

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GARKI, ABUJA - FCT**

**CLERK: CHARITY ONUZULIKE
COURT NO. 10**

**SUIT NO: FCT/HC/GAR/CV/72/2023
DATE: 7/3/2022**

BETWEEN:

**TRANSURB TECHNIRAIL
CONSULT LIMITED..... CLAIMANT**

AND

- | | | |
|--|---|-------------------|
| <ol style="list-style-type: none">1. FEDERAL CAPITAL TERRITORY
ADMINISTRATION (FCTA)2. THE HON. MINISTER, FEDERAL CAPITAL
TERRITORY (FCT), ABUJA. | } | DEFENDANTS |
|--|---|-------------------|

**JUDGMENT
(DELIVERED BY HON. JUSTICE S. B. BELGORE)**

As a precursor to this judgment, I feel free to state that in a suit marked and placed under the undefended list procedure, there are most important and germane steps or procedure that must be observed by the trial Court. The basic procedures or settled principles are:

1. When the matter under the undefended list comes up for hearing, on that day, the Court has only one duty. That duty is to see if a Notice of intention to defend with an affidavit in support was filed by the defendant, if none was filed the Court must proceed for judgment. **(BEN THOMAS HOTEL LTD VS. SEBI FURNITURE LTD) 5 NWLR (PT. 123) 523 SC.**

2. In an action brought under the undefended list procedure, the trial Court is required to consider only the evidence contained in the affidavit filed by the Defendant in support of Notice of intention to defend suit. Once the Court comes to the conclusion that the affidavit does not disclose a defence on the merit or a triable issue, the Court is to proceed with the hearing of the suit as an undefended suit and enter judgment accordingly without calling on the Defendant **EVEN IF** present in Court, to answer or be heard. **HAIDO VS. USMAN (2004) 3 NWLR (Pt. 859) 65.**

It must be stated that the undefended list procedure is a *sui generis* proceedings as such it is strictly governed by their own law i.e. order 35 of the Rules of this Honourable Court. It is not to be lumped and confused with other species of civil proceedings that are expected to follow a normal procedure.

In the instant suit, this Court upon taking cognizance of the writ of summons in form 1, reading the endorsements on the writ together with the affidavit in support of same, wherein the Claimant averred that it sincerely believes that the Defendants have no defence whatsoever to the claim, marked the writ accordingly and entered it in what is called the “**undefended list**”, and in keeping faith with the rules of this Honourable Court gave 31st January 2023 a return date for hearing.

On the return date the defendants had filed their Notice of Intention to defend together with a 7-paragraphed affidavit purported disclosing their defence on the merit.

The law is now settled beyond peradventure that the duty of the Court on the return date is to determine whether the defendants ought to be granted leave to defend or whether the suit is keeping faith with order 35 Rule 4 be heard as undefended and judgment entered accordingly.

The Claimant's claim on the Writs of Summons is as follows:

1. The Claimant's claim against the Defendant is for the liquidated sum of **N9,341,048,918.78 (Nine Billion, Three Hundred and Forty-One Million, and Forty-Eight Thousand, Nine Hundred and Eighteen Naira, Seventy-Eight Kobo)** only, being liquidated sum owed to the Claimant by the Defendants, which sum represents the total outstanding Contract sum the Defendants owe the Claimant for Project Management and Consultancy Service for the Supervision of Abuja Rail Mass Transit Project Phase 1 (Lots 1A & 3), duly executed and delivered by the Claimant, and which the Defendants have taken full advantage of. This said sum is captured in several contract duly executed by the parties, particularly the 1st Defendants letter dated 24th July, 2019 with Reference No. **FCT/TS/DT/1647** promising to pay to the stated sum. The Defendants have failed, neglected and/or refused to pay the Claimant despite repeated demands and appeals.
2. AND for an order of injunction restraining the Defendants, their agents, servants, assigns, successors in office, and/or privies, howsoever called from jointly or severally threatening to terminate or revoke, and or unilaterally terminating or revoking the Claimant's Contract in respect of the remaining part of Lots 1A, and Lot 1B of the Project Management and Consultancy Services Agreement prior and after paying the agreed contract fee for the Project, which the Defendants led and caused the Claimant to commit enormous amount of capital and service pursuant to the Contract, for which the Claimant has not been paid, contrary to Clause 2 of the Rectified Consultancy Agreement.
3. **THE SUM OF 3,000,000,000.00 (THREE BILLION NAIRA BEING GENERAL, EXEMPLARY DAMAGES AND THE AMOUNT ARISING FROM THE OPERATION OF CLAUSE 6.03 OF THE**

CONSULTANCY AGREEMENT EXECUTED ON 24TH SEPTEMBER, 2010), awarded in favour of the Claimant and against the Defendants, jointly and severally for breach of the Project Management and Consultancy Agreement between the Claimant and the Defendant, in failing, refusing and or neglecting to pay the Claimant all accrued contract fees in respect of the project as stipulated in the contract and the breach of other terms of the agreement.

4. 21% interest on the judgment sum from the date of judgment till same is fully liquidated.

The Claimant's General Manager deposed to a 25-paragraphed affidavit in support of its claim in the writ of summons and annexed various exhibits marked as **Exhibits A-I**.

The summary of the Claimant's case, as disclosed in its affidavit, is that sequel to an advert in two national dailies and the Federal Tenders Journal of **15/06/2009-28/06/2009**, it bided for and emerged successful as the preferred bidder for a contract to provide management services for the construction of the Abuja Rail Mass Transit Project, and subsequently received a Letter of Award of Contract and executed a Contract Agreement which was later rectified vide a Rectification of Consultancy Service Agreement. That in furtherance of the said Agreement, Claimant has dutifully carried out several tasks and responsibilities, such as the proper vetting of the Bill of Engineering Measurement and Evaluation submitted by CCECC to the 1st Defendant, resulting in alleged savings of **\$101,325,249.98**; that by the Rectified Agreement, it was agreed that if the project is not concluded within 48 months, the Consultancy Agreement shall be extended till the practical completion of the project; that the project has now been completed and despite taking full advantage of its services, the Defendants have refused to pay Claimant the outstanding contract sum of **N9,341,048,918.78** which is due to it,

despite having received several demands to that effect; that contrariwise, the Defendants have fully paid CCECC for the execution of the contract; that the Defendants have now perfected plans to unilaterally revoke and terminate Claimant's contract in respect of the remaining part of Lots 1A and 1B of the contract, notwithstanding the services already rendered to the Defendants and the huge capital Claimant has invested in providing management services. Claimant concludes by stating that it believes that the Defendants have no defence to the suit.

On their part, the Defendants filed a Notice of Intention to Defend dated 26/01/2021 but filed on 27/01/2023 which is supported by a 7-paragraphed affidavit deposed to by Saidu Wodi, a Legal Assistant in the Legal Services Secretariat of the 1st Defendant. It is their case that in 2010 the 1st Defendant awarded a contract to the Claimant for the provision of Consultancy Services for project management services for the supervision of Lots 1 & 3 of the Abuja Rail Mass Transit Project at a total contract sum of **N1,289,958,088.00** for a period of 48 months or until the practical completion of the project; that the contract was subsequently split into Lots 1A & 3 and 1B, but the Consultancy Agreement covers Lots 1 & 3 as in the contract award letter; that the Defendants have paid the Claimant the sum of **N1,817,448,918.29** so far; that the contract was not terminated or revoked by the 1st Defendant and discussions are still ongoing between the Defendants and the Claimants with regards to outstanding payments and these discussions were not concluded as at the time Claimant filed this suit and that the Defendants disagree with the amount claimed in this suit. The Defendants conclude by stating that it will be in the interest of justice to allow the Defendants defend this suit on its merits and not under the undefended list procedure.

Let me return to the duty imposed on me by order **35 Rule (3) & (4)** of the rules of this Honourable Court to the effect that on the return that the Court should consider the notice of intention to defend together with the affidavit disclosing a defence on the merit. This solemn duty is to read through the affidavit to see

whether the Defendants have disclosed any triable issue or *prima facie* defence that would warrant the Court to grant them leave to defend and transfer the suit to a general cause list. This duty as I am taught in **ASUQUO VS. UDOAKA (2021) LPELR-57428 (SC)** is not to delve into whether the defence will be meritorious or proper. Once the Court is satisfied that there is some type of basis to proceed, it must transfer the suit to the general cause list.

In the instant case, the Defendants admitted that it awarded Messrs Transurb Technirail Consult Ltd a Consultancy contract for the supervision of the Abuja Rail Mass Transit Project for an agreed sum of **N1,289,958,088.00 (One Billion, Two Hundred and Eighty-Nine Million, Nine Hundred and Fifty-Eight Thousand, Eighty-Eight Naira Only)**. The Defendants equally admitted that the contract is for 48 months or until practically completed. The Defendants also stated that it never terminated nor revoked the said contract and that discussion are still ongoing with regards to the outstanding payments and same has not been concluded before the claimant filed suit. Their defence in short, is that the figure was not proved by the Claimant. The affidavit then prayed the Court to grant the Defendants leave to defend.

Having calmly and carefully considered the affidavit in support of the Notice of Intention to defend the undefended list, it is my view that the Defendants have failed to raise any iota of triable issue or *prima facie* case not to talk of *prima facie* defence to warrant the granting of leave to defend.

The Defendants instead attempted to put a wool over the eye of the Court by the averments in paragraphs 4(g), 4(h), 4(i) and 4(j), they should have challenged the purified and immaculate content of the claimant exhibit G1, which I will reproduce herein verbatim:

***The General Manager,
Transurb Technirail Consult Limited,
Abuja.***

**PROJECT: ABUJA RAIL MASS TRANSPORT PROJECT
PHASE 1 (LOTS 1 & 3) SUBJECT: PROJECT MANAGEMENT
AND CONSULTANCY SERVICES FOR THE SUPERVISION OF
ABUJA RAIL MASS TRANSIT PROJECT (LOTS 1A AND 3).**

We write to inform you that the processing of your invoices submitted for work done between May, 2015 to December, 2018 is in progress. The invoices in the sum of N9,341,048,918.78 (Nine Billion, Three Hundred and Forty-One Million, Forty-Eight Thousand, Nine Hundred and Eighteen Naira, Seventy-Eight Kobo) as evaluated by us is being processed.

2. As soon as all necessary processes and approvals are secured, your payment will be made.

3. We are aware of the delay in the processing and payment of these invoices and we are assuring you that the process would soon be completed. We appreciate your effort and the continued provision of your usual services, which are required for the successful completion of this project.

4. Please accept the assurance of our sincere regards.

**Engr. Anthony Agwaniru FNSE, C. ENG, FCIA
Director, Transportation**

This piece of evidence emanated from the defendants on the 24th July 2019, the affidavit disclosing the defence on the merit, made no attempt whatsoever to impugn exhibit G1. The devastating effect of same, is that the Defendants have no defence to relief 1 in the Claimant Writ of Summons.

In **ATAGUBA & CO. VS. GURA NIG. LTD (2005) LPELR-584 (SC)** the Supreme Court held:

“A defence on the merit for the purposes of Undefended list procedure may encompass a defence in law as well as on fact. The defendant must put forward some facts which cast doubt on the claim of the Plaintiff. A defence on the merit is not the same as success of the defence in litigation. All that is required is to lay the Court is to lay the foundation for the existence of a triable issue or issues....

Under the undefended list procedure, the defendant’s affidavit must condescend upon particulars and should as far as possible deal specifically with the Plaintiff’s claim and affidavit, and state clearly and concisely what the defence is and what facts and documents are relied on to support it. The affidavit in support of the notice of intention to defend must of necessity disclose facts which will at least throw some doubt on the case of the plaintiff. A mere general denial of the plaintiff’s claim and affidavit is devoid of any evidential value and as such would not have disclosed any defence which will at least throw some doubt on the plaintiff’s claim. See AGROMILLERS LTD VS. CONANT BANK (NIGERIA) PLC. (1997) 10 NWLR (Pt. 525) 469.

To satisfy a judge in an action on the undefended list, the defendant must depose to what on the face of the affidavit discloses a reasonable defence. See JIPREZE VS. OKONKWO (1987) 3 NWLR (Pt. 62) 737. I have carefully examined the affidavit in support of notice of intention to defend and I cannot see my way clear in faulting the decision of the Court of Appeal, which affirmed the judgment of the trial Court. I am with the trial Judge who said that the defence was a sham.”

In my humble but firm view there are no triable issues raised in the Defendants Notice together with the affidavit disclosing a defence

filed by them, they are shallow, devoid of substance, filed with nothingness and deserve to be labelled as a sham. It is not worthy of activating the discretion of this Court and its legal imprimatur to grant leave, simply put, leave to defend is refused, case is accordingly heard as undefended. I say so as the purported affidavit disclosing a defence on the merit and the illusory defence set up therein are a sham. They are frivolous and vague.

In view of my finding above, the Motion on Notice, that is motion No. **FCT/HC/GAR/147/2023**, though meritorious has become academic and is hereby struck out. Equally I need to say at this juncture that the Court cannot grant reliefs 2 and 3 as they are not proper in the suit of this nature. I have the liberty to order pleadings on both reliefs or strike them out, I prefer the later. Consequently reliefs 2 and 3 are hereby struck out.

Judgment is hereby entered for the Claimants in respect of reliefs 1 and 4 on the Writ of Summons, it is so ordered.

For avoidance of doubt, judgment is entered in the following terms:

1. The Defendants are hereby ordered to pay, forthwith, to the Claimant the sum **N9,341,048,918.78 (Nine Billion, Three Hundred and Forty-One Million, Forty-Eight Thousand, Nine Hundred and Eighteen Naira, Seventy-Eight Kobo)**, being the total outstanding Contract sum the Defendants owe the Claimant for Project Management and Consultancy Service for the Supervision of Abuja Rail Mass Transit Project Phase 1 (Lots 1A & 3), duly executed and delivered by the Claimant.
2. It is further ordered that the said sum shall attract a 21% interest until the entire judgment sum is liquidated.

Before I end this judgment, I need to state that it is high time the government took the contracts they enter with not only the international companies seriously but the local counterparts. The

economic effect of non-payment of monies due to Nigerian contractors is that it affects the families of the workers, who usually live in the suburbs of Abuja. It is unislamic to deny a worker his wages and this rubs off on the entire Government of Nigeria.

The President of the Federal Republic of Nigeria or the Minister of the FCT may not be the reason why this payment was not made but those on the receiving end of it will not see it as such. I say no more.

This shall be the judgment of this Court.

Signed
S. B. Belgore
(Judge) 7/3/2023

Appearance of Counsel:

Idris Yakubu, Esq. for the Claimant/Applicant

J. D. Elogun, Esq. for the Defendants/Respondents