligations arising therefrom on any person except parties to it. In other words, a stranger cannot acquire rights or incur obligations arising from a contract to which he is not a party. See *Rebold Industries Ltd. Vs. Magreola & Sons [2015] LPELR-24612(SC); Reichie Vs. Nigerian Bank for Commerce and Industry [2016] LPELR-40051(SC).*

In the present case, it is not difficult to find that the only parties to the contract in contention, **Exhibit C1**, are the Claimant and the 4th Defendant, as it is explicit on the face of the document.

I have further noted that clause 8 of the contract, **Exhibit C1**, assigns a role to the 3rd Defendant, the Accountant General of the Federation, who is authorized to make deductions of certain amounts of money from the funds allocated to the Local Governments Councils from the Federation Account to fund the execution of the contract. Nevertheless, failure of the 3rd Defendant to carry out the instructions of the 4th Defendant in this regards cannot give rise to a cause of action by the Claimant against the 3rd Defendant or the duo of the 1st and 2nd Defendants in this action. I so hold.

My further view is that only the 4th Defendant has a right of action, if at all, to challenge the refusal of the 1st – 3rd Defendants to comply with her requests as contained in the contract agreement, **Exhibit C.** I so hold.

The Claimant did not establish by evidence that the 1st – 3rd Defendants owe her any obligations whatsoever under the contract, not being parties thereto. It is immaterial, as the **CW1** testified, that at the initial stages the 1st – 3rd Defendants kept to the payment instructions as contained in the contract by ensuring that the sums due to the Claimant for the execution of the contract were duly deducted at source from the funds allocated to the Local Government Councils from the Federation Account and disbursed to her as agreed with the 4th Defendant. However, failure of the 1st – 3rd Defendants to continue to abide by this instruction, does not give rise to a cause of action in favour Claimant against them. This is so in that whatever obligations the 1st – 3rd Defendants may have under the contract, if any, is to the 4th Defendant, not the Claimant.

In the Supreme Court decision of *Owodunni Vs. Registered Trustees of CCC [2000] 10 NWLR (Pt. 675) 315*, **Ogundare, JSC** (of blessed memory), further underscored the point by holding, @ page 339, as follows:

> ***"...a plaintiff who has no privity of contract with the defendant will fail to establish a cause of action for breach of contract as he will simply not have the locus standi to sue the defendant on the contract."***

I therefore agree with the submissions of the 1st Defendant's learned counsel that in the circumstances of the present case, the Claimant lacked the *locus standi* to seek an order to compel or direct the 1st – 3rd Defendants to deduct at source the funds belonging to the Local Government Councils for purposes of paying her the said variation sum of **₦61,552,350,716.17** in respect of the contract between her

and the 4th Defendant; they not being parties to the said contract.

I have also considered the concurring arguments of the respective learned counsel for 1st and 2nd Defendants that by virtue of **s. 162(5)** of the **Constitution,** Local Governments do not possess any fund that can be deducted at source because there are no direct allocations from the Federation Account to the Local Government Councils in Nigeria.

The provision of **s. 162(5)** of the **Constitution** states as follows:

> ***"Any amount standing to the credit of local governments in the Federation Account shall be allocated directly to the States for the benefit of their local government***

councils on such terms and in such manner as may be prescribed by the National Assembly."

By my understanding, there is nothing in this provision that precludes Local Government Councils from deciding that funds due to them from the Federation Account should not be deducted at source by the Federal Government for lawful purposes. This indeed explained why the 1st – 3rd Defendants complied with the request of the 4th Defendant to deduct at source funds belonging to the Local Governments in the Federation Account to service the contract in issue which enabled the Claimant part-perform the same. This position is clearly further confirmed in the judgment of the Federal High Court, **Exhibit C3**, where the Court found as fact (at page 24 thereof), that the 1st – 3rd Defendants had approved payments on four different occasions to the Claimant, in compliance with the 4th

Defendant's mandate to pay the Claimant for the execution of the contract in the manner agreed under the contract agreement prior to the institution of that action by the Claimant in December, 2017.

Again, whilst being cross-examined by the respective learned counsel for the 1st and 2nd Defendants, the CW1 confirmed that so far the sum of **₦37,000,000,000.00 (Thirty Seven Billion Naira)** only had been paid to the Claimant for the execution of the contract through deductions at source from funds accruing to the ***774*** Local Government Councils from the Federation Account.

I have read the authorities relied upon by learned counsel for the respective 1st and 2nd Defendants, *A. G., Lagos State. Vs. A. G., Federation [2004] 18 NWLR (Pt. 904) 1; The A. G., Bendel State Vs. The A. G., Federation [1983] LPELR-*

3153(SC); A. G., Ogun State Vs. A. G., Federation [2000] 12 NSCQ 302. The common denominator in these decisions is the compelling pronouncement of the Supreme Court that the Federal Government lacked the legal authority to withhold funds allocated to State Governments in the Federation Account or manage same on their behalves without their express consent or agreement. Whereas, in the present case, it is the contract agreement, **Exhibit C1**, that authorized the 1st – 3rd Defendants to dabble into the funds due to the Local Government Councils in the Federation Account to fund the contract which they in fact did.

As such, the said Supreme Court authorities relied on by learned counsel for the respective 1st and 2nd Defendants, for the contention that the contract between the 4th Defendant and the Claimant, **Exhibit C1**, was an illegal

contract, are clearly inapplicable in the circumstances. I further hold that the arguments of learned counsel for the 1st Defendant that the contract, **Exhibit C1**, is illegal in that the Local Government Councils, through the 4th Defendant, lacked the authority to direct deductions from their allocations from source to fund the contract with the Claimant, is clearly misconceived, untenable and not supported by the evidence on record.

The conclusion of the Court, from the foregoing analysis, is that even though the Claimant lacked the *locus standi* to have instituted the present action against the 1st – 3rd Defendants on the basis of the finding that she has made out no reasonable cause of action against them; they not being parties to the contract between her and the 4th Defendant; nevertheless, they are not lawfully precluded or

hindered from complying with the request of the 4th Defendant with respect to the arrangement for funding the contract.

In the same token, the Claimant lacked the capacity to pray the Court to compel the 1st – 3rd Defendants to pay her the contract review sum of **₦61,552,350,716.17** as agreed to by parties to the contract since she exercises no lawful authority over them by the said contract.

The view of this Court is that it is incumbent on the 4th Defendant to seek other means it deems appropriate to access funds lawfully accruing to all the 774 Local Government Councils from the Federation Account in order to fund the contract lawfully entered into with the Claimant.

On this score, I hereby resolve issue two, as set out, against the Claimant.

ISSUE THREE:

WHAT IS THE LAWFUL REMEDY OF THE CLAIMANT AGAINST THE 4TH DEFENDANT IN THE CIRCUMSTANCES?

By my understanding of the evidence adduced on the record, the case clearly made out by the Claimant against the 4th Defendant is that of breach of contract; whereas on the other hand, the 4th Defendant seemed to be contending frustration of contract on the part of the 1st – 3rd Defendants.

It was held in the authority of *Tsokwa Oil Marketing Company Vs. B.O.N. Ltd. [2002] 11 NWLR (Pt. 777) 163*, that a valid contract may be discharged in any of the four ways stated as follows:

(a) By performance: or

(b) By express agreement: or

(c) By the doctrine of frustration; or

(d) By breach.

See also *Adedeji Vs. Obajimi [2018] LPELR-33712(SC)*.

Now, frustration of contract occurs where after the contract was concluded, events occur which make performance of the contract impossible, illegal or something radically different from that which was in the contemplation of the parties at the time they entered into the contract occurred. A contract which is discharged on the ground of frustration is brought to an end automatically by the operation of law, irrespective of the wishes of the parties. The doctrine is lucidly explained, *per* **Oguntade, JSC,** in *S.E. Co. Ltd. Vs. N.B.C.I [2006] 7 NWLR (Pt. 978) 198*, where His Lordship held as follows:

"The doctrine of frustration simply means that if the performance of a contract depends on the continued existence of a state of affairs, then the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract. Frustration, it is submitted only 'occurs under conditions that are totally out of the control of the parties'."

In *A. G., Cross River State Vs. A. G., Federation [2012] LPELR-9335(SC)*, the Supreme Court listed some events that have been judicially recognized to cause frustration of contract as follows:

a. Subsequent legal changes

b. Outbreak of war.

c. Destruction of the subject matter of contract.

d. Government requisition of the subject matter of the contract.

e. Cancellation of an expected event.

See also *NBCI Vs. Standard (Nig.) Eng. Co. Ltd. [2002] 8 NWLR (Pt. 768) 104; Obayuwana Vs. The Governor of Bendel State [1982] 12 SC 147; Okereke Vs. Aba North LGA [2014] LPELR-24521(CA).*

In order for doctrine of frustration to avail a party, he must show that he is willing and capable of performing his own obligation under the contract but was prevented from doing so by circumstances beyond his contemplation and control. See again, *Egbe Vs. Alhaji [1990] 1 NWLR (Pt. 128) 564; Ademola Vs. Sodipo [1989] 5 NWLR (Pt. 121) 329.*

It is also pertinent to underscore that the defence of frustration of contract, like other recognized defences, need not be specifically pleaded by using the word **'frustration'** and it is sufficient that the party raising it pleads facts alleging impossibility of performance of a contract and alleges the occurrence of one or more of the above mentioned events that the Courts have listed as constituting frustration.

Additionally, it is the duty of the Court to make the necessary inference from the evidence led whether and when frustration has occurred. In other words, it is the Court that determines the existence of frustration from the facts pleaded and evidence led by the parties. See *Attorney General, Cross River State Vs. Attorney General of the Federation* *(supra)*; *Pulseline Services Ltd. Vs. Equitorial Trust*

Bank [2010] LPELR-4886(CA); Malik Vs. Kadura Furniture & Carpets Co. Ltd. [2016] LPELR-41308(CA).

Now, in the instant case, the defence made out by the 4th Defendant in the present case, as I had noted earlier on in this judgment, is that but for the failure of the 1st – 3rd Defendants to release the necessary funding to the Claimant for the completion of the project, the 4th Defendant had, on its part, fulfilled its obligations to the Claimant with respect to the contract. Invariably, the case of the 4th Defendant is that the failure of the 1st – 3rd Defendants to heed its instructions as contained in clause 8 of the **Exhibit C1** has occasioned frustration of the contract.

I am however less impressed by the 4th Defendant's stance. I reckon that the law, as it was when the 1st – 3rd Defendants complied with the arrangement under the contract for them

to make deductions at source from funds accruing to the **774** Local Government Areas of the Federation from the Federation Account to fund the project, has not been shown to have changed up to date. There is nothing on the records to show that the **774** Local Government Councils no longer receive funds accruing to them from the Federation Account from which the contract could continue to be funded.

Again, the 4th Defendant did not deny the Claimant's claim and the testimony of the **CW1** in *paragraph 46* of his *Statement on Oath* that the 4th Defendant had alternative capacity to fund the contract variation from the huge sum of **$3,188,078,505.96 (Three Billion, One Hundred and Eighty Eight Million, Seventy Eight Thousand, Five Hundred and Five Dollars and Ninety Six cents)** only, paid to her as a fall out of the judgment in *Suit No.*

FHC/ABJ/CS/130/2013 – Linas International Ltd. & Ors Vs. Federal Government of Nigeria & Ors., which judgment was admitted in evidence as **Exhibit C4**.

The 4th Defendant cannot therefore put up a posture of helplessness to suggest that it has become incapable or that it has become impossible for it to perform its obligations under the contract; notwithstanding the uncooperative posture and stance of the 1st – 3rd Defendants. I so hold.

In the circumstances, the defence of frustration that the 4th Defendant seemed to have tacitly put forward, although not categorically pleaded in its Amended Statement of Defence; and which, if successfully established, would have discharged it from liability under the contract, does not avail for it in the circumstances of this case. I so hold.

What other remedies then are available to the Claimant, on the basis of the evidence led on the record?

The position, from the evidence on the record is that the 4th Defendant has failed to discharge its obligations of continuing to fund the project as agreed with the Claimant under the contract, **Exhibit C1**. The 4th Defendant is therefore liable to the Claimant in breach of contract, in the circumstances.

Now, from the reliefs the Claimant has claimed in this action, it appears to me that she is seeking both specific performance of the contract on the one hand, by insisting on the payment of the quantum of the reviewed contract; and at the same time damages for breach of contract.

It should be reckoned that the only ground by which a party that has part-performed a contract could insist on specific

performance, as the Claimant seems to me to be pressing for in the present case, is where monetary damages are inadequate or inappropriate to assuage the losses suffered. See *BFI Group Corporation Vs. Bureau of Public Enterprises (supra)*.

In *Afrotec Tech. Servo (Nig.) Ltd. Vs. MIA & Sons Ltd. [2000] 15 NWLR (Pt. 692) 730*, the Supreme Court, whilst elucidating on the principles of specific performance, held as follows:

> ***"The fundamental rule is that specific performance will not be decreed if there is an absolute remedy at law in answer to the plaintiff's claim, that is to say, where the plaintiff would be adequately compensated by the common law remedy of damages."***

It is my firm view that to compel the 4th Defendant to perform specifically the contract it entered with the Claimant, by paying the said sum of **₦61,552,350,716.17** will work further hardship on the Claimant in that there is no guarantee that the 4th Defendant has the will to ensure compliance, considering the evidence led on record as to the stance of the 1st – 3rd Defendants in this case.

In the circumstances, recourse must be had to the remedy available to the Claimant for the non-performance or breach of the contract by the 4th Defendant, which is in the area of damages.

In *Olaopa Vs. O.A.U. Ile-Ife [1997] 7 NWLR (Pt. 512) 443*, the Supreme Court considered the issue of remedies available in breach of contract and held, *per* **Wali, JSC**, as follows:

"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 fruits of the labour he has already rendered. In situation like this, two alternative remedies are open to him:-

(a) damages for breach of contract;

(b) reasonable remuneration in quantum meruit for the work already done."

In the present case, I have noted that the Claimant claims the sum of **₦10,000,000.00 (Ten Billion Naira)** only as <u>general damages</u> from the 4th Defendant as a result of the humiliation, embarrassment and financial losses she suffered for the 4th Defendant's failure to release to her the approved variation sum of **₦61,552,350,716.17**.

The **CW1** had also testified in *paragraph 59* of his *Statement on Oath*, in furtherance of the averment in *paragraph 38* of the *Amended Statement of Claim*, referring to the letter written to the 4th Defendant, dated 10th October, 2016, **Exhibit C5**, whereby she gave a breakdown of components of the total variation sum, namely:

i. Revised variation claims for constructing and equipping the 774 comprehensive primary healthcare centres in Nigeria is **₦34,272,580,537.35**;

ii. Add 255 deterioration of building components and hospital equipment, of the sum **₦8,568,145,134.34**; and

iii. Add backlog of consultancy fees, security bills, warehouse facilities and office accommodation, all amounting to **₦18,711,625,044.47**.

The 4th Defendant specifically admitted *paragraph 38* of the *Amended Statement of Claim* in *paragraph 1* of its *Amended Statement of Defence*.

Now, the effect of the **CW1's** testimony in *paragraph 59* of his *Statement on Oath*, is that out of the total sum of **₦61,552,350,716.17**, claimed by the Claimant as contract review sum, the sum of **₦18,711,625,044.47 (Eighteen Billion, Seven Hundred and Eleven Million, Six Hundred and Twenty Five Thousand, Forty Four Naira and Forty Seven Kobo)** only, represented expenditure the Claimant had already incurred as a result of the prolonged delay in the continuation of execution of the contract.

The **CW1** further testified in *paragraph 65* of his *Statement on Oath* that for every day that the approved sum is not paid, the Claimant has been incurring series of bills not only to maintain the sites all over the country but also to settle sundry bills of all subcontractors.

The settled position of the law is that assessment of damages in breach of contract is calculated on the loss incurred by the injured party, which loss is either in the contemplation of the parties to the contract or is an unavoidable consequence of the breach. The settled position is further that the essence of damages in breach of contract cases is based on the maxim *restitutio in integrum*, meaning that the claimant be restored to a position as if the contract has been performed, by way of monetary compensation. See the *locus classicus* English case of *Hadley Vs. Baxendale*

[1854] 9 EX 341 which had stood the test of the ages. See also the indigenous authorities of *Arisons Trading & Engineering Company Ltd. Vs. The Military Governor of Ogun State [2009] 15 NWLR (Pt. 1163) 26; Agu Vs. General Oil Ltd. [2015] LPELR-24613(SC).*

In the present case, my finding is that the Claimant is justifiably entitled to the sum of **₦18,711,625,044.47 (Eighteen Billion, Seven Hundred and Eleven Million, Six Hundred and Twenty Five Thousand, Forty Four Naira and Forty Seven Kobo)** only, which is shown to have been contemplated by both parties, that is the 4th Defendant and the Claimant, as the losses and costs already incurred by the Claimant and which flowed naturally as a result of the breach of contract occasioned by the 4th Defendant.

This award is premised on the position of the law that there is no dichotomy between special and general damages in the law of contract. In contract it is damages *simplicita* for loss arising from the breach as contemplated by the parties.

Even though the Claimant has claimed a total sum of **₦61,552,350,716.17**, it will be appropriate to grant the sum of **₦18,711,625,044.47 (Eighteen Billion, Seven Hundred and Eleven Million, Six Hundred and Twenty Five Thousand, Forty Four Naira and Forty Seven Kobo)** only, on the basis of the principle that a party is entitled to judgment for any part of his claim he is able to establish to the satisfaction of the Court even though the reduced sum was not expressly claimed. See *Okoebor Vs. Eyobor Engineering Services Limited [1991] 4 NWLR (Pt. 187) 553;*

Akinterinwa Vs. Oladunjoye [2000] All FWLR (Pt. 10) 1690; Okuilor Vs. Jite [2005] All FWLR (Pt. 287) 855.

See also the authority of *Value Line Securities Investment Ltd. Vs. Anakwube [2015] LPELR-24486(CA)*, where the Court of Appeal endorsed the middle line taken by the trial Court in that case to grant damages *simplicita* as against general damages claimed by the Claimant. See also *Mazarett Vs. Williams [1830] 1 B and Ad 415.*

SUMMARY OF CONCLUSIONS

In the final analyses, the summary of the decision of this Court, on the basis of the state of the pleadings of the parties, analysis of the totality of the admissible and credible evidence led on record and the totality of legal

arguments canvassed by the respective learned counsel for the respective parties is as follows:

1. *That there is abundance evidence of a valid, legal and enforceable contract executed between the 4th Defendant, representing the totality of the 774 Local Government Councils in Nigeria; and the Claimant, for the construction and equipment of one comprehensive healthcare centre in each of the* ***774*** *Local Government Areas of Nigeria upon lawful terms set out in the contract agreement,* ***Exhibit C1****.*
2. *That the said contract did not violate the provision of* ***s. 162(5)*** *of the* ***Constitution*** *and thus cannot be classified as an illegal contract.*
3. *That the 1st – 3rd Defendants were not parties to the said contract executed between the 4th Defendant and the*

Claimant and are thus not liable to the Claimant in any way whatsoever under the said contract; and by extension are not liable to the Claimant in the present action; there being no legally cognizable cause of action formulated against them.

4. *That the Claimant had achieved about **50%** completion of the contract when, in December, 2007, the same was unlawfully terminated by the Federal Government of Nigeria as represented by the National Economic Council.*

5. *That the illegality of the action of the Federal Government in cancelling the said contract and the legality of the contract were affirmed by the Federal High Court in judgment handed down on 16/03/2010 after protracted trial.*

6. *That the Claimant proposed upward review of the contract sum as a result of unfavourable economic circumstances foisted on her as a result of the long delays occasioned by the interference of the Federal Government in the execution of the contract; which review the 4th Defendant agreed to and accepted.*

7. *That the 4th Defendant's tacit defence of frustration of the contract occasioned by the purported conducts of the 1st – 3rd Defendants is unavailable in the circumstances of this case.*

8. *That the 4th Defendant rather breached the continued execution of the contract occasioned by the refusal of the 3rd Defendant to continue to undertake the instructions assigned to him by clause 8 of the contract as to the manner in which the contract shall be funded.*

9. *That the remedy available to the Claimant, in the circumstances of the present case, is not a relief compelling the 4th Defendant to specifically perform the contract, as the attainment of such relief may be futile considering the stance exhibited, particularly by the 2nd and 3rd Defendants in this action.*

10. *That the lawful remedy available to the Claimant as a result of the 4th Defendant's sustained breach of the contract between them is to walk away with damages as contemplated by both parties as arising from the breach.*

On the basis of the foregoing summary of the conclusions of this Court; and in the final analysis of the totality of the case put forward by parties in this suit, the judgment of this Court is that only the Claimant's relief for damages for the loss she suffered as a result of the 4th Defendant's breach of the

contract between them is meritorious. Accordingly, the Court hereby awards the sum of **₦18,711,625,044.47 (Eighteen Billion, Seven Hundred and Eleven Million, Six Hundred and Twenty Five Thousand, Forty Four Naira and Forty Seven Kobo)** only in favour of the Claimant against the 4th Defendant as damages for breach of the contract executed between the two parties on 16th February, 2007; which contract the Claimant part-performed. Parties shall bear their respective costs of this action.

OLUKAYODE A. ADENIYI
(*Presiding Judge*)
06/03/2020

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