

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 10

SUIT NO: FCT/HC/CV/170/2016

BETWEEN:

1. MAIC INTERNATIONAL LTD

2. MR CHUKA MODEBE& ORS.....CLAIMANTS

VS

THE INFRASTRUCTURE BANK PLC.....DEFENDANT

JUDGMENT

By a Writ of Summons filed on 11/11/2016 the Claimants commenced this Suit against the Defendant. The pleadings of the parties are;

1. The Claimants Statement of Claim dated and filed 11/11/2016.
2. The Defendant's Statement of Defence dated 27/2/2017.
3. The Claimants Reply to the Defendant's Statement of Defence filed on 25/9/2019.

In Paras 68 of the Statement of Claim, the Claimants prays for the following reliefs;

1. A DECLARATION that the Defendant is in breach of its contracted obligation to the Plaintiff under the Mandate Agreement as contained

in the document titled "Mandate Letter For Housing Estate Development Project, Enugu State" dated 3rd June 2013 executed the Plaintiffs and the Defendant, having failed to produce any documentation whatsoever as dictated by the mandate letter including but not limited to the investment Memorandum which was to be used to "attract investors" and provide funding of the sum of ₦500,000,000 for the development of the Plaintiffs' housing estate (Kaudrain Estate) in Ibagwa Nike. Enugu State being the purpose for which the Plaintiffs engaged the Defendant Services.

2. A DECLARATION that the negligent conduct and undue delay in responding to the needs of the transaction of the housing estate development project as contained in the Mandate Agreement executed between the plaintiffs and the defendant in respect of which the Defendant advanced the payment of the transaction advisory fee, result in the loss of over 90(Ninety) secured purchasers who were ready and willing to purchase, the One Hundred(100) housing units in Phase 1 of the estate development.
3. AN ORDER OF THIS HONOURABLE COURT directing the Defendant to refund the entire sum of ₦6,300,000 (Six Million Three Hundred Thousand Naira Only), comprising the 60% paid as Transaction Advisory Fee for the Housing Estate Development which sum amounts to a debt due and recoverable from the Defendant arising from a failed consideration.

4. AN ORDER OF THIS HONOURABLE COURT commanding the Defendant to effect the payment of the sum of ~~N~~300,000,000.00 (Three Hundred Million Naira Only) in favour of the Plaintiffs representing direct loss of profit occasioned by the Defendant's negligence to act professionally and in good faith and non – performance of the Defendant's obligation to the Plaintiffs as contained in the Mandate Agreement thereby occasioning huge financial loss and loss of business reputation to the Plaintiffs.
5. AN ORDER OF THIS HONOURABLE COURT awarding the sum of ~~N~~100,000,000 (One Hundred Million Naira Only) as general damages against the Defendant for breach of the terms of the agreement as contained in the Mandate Agreement executed between the Plaintiffs and the Defendant arising from failure of the Defendant to discharge its obligation in accordance with the contract.
6. AN ORDER OF THIS HONOURABLE COURT commanding to pay 10% (Percent) Post Judgment Interest on the Judgment Sum until satisfaction of the Judgment thereof.
7. AND FOR SUCH FURTHER ORDER(S) this Hon. Court deem fit to make in the circumstances.

The Claimants open its case through the 2nd Clamant Mr. Chukwu Modebe who testified and tendered document as Exhibits, while the Defendant called no witness.

The Claimant's Witness – Mr. Chukwu Modebe, the M.D of the 1st Claimant testified as PW1, the sole witness, and adopted his two Witness Statement on Oath sworn to on 11/11/2016 of 69 Paragraph and 25th September, 2017 of 18 Paragraph. The evidence of the PW1, in brief, is that, the 1st Claimant a Private Limited Liability Company, engaged in the business of Property and Real Estate Development, pursuant to a mass housing and district development project approach the Defendants to provide financing its housing project due for execution in three Phases. Consequent upon their application, dated 31/1/2013 to the Defendant, the Defendant vide a letter 19th February, 2013 gave approval to the request on conditions as stated in the Mandate Agreement entered by the parties. PW1 stated that pursuant to that Agreement, the Claimants performed their part of the contract agreement, inclusive of presentation of off-takers, and an initial payment towards the transaction advisory fee of ₦10million. That despite compliance on their part, the Defendant failed to perform its own part of the obligation, causing the Claimants to lose its major off-takers, and loss of revenue, reputations and frustration of the entire project, hence this suit seeks for the reliefs as set out in the Writ/Statement of Claim.

The PW1 in course of evidence, tendered documents in evidence marked as "A1-A40" and "D".

Cross – examined; the PW1 admitted that "Exhibit A4" regulates the 1st part of the transaction. He admitted that the payment for the 1st part of the transaction was delayed by the Claimants. He maintained that with "Exhibit A4" the promise to provide off-takers is for Phase I and all other Phases. Also stated that the accounts opened for off-taker by the

Defendants was in error, that it is the Primary Mortgage Bank that is authorised to open such Account. He confirmed that the off-takers question the request to open account by the Defendant, but that the said letters are not before the court. He admitted that the off-takers did not pay any money as back up to their interest because it is not the correct procedure.

The Defendants testified through one Kassim Yakubu as DW1, adopted his Statement on Oath sworn to on 27th February, 2017 of 77 Paragraph and stated that there was a contractual relationship entered by the parties, under Exhibit "A4" and divided into segment in Transactory Advisory Services and Transaction Finance Services. That it was agreed to fund the project to the tune of ₦500,000,000.00 (Five Hundred Million Naira Only), subject to compliance with the provisions of the Mandate Agreement. That pursuant to that agreement, by the Phase 1, Claimants was expected to pay a total sum of ₦100,000,000.00 (Ten Million Naira) for Transaction Advisory Services in three tranches, but failed to do so within the stipulated set time as per the Exhibit "A4" Mandate Agreement. The consequent upon the failure of the Claimants to comply as per this first part of the Agreement and not providing Off-Takers, caused a stalling of the project.

Cross-examined, he stated that it is contained in part, in Exhibit A5 that there shall be 100% provision of off-takers by the Claimants before financial support. He admitted that Exhibit A7 forms part of the past implementation documentation agreement, but not finalised by the Defendant.

He confirmed that Exhibit A3 is in agreement with what is contained in the Innosons letter. He maintained that since the "Exhibit A3" was referred to

by the Claimants, it is the Claimants that should respond to the issues, though aware of the said "Exhibit A-3". He confirmed that "Exhibit A-25" is a restatement of the contents of "Exhibit A-3", but did not react because it has not concluded their part. He affirmed the contents of "Exhibit A-30" of what it states. He confirmed the "Exhibit A-25" and took them about 7(Seven) months to respond, by which time the ultimatum given by Innoson had expired. He also stated that the "Exhibit A-31" is a confirmation of the exit of Innoson from the project. He confirmed from Exhibit A26 and

"A 27" that there was not letter of complaint of the delay in payment of the 1st Tranche of Transaction Advisory Fee. Also the Defendant started work on the project following from that payment made on 23/9/2013 by the Claimants. He also confirmed that by Exhibit A24, the Defendant had assumed position as Financial Adviser/and Finance Arranger. He also confirmed that Exhibit A28 is a list of off-takers. Also confirmed that the Defendant were liaising agent with Federal Mortgage Bank in the interest of agents in the housing sector, he admitted that they did not respond to Exhibit "D".

At the close of trial, both counsel filed and exchanged their Final Written Addresses. The Defendant's Final Written Address settled by K.T. Sulyman (Mrs) was filed 21/2/2020 and also filed a Reply on Points of law to the Claimant's Final Written Address on 1/7/2020. The Claimant's Final Written Address settled by Abdul Mohammed was filed on 6/5/2020. Both Counsel adopted their Addresses 23/11/2020.

In the Final Written Address of the Defendant, Learned Counsel formulated 3 (three) issues for determination;

- (1) Whether the Claimants have, by the evidence before this honourable court, proved the alleged Defendant breach of its contractual obligation under the Mandate Agreement.
- (2) If issue one is in the negative, whether the Claimants are entitled to the reliefs sought.
- (3) Whether this suit is incompetent and amounts to an abuse of court process.

In the Claimants' Final Written Address, Learned Counsel, formulated three(3) issues for determination.

- (1) Whether the Claimants have, by the evidence before this Honourable Court, proved alleged Defendants breach of its contractual obligation under the Mandate Agreement?
- (2) If the issue one is in the positive whether the Claimants are entitled to the Relief(s) sought?
- (3) Whether this suit is competent and amounts to an abuse of court process?

I have carefully given an insightful consideration to the pleadings, evidence, submission of learned counsel for the parties and the judicial authorities cited, it is the court's finding that the broad issue that calls for

determination in the instant suit, is whether or not the Claimants has made out a case to justify the grant of the reliefs sought.

However, before proceeding to determine this broad issue, it would be most appropriate to deal with the issues 3 of both counsel issues distilled for determination, which is, whether this suit is incompetent and amounts to an abuse of court process.

Learned Counsel for the Defendant contends that this suit is incompetent and should be dismissed. The Defendant predicated their argument on the grounds that the Claimants having failed to comply with the terms of the Mandate Agreement as exemplified by its failure to pay the engagement fees as and when due and failure to provide effective Off-Taker, does not as all of these show any cause of action. More so, as no substantive right is capable of being enforced against the Defendant. Referred the court to several judicial authorities, in urging the court to dismiss this suit.

The Claimants joined issues with the Defendant in their written submission, in urging the court to discountenance the contention of the Defendant, in day so, relied on Pletorial of authorities cited, showing that the Claimants been aggrieved consequent upon breach of a contractual relationship, have approached this court for remedy to this alleged wrong and therefore cannot be termed an abuse of court process.

Abuse of court process simply means that the process of court has not used Bonafide and properly. It also means the use of judicial process by a party to the irritation and annoyance of his opponent and interference with the Administration of Justice. See Umeh Vs Iwu(2008) 8 NWLR (PT. 1089)

225 at 228 – 229, NDIC Vs UBA PLC & Ors 2016 LPELR – 24316 (CA) Oseji (JCA) (As he then Was) as;

" The Misuse of court process and it includes acts which otherwise interfere with the cause of justice. Clearly the acts includes where without reasonable grounds, a party institutes frivolous, vexatious and oppressive actions and also by instituting multiplicity of actions or a frolic act of forum shopping, i.e a favourable court to entertain a matter"

In this instant case, on a careful perusal of the Writ of Summons, Statement of Claim and the Exhibits attached therein, the court finds that the Claimants case is hinged on a Claimants of contractual breach, wherein they are seeking a remedy. This, in my view, is the issue to be considered by the court and consequent upon that this court finds that the submission of the Defendant that this suit is incompetent on the ground that it lacks facts to support the case, therefore an abuse of court process, lacks merit and should fail. This issue fails and is hereby discountenanced by the court. Having resolved the issue of competence and jurisdiction in favour of the Claimants, I shall now proceed to determine the broad issue of whether or not the Claimants have made a case to justify the grant of the reliefs sought.

It is the settled position of the law in our adversarial legal jurisprudence that the burden of proof first lies on a party who asserts a state of affairs and seeks the court favourable finding or declaration in that regard to lead credible evidence in proof of it lest he fails. The burden of proof,

however, is not static as it shifts from party to party until the issue in contention is resolved. See Sections 131 – 134 of the Evidence Act, 2011.

In this instant suit, from the pleadings, evidence and submission of Counsel, it is evidently clear that the dispute touches on a contractual relationship between the parties, vide "Exhibit A-4" which is alleged to have been breached, hence this suit. In dealing with the broad issue, I shall consider them in the order of issues settled by both parties for determination which are similar; simply. Firstly whether the Claimants have proved by evidence the alleged breach on the part of the Defendant.

It is agreed by the parties that a contract came into existence between them vide a Mandate Letter/Agreement dated 3rd June, 2013, "Exhibit A-4" this court will rely on the said terms contained therein in the resolution of the dispute in this instant suit, as it is trite law that parties to a contract are bound by the terms stipulated by the terms of their contract and the court cannot delve outside the Terms of the contract as agreed by the parties. See the case of Dragatanos Construction (Nig) Ltd Vs FAB Madis Ventures Ltd (2012) all FWLR (PT. 616) @ 441. It is the contention of the Claimants by evidence before the court that by Exhibit A4, the binding contract, they complied with the Terms of contract, though admitting that they did not comply as to the time stipulated for the payment of the first tranche of Transaction Advisory Fees, but that by itself cannot form the basis of the Defendant failing to comply with their own parts of the Agreement. The Defendant now contending that it was the failure of the Claimants to comply with the payment of the 1st tranche of Transaction

Advisory Fees that led to the frustration, is an afterthought and an act constituting to a waiver of their rights to complain.

In proof of the Claimants compliance with the Terms of the Agreement – Exhibit A4, the Claimants relied on "Exhibit "A4", the Mandate Agreement; Exhibit A24, A30, A25 to show.

On the Claim of the Defendant that the failure of the Claimants to comply with the payment of the 1st Tranche of the Transaction Advisory Fees, and failure to furnish them with viable Off-Takers complying to their request to making their contributory participation into the account opened, led to the frustration of the project, the Claimants, contends that the Defendants by their conduct of not complaining upon receipt of the payment vide "Exhibit "A20", this fact was admitted under –Cross-Examination of the DW1. Further contend that by Exhibits A24, A25, A30, A31 have represented to the Off-Takers that they are acting as the Transaction Adviser and Finance Managers to the Claimants. That in all of these, constitutes a waiver, therefore the Defendants cannot be heard to complain as they are stopped by law from reneging. On these contentions, the Claimants referred the court to several judicial authorities in urging the court to so hold. Finally, contend that the failure of the Defendant in line with the Exhibit A4 and having waved their right to complain, failed to perform their obligation in the contract, thus that failure to provide Transaction Advisory caused a resultant breach of the contract to provide the funds as agreed to meet the contract.

The Defendant contention in the main, is that the Claimants failure to comply firstly to the terms of the contract as provided by Exhibit A4 as it relates to payment of the 1st Tranche of the Transaction Advisory fees led to the frustration of the contract, and secondly, the failure of the Claimants to secure viable Off-Taker who are willing to make commitment to the project. On this point, the Defendant, referred the court to Exhibit A26, A27 and A30 requesting the Claimants to secure Off-Takers for the project. Finally on this point contend that it was this failure of the Claimants to comply with these preliminary conditions that led to the frustration of the contract on the part of the Claimants, and urged the court to so hold.

I have carefully considered the evidence and submission of both counsel on this issue under consideration.

Firstly, this court has in course of this Judgment held that parties are bound by their Agreement. The relevant document to consider in this is Exhibit A4 - the Mandate Agreement and its in this document that the court will look at it to construe whether there was compliance in line with it.

On the first issue in contention, that is non-compliance with the payment of Transaction Advisory Fees within time stipulated, leading to frustration of the contract as alluded to by both parties.

By Clause 5, under Remuneration, it was clearly stated that Transactory Advisory Fees shall be paid in three (3) instalments; the fist which is 60%, the sum of ~~N~~6,300,000.00(Six Million Three Hundred Thousand Naira Only)

should be paid within 10 Calendar days, of the execution of the Mandate Letter.

In this instant, the payment was made on the 23rd September, 2013, a period well outside the stipulated period agreed. There is no evidence of compliant on the part of the Defendant, rather evidence of the Defendant continuing in the transaction. The question that calls for consideration, is whether the issue raised by the Claimantsthat the Defendant by the conduct amount to a waiver of their right to complain.

On what amount to waiver, has been stated in the case of A.I.E Vs Adebayo (2015) 19 NWLR (PT. 959) P.44 @ 122 Per Ogbuagu (JSC) as expressed or implied, two element it is settled, must co-exist;

- (1) The party against whom the doctrine is raised, must have knowledge or be aware of the act or commission which constitutes the waiver; and
- (2) He must do some unequivocal act adopting or recognising the act or omission; see also MPA Vs Aminu Ibrahim & Co & Ors (2018) LPELR – 44464 (SC).

By the conduct of the Defendant, in reaction to the late payment of the Transaction Advisory Fees vide Exhibit A19 and not complaining, the conduct of the Defendant by their representation to the Off-Takers in their letters dated 8/10/2013, Exhibit A25 and 14/11/2013 – Exhibit A20 acknowledging payment of the said fees without complain, and a letter of 29/4/2014 – Exhibit A30 to the Off-Takers representing as Transactory Advisory and Finance Arranger, is clearly an act of waving their right to

complain. It is clear that the Defendants have by their conduct in their transaction, lead the Claimants to believing that the transaction is still ongoing regardless of the delay which ordinarily is on breach.

On the issue of the Defendant alleging that the Claimants did not finish them in good time with Off-Takers as the failure of the Off-Takers to show any commitment in the project, therefore leading to frustration of the contract on the part of the Claimants.

A careful perusal of the Exhibit A4, the Mandate Letter and the binding agreement between the parties, there is no where it is expressly stated that the Claimants must in providing Off-Takers, the said Off-Takers must also show commitment to the project.

In this instant, there is evidence that the Claimants provided Off-Takers – Exhibit A25, A29, A30, A31 Exhibit "D" and the Defendant's Witness under Cross - Examination admitted to these facts, but claimed that the Off-Takers failed to comply as to commitment to the project requested by the Defendant, hence all of these caused the frustration to the execution of the contract.

This court has stated that the A-4 did not make any provision for this condition now set out by the Defendant. Parties are bound by their terms of contract.

Having carefully considered all the issues raised in this instant, the court finds that it ensures in favour of the Claimants. The Defendants having by the conduct waved their right cannot later turn round to complain

consequently failed to bring the said contract to its full and final terms, is in breach of the said contract. I so hold.

Now the issue whether the Claimants is entitled to the reliefs sought.

The court having found that there is a breach of contract, it therefore follows that there must be remedy, as espoused on the case of Bilante Int'l Ltd Vs MDIC (2011) LPELR-781(SC).

"Damages follows breach of contract and is payable by the party responsible for the breach"

In respect of reliefs A and B, which are declaratory reliefs sought by the Claimants. It is trite that a party seeking for a declaratory relief, must rely on the strength of his case and not on the weakness of the case of the Defendant. See Orlu Vs Gogo-Abite(2010) all FWLR (PT. 524) Pg 1 (SC). This court having found that the Defendant is in breach of the contract from the documentary and evidence before this court, the Claimants is entitled to this relief.

On relief C, an order directing the Defendant to refund the entire sum of ~~₦~~6,300,000.00 (Six Million Three Hundred Thousand Naira Only) to the Claimants, this court having found that the Defendant by its conduct has breached the contract, would not have any justifiable reason to keep this fund. Accordingly, the Claimants is entitled to this relief.

On the relief D – an order commanding the Defendant to effect the payment of the sum of ~~₦~~300,000,000.00 (Three Hundred Million Naira Only) in favour of the Claimants representing loss of profit. Granted that this court has found that there is a breach, and the fact that the Exhibit A4

- Mandate letter stated clearly that the contract is estimated at ~~₦~~800,000,000 this court finds that from the evidence, this is not within the contemplation of the parties and therefore cannot find any good reason why this claim should be allowed, the claimant may however, be compensated in damages. Accordingly, this relief fails.

On the relief e, An order awarding the sum of ₦100,000,000.00 (One Hundred Million Naira Only) as general damages against the Defendant for breach of the Terms of the Agreement between the parties; as per Mandate Agreement. It is settled law that damages will succeed where the breach or damages flows from the natural or probable consequences, and within the contemplation of the parties at the time of the contract. See AGU Vs General Oil Ltd (2015) LPELR – 24613 (SC) Per Okoro JSC @ Pg. 20 – 22 Para E – C.

Further it is granted at the discretion of court, where liability is established as in this instant case. In doing so, the court is entitled to make its own assessment of the quantum of such damage. See Beta Glass Plc Vs Epaco Holdings Ltd (2011) all FWLR (PT. 579) Pg. 1173 @ 1181-1182. See also Taylor Vs Oghenero (2012) all FWLR (Pg. 610) Pg. 1358@ 1362. Accordingly, the Claimants are entitled to this relief, which I assess and fix at ₦10,000,000 (Ten Million Naira Only).

On the relief f, and order commanding the Defendant to pay 10% post judgment interest on the Judgment Sum until satisfaction of the Judgment thereof.

Interest on Judgment Sum is provided for by the Rules of Court. Order 39 Rule 4 of the FCT High Court (Civil Procedure) Rules, 2018 gives the court the discretion to grant interest on Judgement Sum at a rate not less than 10% Per Annum. The Power of Court to grant was affirmed in the case of UBA Vs Lawal (2018) all FWLR (Pt. 434) 1548 @ 1564 Para E-F. See also Ifemesia Vs ECO Bank (2018) LPELR – 46589 (CA).

From all of these and having found that there is breach of contract of the part of the Defendant, judgment is hereby entered in favour of the Claimants as follows:-

1. It is hereby declared that the Defendant is in breach of its contractual obligation to the Plaintiffs under the Mandate Agreement as contained in the document titled "Mandate Letter For Housing Estate Development Project Enugu, Enugu State" dated 3 June, 2013 executed by the Plaintiffs and the Defendant, having failed to produce any documentation whatsoever as dictated by the Mandate Letter, including but not limited to the Investment Memorandum which was to be used to "attract investors" and provide funding of the sum of ₦500,000,000 for the development of the Plaintiffs housing estate (Kaudrain Estate) in Ibagwe Nike, Enugu, Enugu State being the purpose for which the Plaintiffs engaged the Defendant's Services.
2. It is hereby declared that the Defendant's negligent conduct and undue delay in responding to the needs of the transaction of the Housing Estate Development project as contained in the Mandate Agreement executed between the Plaintiffs and the Defendant in

respect of which the Defendant advanced the payment of the Transaction Advisory Fee, resulted in the loss of over 90 (Ninety) secured purchasers who were ready and willing to purchase, the one hundred (100) Housing Units in Phase 1 of the Estate Development.

3. It is hereby ordered that the Defendant to refund the entire sum of ~~₦~~6,300,000.00 (Six Million Three Hundred Thousand Naira Only) being 10% Paid as Transactory Advisory Fee.
4. Relief Dfails.
5. It is ordered that the Defendant pay the sum of ~~₦~~10million as general damages for breach of contract of the Terms of the Agreement as contained in Mandate Agreement.
6. 10% interest per annum of the judgment sum from the date of judgment until same is fully liquidated.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

19/2/2020

APPEARANCE:

F.O. AMEDU FOR THE CLAIMANTS

K.T. SULYMAN FOR THE DEFENDANT.