

**IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE. H. MU’AZU

SUIT NO: FCT/HC/CV/1467/2020

ON THE 15th November, 2021

BETWEEN:

1. EXPERMOH NIGERIA LIMITED - CLAIMANT

AND

1. FEDERAL GOVERNMENT OF NIGERIA

2. ATTORNEY GENERAL OF THE FEDERATION

3. COLONEL MD. DIKIO (RTD) - DEFENDANTS

RULING

By a writ of summons filed under the undefended list procedure the Claimant seeks for the following reliefs against the Defendants.

- 1) The sum of **₦ 99,750,000. 00 (Ninety nine million seven hundred and fifty thousand Naira)** being the contract sum owed the Claimant by the 1st Defendant for provision of consultancy services for the distribution of empowerment/business setup items for eighty-five (85) Youths in Onuocha, Delta State.
- 2) 21% post Judgment interest on the Judgment sum from the date the Judgment is delivered till Judgment sum is fully liquidated.

3) Cost of this action

4) Omnibus prayer

In support of his writ, the Claimant filed a 23 paragraph affidavit deposed to by one Nsikan Ekaetta with 7 annexures. In the affidavit it was averred as follows:

That the office of the special adviser to the president and coordinator, Presidential Amnesty programme engaged the Claimant as a consultant for the provision of consultancy services in the distribution of empowerment/business set up items for thirty-eight (38) Niger Delta Youths in Onuocha, Delta State vide a letter of engagement dated 28th November, 2018 another letter of engagement was issued on 10th December, 2018 changing the scope of the work of the Claimant which the Claimant accepted via a letter dated 28th November, 2018 and 11th December, 2018 respectively.

That the contract was executed by the Claimant according to the terms contained in the letters and a certificate of completion was issued afterwards by the 1st defendant dated 8th February, 2019.

That the claimant via a letter dated 26th February, 2019 forwarded an invoice of **₦99, 750, 000. 00** to the office of the special adviser to the President and Coordinator Presidential amnesty programme.

That the 1st Defendant has refused to pay the contract sum to the claimant despite executing and completing the contract as specified.

That a demand letter was written by the Claimant's Solicitors dated 1st November, 2019 on behalf of all affected companies and another letter dated 31st January, 2020 respectively which were received and duly acknowledged by the Defendant have however, refused to act or reply to same.

That the contract sum is **₦ 99, 750,000. 00 (Ninety nine million seven hundred and fifty thousand Naira)** which is yet to be paid even after completing the contract and several demands to that effect.

That the defendants have no defence to this suit and the court should in the interest of justice grant the claimants claims.

In response the Defendant filed a notice of intention to defend dated the 8th September, 2021, a 10-paragraph affidavit and one exhibit in support.

It was averred that Claimant stating the Defendants have no defence and its failure to exhibit the agreement dated 4th December, 2018 between the parties is misleading.

That the Defendant has ample defence and that the Claimant is not entitled to the sum claimed in the writ of summons as there are contentious issues to be canvassed by the Defendants in line with the contract signed by the Claimant and the Defendant.

That the Defendants shall during hearing prove the following:

- 1) That the Claimant is bound by the agreement signed with the Defendants.
- 2) That the claimant cannot unilaterally allege to have performed its obligations where there is no written assessment issued by the 3rd defendant as required under the agreement.
- 3) That the Claimant's unilateral amendment of the performance of contract is against the provisions of Article VI of the agreement.
- 4) That the Claimant was never issued an interim performance certificate as required in Article II of the agreement.
- 5) That the Claimant and the 3rd defendant are yet to identify the person's the claimant alleges to have distributed the items under the contract as among the 30,000 beneficiaries of the 3rd defendant.
- 6) That Article X of the contract stipulates for arbitration as the mode of resolution of disputes arising from the contract between

the parties in accordance with the Arbitration and Conciliation act, cap A18 LFN 2004.

- 7) That the Claimant mischievously shielded vital details regarding the agreement with the intent of misleading the Court.

Counsel urged the Court to in the interest of Justice transfer the suit to the general cause list as the defendants have a defence on merit.

I have given due consideration to the foregoing averments in the Claimants' and Defendants' affidavits. Before proceeding to consider the averments, the legal framework and rudiment of what is expected of a Defendant to disclose in his affidavit, before a suit under the Undefended List procedure is transferred to the general cause list, needs to be set out.

Order 35 Rule 3(1) and (2) of the Rules of Court, 2018 provides for steps to be taken by a Defendant on whom a writ issued under the Undefended List is served. It provides;

“(1) where a party served with the writ delivers to registrar before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the Court may

give him leave to defend upon such terms as the Court may think just.

(2) Where leave to defend is given under this Rule, the action shall be removed from the Undefended List and placed on the ordinary Cause List, and the Court may order pleadings or proceed to hearing without further pleadings”

By the provision of Order 35 Rule 3(1) of the Rules, the Defendant’s affidavit ought to disclose a defence on the merit, if the Court is to grant him leave to defend the suit. What is meant by the Defendant’s affidavit disclosing a defence on the merit has engaged the attention of the Courts in a number of cases. In *NYA V. EDEM* (2000) 8 NWLR (PT 669) P. 349, the Court of Appeal explained the phrase in these words:-

“An affidavit disclosing a defence on the merit does not mean that the Defendant must show that his defence must succeed at any event or that he must show rock proof or iron cast defence. All that it means is that the Defendant must show prima facie that he has a defence to the Plaintiff’s action. The defence may fail or succeed but it is not the business of the Court to determine that at this stage. This can only be done at the trial”

In ATAGABA & CO. V. GURA NIGERIA LTD (2005) ALL FWLR (PT 256) P. 1219, the Supreme Court surmised that the Defendant's affidavit in support of the Notice of Intention to defend must disclose a prima facie defence. It must not contain a general Statement that the Defendant has a good defence to the claim. Such general statement must be supported by particulars which if proved would constitute a defence. It is sufficient if the affidavit discloses a triable issue or difficult point of law or it posits the existence of a dispute as to the facts which ought to be tried or that there is a real dispute as to the amount due which requires the taking of an account to reach a decision. The Court, per Tobi JSC (of blessed memory) held inter alia that:-

"... The affidavit in support of the notice of intention to defend must of necessity disclose facts which will at list throw some doubt on the case of the Plaintiff...."

Having been so guided, In this case, the Defendant filed a notice of Intention to Defend supported by an affidavit. In the affidavit, facts in support of the Notice of Intention to Defend on the basis of which he seeks for a transfer of the suit to the general Cause List were averred. The defendants have denied the claim of the claimant and provided evidence in form of Exhibit A (the agreement between the parties) from which the claims of the claimant arose. The Defendants also

particularized facts they intend to prove if they are given the opportunity. For clarity I reproduce same below;

“That the Defendants shall during hearing prove the following:

- 1) That the Claimant is bound by the agreement signed with the Defendants.
- 2) That the claimant cannot unilaterally allege to have performed its obligations where there is no written assessment issued by the 3rd defendant as required under the agreement.
- 3) That the Claimant’s unilateral amendment of the performance of contract is against the provisions of Article VI of the agreement.
- 4) That the Claimant was never issued an interim performance certificate as required in Article II of the agreement.
- 5) That the Claimant and the 3rd defendant are yet to identify the person’s the claimant alleges to have distributed the items under the contract as among the 30,000 beneficiaries of the 3rd defendant.
- 6) That Article X of the contract stipulates for arbitration as the mode of resolution of disputes arising from the contract between the parties in accordance with the Arbitration and Conciliation act, cap A18 LFN 2004.

7) That the Claimant mischievously shielded vital details regarding the agreement with the intent of misleading the Court.”

By these averments, it is apparent to the court that the Defendants have duly raised triable issues and a defence on the merit with regard to the Claimant’s claim. And I so hold.

Accordingly, matter is hereby transferred to the Ordinary cause list for trial. The parties are also hereby directed to exchange pleadings in accordance to the Rules of this court.

Signed
Hon. Judge
15/11/2021