

Legal Effect of Negotiation – Whether Parties are Bound Thereby

In The Supreme Court of Nigeria
Holden at Abuja
On Friday, the 27th day of January, 2023

Before Their Lordships:

John Inyang Okoro
Amina Adamu Augie
Adamu Jauro
Tijjani Abubakar
Emmanuel Akomaye Agim
Justices, Supreme Court

SC/CV/210/2021

Between:

1. Anchorage Leisures Limited
 2. Siloam Global Services Limited
 3. Honeywell Flour Mills Plc.
- Appellants

And

Ecobank Nigeria Limited

Respondent

(Lead judgement delivered by Honourable Emmanuel Akomaye Agim, JSC)

Facts

Each Appellant took a loan from the Oceanic Bank Plc. (acquired by Ecobank Limited). In December 2006, the 1st Appellant obtained a loan of ₦450,000,000.00 (Four hundred and fifty million Naira). The 2nd Appellant, on its part, obtained a loan from the Respondent by way of an Underwriting commitment to the sum of ₦2,300,000,000.00 (Two billion, three hundred million Naira). By a letter dated 14th December 2011, this loan was later re-structured as a five-year term loan with a one-year moratorium. The 3rd Appellant borrowed the sum of \$10,000,000 (Ten million USD) and ₦200,000,000.00 (Two hundred million Naira). The Appellants utilized the loans but failed to repay as and when due, despite repeated demands by the bank.

In view of the foregoing, a certain Dr. Oba Otudeko, the Chairman of Honeywell Group Limited, who was not a party to the loan contracts between the Appellants and the Respondent but who has an interest in each of the Appellant, promoted and facilitated a negotiation of their repayment obligations under their individual loan contract to secure a waiver by the Respondent of some of the amount of debt due from each of the Appellant. This meeting, which held on 22nd July 2013, resulted in an oral agreement that the Appellants pay a collective sum of ~~₦~~3,500,000,000.00 (Three billion, five hundred million Naira) as full and final satisfaction of the sum total of their accrued debt which was ~~₦~~5,500,000,000.00 (Five billion, five hundred million Naira). The negotiated sum was subject to the condition that the Appellants pay a collective sum of ~~₦~~500,000,000.00 (Five hundred million Naira) immediately on 22nd July 2013 and ~~₦~~3,000,000,000.00 (Three billion Naira) in lump sum “immediately thereafter”(before the then visiting Central Bank of Nigeria (CBN) examiners who were examining the Respondent’s records departed from the bank).

Further to the said negotiation, the Appellants paid the sum of five hundred million Naira on 22nd July 2013. Regarding the other payment of three billion Naira lump sum, the Appellants wrote a letter to the Respondent proposing to pay the balance of three billion Naira in three equal half yearly instalments. The Respondent reacted to the letter, reiterating their agreement for a lump sum payment of three billion Naira before the CBN examiners’ departure from the bank. This discussion lingered till 12th December 2013 when parties had a further meeting. As at the date, the Appellants had only paid the sum of one billion, three hundred and fifty million Naira of their indebtedness. After the meeting, a further sum of one billion Naira was paid, and the balance payment was agreed to be accelerated. By 10th January 2014, the Appellants had completed payment of the sum of three billion, five hundred million Naira. They, therefore, wrote to the Respondent requesting the bank to remove the negative caution on the Appellants’ account on CBN CRMS portal. They equally requested a letter for full discharge from any indebtedness to the bank and release of all the securities of the Appellants with the Respondent. The Respondent, however, stated that it could not issue the letter of non-indebtedness as the request for waiver was still going through its internal process. Thereafter, the Respondent communicated the refusal of the request for waiver to the Appellants and demanded the outstanding indebtedness. The Respondent informed the Appellants that the offer of waiver lapsed by August 2013.

In view of the above, the Appellants instituted Suit No. FHC/L/CS/1219/2015 against the Respondent. There was an interlocutory appeal in the suit which went to the Supreme Court. Upon the final determination of the suit, the trial court found that the Appellants had liquidated their indebtedness to the Respondent and granted the reliefs sought. The Respondent successfully appealed the decision. The Court of Appeal held that the Appellants lacked the *locus standi* to sue and this feature robbed the trial court of jurisdiction to try and determine the suit. In the alternative, the court allowed the appeal on ground that the Appellants did not fulfil the condition for waiver of the balance of their indebtedness as negotiated on 22nd July 2013. The Appellants have therefore, appealed to the Supreme Court.

Issues for Determination

The Supreme Court adopted the issues raised by the Appellants in its determination of the appeal, thus:

1. *Was the lower court correct that its earlier decision in Appeal No: CA/L/1270/2015 – Ecobank Nigeria Limited v. Anchorage Leisures Limited and Ors. (decided on 30th March, 2016 and affirmed by the Supreme Court in SC:406/2016 – Ecobank Nigeria Limited v. Anchorage Leisures Limited and Ors. delivered on 13th July, 2018) did not decide/resolve the entitlement/title of the Appellants (as Plaintiffs) vis-à-vis Honeywell Group Limited to have filed Suit No: FHC/L/CS/1219/2015.*
2. *Did the lower court correctly strike out Appellant's claim qua suit at the trial court for lack of locus standi or absence of a right to proceed against the Respondent in the overall circumstances of the case before it.*
3. *Was the lower court correct in its consideration and resolution of the outcome of the 22nd July, 2013 meeting between the parties, and, the subsequent setting aside of the decision of the trial court which granted the reliefs claimed by Appellants as Plaintiffs before the said trial court.*

Arguments

On issues one and two, counsel submitted on behalf of the Appellants that the meeting of 22nd July 2013 was between the Appellants and the Respondent in their capacities as customers and banker for the resolution of their obligations arising from the relationship of debtors and creditor. He argued that the Appellants possess the requisite *locus standi* to commence the action to enforce

the agreement reached on 22nd July 2013. In respect of issue three, counsel submitted that parties are bound by the negotiated agreement reached at the meeting of 22nd July 2013 and other correspondence and meeting, in furtherance of which the Appellants paid the agreed sum of three billion, five hundred million Naira as full and final settlement of their indebtedness.

Counsel for the Respondent countered the submissions above. It is the bank's position that Dr. Oba Otudeko, who is the Chairman of Honeywell Group Limited, negotiated with the Respondent at the meeting of 22nd July 2013. The Respondent posited that there was novation of contract thereby or transfer of liability from the Appellants to Honeywell Group Limited, and thus, the Appellants lacked the *locus standi* to institute an action based on the negotiation of 22nd July 2013. On issue three, counsel argued that the agreement reached at the meeting of 22nd July 2013 was for the Appellants to pay the sum of three billion Naira in lump sum before the CBN examiners' departure from the bank. He argued that having failed to make the payment by August 2013, the offer lapsed thereby and as at January 2014 when the Appellants eventually completed the payment of three billion five hundred million Naira, the bank could not obtain the approval of its board to waive the balance of accrued debt. More so, the account of the Appellants was flagged as "related part loans" by the Central Bank of Nigeria and Nigerian Deposit Insurance Corporation during a review of the bank, as the Chairman of the Appellants was a former director of Ecobank Transnational Incorporated, the parent company of the Respondent.

Court's Judgement and Rationale

Deciding the first and second issues relating to the *locus standi* of the Appellants to institute the action at the trial court, the Supreme Court stated that in the interlocutory appeal between parties (**SC/CS/406/2016**), though the apex court did not specifically determine the issue of *locus standi* of the Appellants, the court determined therein that the Appellants and the Respondent were engaged in the meeting of 22nd July 2013 in their capacities as customers and their banker and as debtors and creditor to negotiate the discharge of the Appellants' debt repayment obligations under their respective loan contracts with the Respondent. Having determined the relationship between parties in the said decision, the Court of Appeal should have refrained from exercising jurisdiction on the question of whether the Appellants were parties to the transactions at the meeting of 22nd July 2013, which held between only Dr. Oba Otudeko and the Respondent. Their Lordships held that *by virtue of Section 235 and 287(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the doctrine of*

issue estoppel, the decision of the Supreme Court on the issue is final and cannot be re-opened under any guise by any other court. Since the Court of Appeal relied on its determination that the Appellants are strangers and not parties to the meeting of 22nd July 2013 in reaching its decision that they lacked locus standi to institute the action, the lower court lacked the jurisdiction to determine the question. It is the law that where the determination of a question before a court is predicated on its determination of an underlying question that it has no jurisdiction to determine, then it would lack the jurisdiction to determine the question before it. The Supreme Court, thereby, held that the exercise of jurisdiction by the Court of Appeal on the question is a nullity and determined issues one and two in favour of the Appellants.

Regarding the third issue on whether the Respondent is legally bound to accept the three billion, five hundred million Naira collectively paid by the Appellants as complete and final liquidation of their respective debts by virtue of the understanding reached at the meeting of 22nd July 2013 and the follow-up meetings thereon, the apex court held that the minutes of the meeting held on 22nd July 2013 (Exhibit A) discloses an agreement made subject to the fulfilment of certain terms and conditions. The content of the Exhibit shows that five hundred million Naira was to be paid immediately and the balance of the negotiated sum was to be paid “immediately thereafter”. The phrase, however fell through the cracks as parties could not agree on when the balance payment became due. Thus, the argument about part performance of the agreement was unfounded as the agreement was inchoate. While the Respondent insisted that the sum of three billion Naira must be paid as a lump sum and before the exit of the CBN examiners who visited the bank, the Appellants proposed payments in three instalments over a period of time. All the correspondence exchanged show that the Appellants opted out of the mutual understanding of payment of the three billion Naira in lump sum as condition for the Respondent’s waiver of some of their debts and triggered a new negotiation by a proposal for payment in three half yearly instalments. It follows that the negotiation did not yield any consensus or create any legal relations between the parties.

Negotiation is negotiation and in any form, it is governed by the principles in the law of contract. In other words, to be a valid contract, there must be an offer and acceptance and in addition consideration. So, negotiation, cannot and does not on its own, constitute a contract – CHUKWUMA v IFELOYE (2008) 12 SC (PT. II) 291. The Respondent can decide to waive its right to recover all the debts due to it from each Appellant, but it cannot be compelled to waive its said contractual right. If it refuses to waive the right or go ahead with the negotiation

to secure its waiver of some of the debts, the debtor must pay all the debts which had accrued under the loan contract. *A waiver must be clear, unequivocal and voluntary. Where negotiations have resulted in an agreement by a person to receive a sum of money lesser than what is due to him under a written contract, the agreement must be in writing* – **AUTO IMPORT EXPORT v ADEBAYO & ORS. (2005) 19 NWLR (PT. 959) 44.**

Having resolved issues one and two in favour of the Appellants and issue three against them, the Supreme Court affirmed the judgement of the Court of Appeal in Appeal No. CA/LAG/CV/975/2019 setting aside the decision of the trial court. The Appellants' claim at the trial court was thereby, dismissed. Costs in the sum of ₦3,000,000.00 (Three million Naira) was awarded against the Appellants in favour of the Respondent.

Appeal Succeeds in Part.

Representation:

Chief Wole Olanipekun, SAN with Faith Adanghofua, Esq.; Akintola Makinde, Esq.; Quam Bisiriyu, Esq. and Emeka Ananyi, Esq. for the Appellants.

A.B. Ogumba, SAN with O.A. Divine, Esq.; O.T. Ogumba, Esq. and O.K. Ogumba, Esq. for the Respondent.

Reported by Optimum Publishers Limited

Publishers of the Nigerian Monthly Law Reports (NMLR)

An Affiliate of Babalakin & Co.