IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON WEDNESSDAY THE 28TH DAY OF JANUARY, 2020.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI
SUIT NO. CV/2917/2017

XALAN NIGERIA LTD ----------CLAIMANT/APPLICANT

AND

S. DANIELE W/A LIMITED ----------RESPONDENT

RULING

This Originating Motion is brought pursuant to **Order 7 Rule 2 (1) and 3 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004, Article 9,10,11 and 12 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004** and under the inherent jurisdiction of this Honourable Court, whereby the Claimant claimed against the Respondent the following reliefs:

1. An order of this Honourable Court, setting aside the appointment of Professor Fabian Ajogwu, SAN, FCIArb, as the sole Arbitrator, over the dispute between the parties, made by Order of this Court dated the 4th of July, 2017.
2. An order of this Honourable Court setting aside the interim Award (Ruling/Decision) made by the sole Arbitrator, Professor Fabian Ajogwu, SAN, FCIArb, on the 28th of August 2017 on the challenge made to his appointment as Arbitrator made by the Court on the 4th of July 2017.

3. An order of this Honourable Court perpetually restraining the sole Arbitrator, Professor Fabian Ajogwu, SAN, FCIArb from continuing with the Arbitral proceedings between the parties herein.
4. for such further or other orders that this Honourable Court may deem fit to make in the circumstances.

The grounds upon which this application is made are as following:

1. The Applicant/Claimant filed an Originating Motion on the **12th of April 2017** urging the Honourable Court to appoint any of the following proposed Arbitrators, thus: **Chikwendu Madumere, FCIArb, FCIA, FCILRM.; Bldr. (Hon.) Bala Bawa Kaoje, FNIOB, FCIA, PPNIOB, MCABE-UK; Prof. Ahmed Doko Ibrahim, ASCIArb; Mr. Agada John Elachi, Esq, FICMC, FCIArb. (UK).**
2. The Honourable Court in its wisdom on the **4th of July 2017** appointed **Prof. Fabian Ajogwu, SAN, FCIarb**., as the Sole Arbitrator.
3. At the Preliminary meeting held in Lagos on the **4th of August 2017**, a Procedural Order Number 1 was made by the Arbitral Tribunal and same was forwarded to Claimant's counsel via email on the said **4th August 2017**.
4. On the **10th of August 2017**, at about **6:04pm**, the Claimant's Managing Director (MD) informed her lead counsel **Y.C. Maikyau, SAN, FCIArb**. Via email from aokuboye@yahoo.com to ycmaikyau@yahoo.co.uk of her "***very deep worry about the possibility of inadvertent bias"*** on the part of the Court appointed Sole Arbitrator, **Prof. Fabian Ajogwu, SAN, FCIArb.**, having

discovered that the sole Arbitrator acted and continues to act for the **Federal Government** and particularly the **Central Bank of Nigeria** (hereinafter called CBN) in a number of cases and expressed fear of the Arbitrator's incline to conscious bias in favour of the government to her detriment.

5. Notwithstanding the obvious involvement and direct economic interest of the CBN in the outcome of the Arbitral proceedings, the Sole Arbitrator failed to disclose the fact that he has been counsel to the CBN upon Notice of his appointment to serve as Sole Arbitrator.
6. Consequent upon the foregoing, the Claimant challenged the appointment of **Prof. Fabian Ajogwu, SAN FCIArb** as the Sole Arbitrator by a letter dated **15th of August 2017** which was delivered to the Sole Arbitrator and the Respondent's counsel through email and hardcopy also delivered to the Respondent's Counsel, **John Erameh, Esq** at his Abuja address.
7. After the exchange of addresses for and against the challenge, on the **28th of August 2017** at **6:51Pm** the Claimant received via email, the interim award (ruling/decision) of the Sole Arbitrator declining to withdraw from the arbitral proceedings and deciding to proceed with the Procedural Order No. 1 and with the addition of 14 days to the specified dates.
8. It is not in dispute that both the Claimant and Respondent were appointed by the CBN for the project over which the dispute arose and neither is it in contention that the Sole arbitrator is counsel to the CBN.

9. That CBN had by a letter dated **21st march 2017** admitted re-awarding the contract to the Respondent after the purported termination of the Sub-Contract between Claimant and Respondent.
10. The decision of the Sole Arbitrator to proceed in the matter despite the challenge by the Claimant will prejudice the Claimant and occasion injustice to the Claimant.
11. It is in the interest of justice to grant this application.

Learned Counsel to the Applicant relied on the 29 paragraph Affidavit deposed to by Nwabueze Obasi-Obi, a legal practitioner in the firm of Messrs Y. C. Maikyau & Co., solicitors to the Claimant/Applicant and 16 Exhibits attached thereon. I have accordingly read the Affidavit evidence and the attached Exhibits. Claimant/Applicant also filed a further affidavit and a reply on points of law to the Respondent's Counter Affidavit in opposition to the Originating Motion and same was adopted.

In opposition, the Respondent filed an 11 paragraph counter affidavit deposed to by Onyinyechi Okereke, a solicitor in the law firm of John Erameh & Co, solicitors to the Respondent; attached therewith are 6 Exhibits marked Exhibits JO1 – JO6. Learned Counsel to the Respondent relied on the said Counter Affidavit and Exhibits in opposing the Originating Motion.

I have carefully studied the depositions in the respective affidavits, including the Claimant/Applicant's further affidavit and the written

submissions of learned counsel Viewed against the background of the Applicant's claims and the grounds as reproduced above. Both Counsel adopted their Final Written Addresses filed in this matter.

The Claimant/Applicant's Counsel in its written address, did not raise any issue for determination. He summarized the relevant facts to this application and stated that one of the paramount duties of an Arbitrator is the duty to be fair to the parties. That this must remain the case throughout the Arbitral proceeding but however in this case the conduct of the Arbitrator is anything but observance to this golden rule of fairness in any form of adjudication or dispute resolution. Counsel submitted that the involvement of the Central Bank of Nigeria was more than apparent given the relationship between the sole Arbitrator and Central Bank of Nigeria, that the sole Arbitrator was under a duty to have declined the appointment in view of conflict of interest, that is, the relationship between the CBN and the Sole Arbitrator on one hand and the requirement for the sole Arbitrator to be independent and impartial on the other hand. Learned counsel submitted that the Arbitration and Conciliation Act, is a statute patterned after the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the expression "impartiality or independence" used in Section 8 of the Arbitration and Conciliation Act and the use of the appearance test of justifiable doubts to the impartiality or independence of the Arbitrator, is to be applied objectively. That is to say, the test must be that of a reasonable third person's test. Counsel submitted that the question would be what is or

would be the impression of a dispassionate bystander seized of the above mentioned facts? Counsel answered by saying that there is certainly no person/entity that can be more interested in the Arbitral proceedings than the CBN and the fact that Professor Fabian Ajogwu SAN, FCIArb, is the sole Arbitrator, has engendered an obvious conflict of interest on his part. Counsel submitted though the sole Arbitrator in his decision, admitted being Counsel to CBN, he still maintained the view that such did not raise justifiable doubt as to his impartiality and independence; counsel submitted that it is not the Sole Arbitrator's view of the situation that counts but that of a dispassionate third person. He cited the case of **ADIGUN V. A.G OF OYO STATE (1987) 1 NWLR Page 678 @ 719-720 PARAS H-D PER ESO, JSC**, where the reasonable man's test was laid down. Counsel placed reliance on the International Bar Association Guidelines and urge the Court to be guided by the principles laid down therein as guide in determining conflict of interest. Counsel also cited **Karel Daele's** book on C**hallenge and Disqualification of Arbitrators in International Arbitration, published by Walters Kluwer Law & Business' at pages 8 and 9.** Learned Counsel further submitted that the Sole Arbitrator has acted for CBN in several capacity as Counsel and given the transaction that gave rise to this dispute, CBN, exerts considerable control over the Respondent and there arose a duty on the part of the Arbitrator to decline the appointment as an Arbitrator but also as a legal practitioner. Counsel also submitted that the Claimant did not at any time allude to the fact that the CBN is a party to the sub-contract. That if the Sole Arbitrator had any doubt as to the extent of the involvement of CBN in the matter,

the interim preservative orders (Exhibit 1A) should have cleared such doubt. Finally, Counsel submitted that had the Sole Arbitrator considered the test of objectivity, he would have declined the appointment. That in the case at hand, there exists a conflict to warrant the Arbitrator recusing himself from the proceedings. Learned Counsel prayed the court to grant their application and appoint another Arbitrator in strict adherence to the provisions of the Arbitration Clause in the Sub-Contract agreement and perpetually restrain the Arbitrator from going ahead with the Arbitral proceedings.

The Respondent in his written address raised a sole issue for determination, to wit;

> "Whether in the light of the facts and circumstances of this case there is justifiable doubts so as to disqualify the Sole Arbitrator from continuing and concluding the arbitration process".

Learned Counsel stated that the Claimant's objection to the appointment of Professor Fabian Ajogwu SAN, FCIArb, as the sole Arbitrator was taken out on a sole ground, to wit: that there is a possibility of inadvertent bias by virtue of the fact that the learned professor works for CBN and the Federal Government as an external solicitor, as this was the issue submitted to the Tribunal to determine on the 28th of August, 2017. Counsel submitted that all allusion to the qualification of the Sole Arbitrator and particularly all arguments contained in paragraphs 2.2 to 2.4 of the written address in support of the Originating motion is misconceived and ought to be struck out and they urged the court to so hold. Counsel submitted to CBN not being a

party to the Arbitral proceedings, that the fear and complaint of the Claimant is baseless and diversionary, as only parties to a contract can derive benefit and suffer liability there from. He relied on **B. M LTD V. WOEMANN INC (2009) 13 NWLR (PT. 1157) 149 @ 160**. Counsel stated that the parties on record do not include CBN, the sub-contract giving rise to the arbitration proceedings does not have CBN as a party, that both parties on record are contractors of CBN and that the Claimant was nominated by CBN to carry out the sub-contract. That the Sole Arbitrator does not have direct interest in the subject matter and none has been alleged (pecuniary or otherwise), that the fact that he once served in some occasion as a solicitor for CBN is too remote a fact to be construed as bias and likelihood of bias and to hold so will be to stretch the principle to the point of absurdity, he cited **METROPOLITAN PROPERTIES CO. (F.G.C.) LTD V. LENNON (1969) 1 QB 577 AT 598.** Counsel submitted that it is trite that an allegation of bias or likelihood of bias on the part of a judge or tribunal other than on the grounds of pecuniary interest (i.e the taking of bribe) must be supported by a clear, direct, positive, unequivocal and solid evidence from which real likelihood of bias can reasonably be inferred not by mere suspicion or inference citing **AKOH V. ABAH (1988) 3 NWLR (PT. 85) 695 and AJIBOLA V. POPOOLA (1997) 4 NWLR (PT. 498) 206 @ 213-214**. He urged the court to hold that the Claimant has failed to put forward any evidence of the character described above beyond advancing its unfounded suspicion. Counsel stated that the test is not the Claimant's perception of the facts but the impression a disinterested third party sitting at he back of the conference room observing the

proceedings will have, he cited **RENON V. TEKAM (2001) 14 NWLR (PT. 732) 28 @ 36-37**. Learned Counsel contends that the reliefs begin sought by the Claimant are grossly incompetent and the basis for this are as follows;

On relief 1 – counsel submitted that the Claimant's Application is akin to an appeal against the decision of this Honourable Court delivered on the 4th of July, 2017 appointing the Sole Arbitrator which was done pursuant to Sections 7 (3) & (4) of the Arbitration and Conciliation Act. Urging the court to strike out same accordingly.

On relief 2 – Counsel contend that same is incompetent in the light of the provision of Section 9 (3) Arbitration and Conciliation Act. He submitted that Section 9 (3) Arbitration and Conciliation Act gives Arbitrator the right to decide on the challenge solely without recourse to the court. Counsel submitted that Article 12 of the Act is inconsistent with the provision of the Act and by virtue of Article 1 of the Rules of the Act, consequently Article 12 cannot apply to relief 2.

On relief 3 – Counsel urged the court to strike out same being a consequential relief to reliefs 1 and 2 as the said relief 3 cannot stand independently in the absence of reliefs 1and 2 being sought.

Counsel urged the court to take cognizance of the fact that there is a subsisting procedure order (exhibits 5 and 10 attached to the Claimant affidavit in support of the originating motion) where the Arbitrator ordered parties to pay for the Arbitrators fee and extension of timeline by 14 days. That the said order was complied to by the Respondent and that the Claimant's refusal to pay amounts to a disobedience of an extant order and consequently not entitled to the court's discretion, he

cited **SHUGABA V. UBN (1999) 11 NWLR (PT. 627) AT 459 and MOBIL OIL NIG. LTD V. ASSAM (1995) 8 NWLR (PT 412) 129**. Counsel urged the court not to allow the court to be used to set a bad precedent where parties to arbitration will pick and choose on what they want as against what the Arbitrator chooses bases on facts, Rules/norms and practice of Arbitration, he referred the court to **UKACHUKWU V. UBA (2005) NWLR (PT. 956) (Pp. 63) paras, D-H**. Learned Counsel urged the court to resolve the sole issue raised in favour of the Respondent.

The Claimant/Applicant in their reply on point of law to the Respondent Counter affidavit urged the court to strike out paragraphs 3j and 4 of the counter affidavit as same are contrary to Section 115(2) of the Evidence Act. Counsel submitted that it is trite law that a counter affidavit to originating motion is akin to a statement of defence in a matter commenced by a writ of summons cited **NNPC V. FAMFA OIL LTD (2012) 17 NWLR (PT. 1328) Pg 148 @ 189**. That the Rules of court makes sufficient provision how an Applicant who intends to discontinue a suit would bring the application. He relied on **Order 27 Rule 2 (1) of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 2018** and the case of **EKUDANO V. KEREGBE (2008), 4 NWLR (Pt 1077) pg 422 at pg 430 para G.** Counsel submitted that the Respondent in suit No. FCT/HC/2815/17 did not file any counter affidavit in response to the originating motion and in the circumstance, the mere filing of the notice of discontinuance (exhibit 5) terminated the suit and urge the court to so hold. He cited A.P.G.A. V. UMEH (2011) 8

NWLR (Pt. 1250) Pg 544 at Pg 567 paragraphs C-F and EGBUKOHIA V. ONYEGBULE (2015) 8 NWLR (Part 1461) Pg 377 at Pg 393 Para C-D and submitted that this instant suit does not amount to an abuse of Court process. See MALLAM & ORS V. REGISTERED TRUSTEES OF IPMAN (2016) LPELR-41606. Learned Counsel submitted also that the submission of the Respondent in paragraph 1.6 that the issue of qualification of the court appointed Sole Arbitrator cannot be reviewed by this Honourable Court because according to the Respondent, it was not part of the issue canvassed before the Arbitral Tribunal is misconceived, in that, such issue can even be raised by the court suo motu because it touches on the Jurisdiction of the Sole Arbitrator and the appointment made by the Honourable court. He cited **Section 8 (3)(b) of Arbitration and Conciliation Act and the cases of IDUFUEKO V. PFIZER PRODUCTS LTD (2014) 12 NWLR (Pt 1420) 69 at 115 para C-D; BEAUMOUNT RESOURCES LTD & ANOR V. DWC DRILLING LTD (2017) LPELR-42814 (CA) and Section 47 (5) of Arbitration and Conciliation Act**. Counsel urged the court to disregard the reference of the cases of **Akoh and Abah (supra);Ajibola v. Popoola (supra)**which were cited out of context. Counsel submitted that the fact that the parties agreed to be bound by the law of the Federal Republic of Nigeria, did not exclude or prevent the court from being persuaded by other Regulations and Rules which would assist the Court in reaching a just conclusion especially where the court requires a further clarification based on the limitation in the Agreement of the parties. Counsel further submitted that the arguments of the Respondent in paragraph 1.8 is misconceived, as the court can set aside or vary its

decision especially where the court would be seen to have acted outside its jurisdiction which limited to the intentions of the parties. That it is trite that the court cannot rewrite the agreement of the parties but can only give effect to it no matter the submission of the parties. He cited the case of **Olarewaju Commercial Services Ltd v. Sogaolu & Anor (2014) LPELR-24086 (CA) and Section 45 (9) ACA**. Finally Claimant urged the court to disregard the case of **Ukachukwu V. Uba (supra)** cited therein and hold in favour of the Claimant in its entirety.

The issue for determination is;

> "Whether the Applicant has been able to prove the likelihood of bias against the Court appointed Arbitrator".

From processes before the court, it is not in contention that both the Applicant and Respondent were appointed by the CBN for the project over which this dispute arose.

It is not in contention that CBN is not a party to this suit. It is also not in contention that the CBN had re-awarded the contracted which gave rise to this dispute to the Respondent.

Claimant/Applicant in this suit is contending that as a result of CBN re-awarding the contract in dispute to the Respondent the sole Arbitrator having acted and continues to act for the CBN in a number of cases makes him unfit to be an Arbitrator in view of the fact that there would be likelihood of bias which would prejudice the Applicant in favour of CBN/Respondent. Learned counsel to the Applicant had stated that on 10th August, 2017, the Applicant has expressed via an E-mail "very deep worry about the possibility of inadvertent bias" on the part of Sole Arbitrator. Consequently by email address dated August 17, 2017, the

Registrar of the tribunal has notified the Respondent & forwarded the Notice of challenge on the Appointment of the sole Arbitrator to the Respondent. S. 8(1) of Arbitration and Conciliation Act provides that an arbitrator may be challenged;

(i) If circumstances exist that give rise to justifiable doubt as to his impartiality or independence, or

(ii) If he does not possess the qualifications agreed by the parties.

Hence interest and bias which would show that an Arbitrator would be biased and has a tendency to show preference for a particular party to the detriment of the other party are grounds which must be proved by the party alleging same in the process of challenging an Arbitrator. It should be noted that bias of an Arbitrator may arise directly or indirectly.

S. 9 (2) & 9 (3) of the Arbitration and Conciliation Act provides that where parties in their agreement did not stipulate the procedure for the challenge/removal of an Arbitrator, the party who intends to challenge an Arbitrator must within 15 days of becoming aware of circumstances which will be sufficient grounds for challenge, send to the arbitral tribunal a written statement of the reasons for the challenge and the Arbitrator challenged may withdraw and unless he does and the other party agrees to the challenge the arbitral tribunal shall decide on the challenge.

From processes before the Court, Applicant had in line with the ACA within 15 days of being aware of the possibility of likely bias from the Arbitrator against it forwarded its complaint to the tribunal and Arbitrator in turn had studied same and made a written decision

declining to recuse himself on the grounds that Applicant had not been able to prove its allegation of likelihood of bias against the Arbitrator.

There can be no argument that a Court which itself had appointed an arbitrator may by order remove himself from circumstances so deserving, if such arbitrator can no more be entrusted with duties of that office **Per COKER JSC in SALIDA VS LABADEDE & 2 ORS (19+2) LPELR – 2993 (SC) P.9 Para D-F.**

In view of the perceived likelihood of bias against the Applicant by the Court appointed Arbitrator, Applicant has applied to this Court to set aside his appointment and likewise set aside the interim award (Ruling) made by said Arbitrator. It has been held by the upper court that the test applied in removing an Arbitrator on grounds of bias is the likelihood of bias and not the real application of bias.

See **OBADARA Vs THE PRESIDENT IBADAN D.C (1964) I ANLR 336.**

Hence a likelihood of bias must be established in every case where it sought to remove an arbitrator on such grounds and this can only be proved by considering the surrounding circumstances of the case.

From the circumstances of this case the only reason why Applicant is alleging "likelihood of bias" against the arbitrator is simply because the Arbitrator has acted as counsel and continues to act as counsel to Central Bank of Nigeria in various capacity and Central of Bank Nigeria is the Bank that awarded the contract in dispute initially to both Applicant and Respondent but subsequently re-awarded to the Respondent alone. The test to be applied under the circumstances is whether considering the circumstances, reasonable or right minded members of the public would think there is substance in the allegation?

See ADEBESIN Vs STATE (2014) LPELR – 22694 (SC) PP. 22 Para C-F per NGWATA JSC.

Hence it is necessary to consider whether the professional relationship between the Arbitrator and CBN is enough to create and establish a likelihood of bias in the minds of reasonable members of the public?

From facts of this case the Arbitrator has not denied having acted in various professional capacities as counsel to different institutions of government including CBN. It is a fact that CBN is not a party to the Arbitration nor a party to the dispute between parties. The CBN has not in any way presented a claim before the arbitration panels.

It is rather farfetched that Applicant is entertaining likelihood of bias based on Arbitrator having acted professionally as counsel to CBN. Applicant has not been able to prove that the Respondents and the Arbitrator or CBN Arbitrtor are in any form of relationship; be it pecuniary, family nor professional. The CBN reserves the right to appoint any lawyer to act on its behalf; the CBN also reserves the right to award its contract to whomever it deems fit. The fact that Arbitrator once acted for CBN as counsel without further facts placed before the court faulting the Arbitrators commitment, unalleged loyalty and proof of what the Arbitrator seeks to gain in such a relationship with CBN as it affects the Respondent is in my view a "stab in the dark". It is a guess work that is based on no information or evidence as nothing is placed before this court to show that any counsel who had once acted professionally for CBN must not Arbitrate in a proceedings where a contract awarded by the CBN gave rise to the dispute especially where

CBN is not a party to the dispute. Applicant has failed to place before this court neither has Applicant adduced cogent reasons to justify the likelihood of bias as postulated by the Applicant. It has been held in the case of **WOMILOJU VS ANIBIRE (2010) 10 NWLR Part 1203 P. 545** that factors that show a real likelihood of bias are (1) Hostility or strong personal animosity towards a party. (2) Personal friendship, family relationship.

It is not every complaint or allegation of bias against Arbitrator/Tribunal that is enough to set aside the appointment of an Arbitrator rather a critical approach would be adopted by the court in dealing with issues pertaining to arbitrators impartiality, independence and conflict of interest as there is need to ensure that parties do not take advantage of conflict of interest to unduly delay arbitral proceedings.

SECRETARY OF IWO CENTRAL LOCAL GOVERNMENT & ORS Vs ADIO (2000) LPELR-3201 (SC) PP 65-66 Para A where IGUH JSC held;

> "it is well settled that in considering whether or not there was likelihood of bias,……there must be reasonable evidence that there was bias or likelihood of bias against a trial judge and mere vague suspicion of unreasonable people, conjecture is clearly insufficient and should not be made a standard for the establishment of such grave issues".

Hence can the fact that Arbitrator once acted for CBN in several professional capacity as a counsel lead to a reasonable person to find that there was likelihood of bias? The case that best analyze and

explain the answer is the case of **YABUGBE Vs C.O.P (1992) 4 NWLR Part 234 Page 152** a case where bias was alleged against a Magistrate trying a case in which a Magistrate was involved, the Supreme Court per UWAIS JSC held

> "If courts are to go by spurious allegations of bias as in this case, then no legal practitioner can be tried by any court because he belongs to the same profession as the Magistrate or High Court Judge that might try him. Similarly, judicial officers with shares in public companies cannot try or hear any case involving such companies or any of the arms of government of that state. I think there is a limit to which the chase of such wild goose can go. Concrete evidence of bias must be shown before the allegation can succeed. In the present case, I see no such evidence and I therefore consider the allegation to be frivolous and unfair to the learned trial Magistrate".

From the totality of the evidence before me and considering the circumstances of this case,

(a) There is no proof that CBN is a party to this arbitration

(b) There is no proof that CBN filed any process in this suit/arbitration

(c) The relationship between CBN and the Arbitrator is strictly professional and it has not been established that it would unduly influence the Arbitrator in the Arbitrating proceedings.

(d) The interest or nexus between CBN and the Arbitrator is too remote or too indirect to affect the judicial mind of the Arbitrator

(e) There is a clear departure from the standard to be employed from which a reasonable man would think it likely or probable that justice has not been done.

In view of the above, I am of the view and I so hold that Applicant has not been able to prove its case and case is consequently struck out in its entirety.

Parties: Absent

Appearances: Nuratu Umar for Claimant appearing with M. F. Belgore and L. M. N. Boulhassan.

HON. JUSTICE M. OSHO-ADEBIYI

JUDGE

28TH JANUARY, 2020