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REQUIREMENT OF DUE DILIGENCE ON CAPACITY OF NIGERIAN GOVERNMENT OFFICIALS/ORGANS/AGENTS TO CONTRACT – *GODWIN AZUBUIKE V. GOVERNMENT OF ENUGU STATE* IN FOCUS*

1. Introduction

It is primary knowledge that in addition to the elements of offer, acceptance, consideration and intention to create legal relationship, for a contract to have any validity in law, the parties must have full legal capacity to do so otherwise there will be no contract.[1] It appears that the contractual capacity of officials/organs or agencies entering into contracts on behalf of government has not captured the needed attention under the Nigerian law. Until recently there has been little guidance on this issue, though the common law has long recognised that the contracts of local authorities will be void unless they are within the authorities' powers, express or implied, or the acts are such as to facilitate, or are incidental to the discharge of those functions.[2] In *Godwin Azubuike v Government of Enugu State*,[3] the point has however been made clearly by the Court of Appeal that persons seeking to contract with government or its agencies or organs must first confirm the capacity under which the persons acting for government proceed. This is not even enough. The party must also ensure that appropriate measures have been taken to comply with all rules and regulations appertaining to the making of such contracts.

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[1] See *Dr. AkpoMudiaga-Odje v. Younes Power System Nigeria Ltd.* [2014] 5 NWLR (Pt. 1400) 412 at 430; *Nicon Hotels Ltd. v. Nene Dental Clinics Ltd.* [2007] 13 NWLR (Pt. 1051) 237 at 267. See also J. Beatson, A. Burrows & J. Cartwright, *Anson's Law of Contract,* (29th edn., London: Oxford University Press, 2010), p. 219.

[2] *Anson's Law of Contract, ibid.,* 224, citing *Hazell v. Hammersmith & Fulham LBC* [1992] 2 AC 1; *Credit Suisse v. Allerdale BC* (1997) QB 306; *Credit Suisse v. Waltham Forest LBC* (1997) QB 362.

[3] [2014] 5 NWLR (Pt. 1400) 364.

2. The *Ultra Vires* Doctrine and Capacity of Statutory/ Government Institutions/Officials to Contract

It must be understood that government, generally, acting on its own right or through its lawful agents has unlimited capacity to contract.[4] In such instances, the *ultra vires* rule has no application to government. That aside, most public institutions and their officials or those acting on behalf of them are statutory creations. In acting therefore, they must conform to the dictates of the statute or other instruments establishing them.[5] Whenever they act outside the enabling statute/instrument, they are said to act *ultra vires*. In essence, related to contracts, their lack of capacity under the enabling statute/instrument invalidates the contract.[6] The *ultra vires* doctrine originally applied to statutory/government institutions [7] before its wide and more popular application to company law.[8]

3. *Godwin Azubuike v. Government of Enugu State*

The problem of capacity with regard to contracts entered on behalf of government by its agencies, officials, or other appointees was the subject of *Godwin Azubuike v. Government of Enugu State*[9] where the appellant's claim for his fees for identifying and recovering funds/properties due to Enugu State Government was dismissed because due process was not followed in awarding him the contract and there was nothing to show that Enugu State Government

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[4] See H. G. Beale (ed.) *Chitty on Contracts* Vol. 1 (29th edn., London: Sweet & Maxwell, 2004), p. 665.

[5] *Attorney-General v. Manchester Corp.* [1906] 1 Ch 643; *Attorney-General v Fulham Corp.* [1921] 1 Ch 44.

[6] It should be noted that it is not compulsory that the statute/instrument must expressly authorise the making of the contract. In *Attorney-General v. Great Eastern Railway* (1880) 5 AC 473 at 478 the court held that: "whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

[7] See *Eastern Counties Ry v. Hawkes* (1855) 5 HLC 331 at 347-348.

[8] See G. H. Treitel and E. Peel, *The Law of Contract*, (12th edn., London: Sweet & Maxwell, 2007), p. 594.

[9] Above note 3.

authorised the Special Committee on Anti-Government Activities to enter into such contracts. Abdul-Kadir, JCA stated:

> The mere fact that it is a committee of Enugu State Government is not enough reason to assume that it has the actual and ostensible authority of that government to do anything under the sun. It must have been established to exercise certain powers and discharge certain functions and duties in pursuance of certain public purposes. It is important that before one enters into any contract with any servant, agent or organ of a government, he or she takes step to find out if such contract is within the usually or wholly possessed authority of such organ, agency or servant of the government ... Even if the contract is within the usual or wholly possessed authority of the agency of government, the award of the contract must be made by the competent authority established and empowered by law to make such awards and the award must be in accordance with the rules and regulations for the making of contracts with government ... Those who enter into contracts with government or its organs should know the rules, regulations and procedures for the making of valid contracts with government. If they do not know, it is their duty and part of the requirement of due diligence to take steps to know and familiarise themselves with those rules and regulations. It is no excuse that the independent contractor has no notice or that he is not in a position to know the internal administrative processes of government or its organ. *The due process of contracts with government is a matter of public knowledge*.[10]

4. Comment

It is now clear that there is need to ascertain the capacity under which government departments, agencies, officials and servants act, including the extent of their authority, prior to contracting with them. Recourse will usually be had to the statute or gazette or any such instrument establishing the organ. Familiarisation with such

[10] *Ibid.,* at pp. 394 – 395 (emphasis supplied). Relying on the English decision in *Western Fish Products Ltd. v. Penwith DC* (1978) LUR 185 at 200 – 203 to the effect that in the absence of holding out by a public authority, an unauthorised act of an officer even though within his usual authority was not binding on the public authority. Heavy reliance was also placed by the court on ss. 90 (3), 91 and 92 of the Contract Law, Cap 26, Revised Laws of Enugu State 2004, with regard to the authority of servants or agents to contract on behalf of the Enugu State Government.

relevant statutes[11] and as in *Azubuike*, the State's contract law, for States that have enacted same is essential. Where a contracting party claims to act as a government agent, it may well be prudent to inspect the appointment instrument and confirm that its issuance is from proper authority and has followed due process. This is essential when it is considered that the consequences of entering into *ultra vires* contracts with government authorities/agents/officials are:

(a) A third party having *locus standi* can approach the courts to prevent the making/conclusion of the contract.[12]
(b) Where the contract is concluded, it cannot be enforced against the government party.[13]
(c) Recovery under the equitable principles of restitution for work done is impossible where the public policy aim of prevention of dissipation of public funds will be jeopardised,[14]although when this is not the case, payments made may be recovered.[15]
(d) The contracting party cannot raise the defence of change of position against the government party.[16]

It would seem that the government authority is able to enforce the contract when the contract is already executed even though the

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[11] Like the Public Procurement Act 2007, the Debt Management Office Act 2003, the Fiscal Responsibility Act 2007 and Public Procurement Regulations for Goods and Works 2007 etc.

[12] *Hazell v. Hammersmith &Fulham LBC* [1991] 2 WLR 372.

[13] See in particular, *Credit Suisse v.Allerdale BC* [1997] QB 306. It is often immaterial that the contract is not *prima facie* unlawful. Thus in *Hinckley & Bosworth BC v. Shaw* [2000] 9 LGR 9 the rule applied to invalidate a pay increase for enhancing redundancy and retirement benefits though same was justifiable and reasonable in itself. In *Bedfordshire County Council v. Fitzpatrick Contractors Ltd* [2001] LGR 397 it was acknowledged that procedural irregularities could invalidate the contract. See also, *Eastbourne BC v. James Foster* [2001] EWCA Civ 1091.

[14] *Young v. Royal Leamington* (1883) 8 AC 517.

[15] *WestdeutscheGirocentraleLandesbank v. Islington LBC* [1994] 1 WLR 938: bank held able to recover payments to an authority where the objective of the prevention of dissipation of public funds was not jeopardised. Confirmed on appeal at the House of Lords as reported in [1996] AC 669.

[16] *South Tyneside BC v.Svenska International* [1995] AC 545; *Hinckley & Bosworth BC v. Shaw* [2000] 9 LGR 9.

other party is unable to enforce same against the government authority. Where the contract is still executory the government authority will be unable to execute it though it may recover payments made under the principles of restitution.[17]

It should be mentioned that the court in *Azubuike* considered the question of whether depriving the appellant of his fees was equitable considering that Enugu State Government had taken the benefit of the recovery of its properties through the appellant's efforts.[18] The court, however, considered that the competing interest of the public in "expenditure of public funds" being "in an organised or regulated manner in accordance with the appropriation law of the State"[19] was of overriding importance. The court further emphasised that:

> A situation which allows indiscriminate procurements, award of contracts and expenditure of public funds by any officer or organ of government unilaterally will result in mass abuse of power, corruption, bad governance and endanger the welfare and the good of the people.[20]

The chairman of the Special Committee on Anti-Government Activities, Squadron Leader, Tsakar had solely signed the contract despite the protest of the other members who observed that considering the amount involved, the committee lacked the capacity to award such a contract. In upholding the voiding of this contract, the Court of Appeal relied on the judgment of the Supreme Court in *Knight Frank and Rutley Nigeria v. Attorney-General of Kano State*[21] where the apex court refused to apply equitable estoppel in spite of the fact that there was detrimental reliance on the act of a government official.

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[17] *WestdeutscheGirocentraleLandesbank v Islington LBC* [1994] 1 WLR 938.

[18] [2014] 5 NWLR (Pt. 1400) 364 at p. 396.

[19] *Ibid*.

[20] *Ibid*., at p. 397.

[21] [1998] 7 NWLR (Pt. 556) 1:where the Kano State Government's repudiation of a contract to assess the rateable value of private residences with a view to levying tenement rates was upheld by the court for common mistake given that only local governments could impose tenement rates under the Constitution. See R. Achara, "Can Nigerian Local Government Councils Autonomously Impose Rates?",*Journal of African Law,* Vol. 47 Issue 02 (2003) pp. 221 – 243, at pp. 223 – 227 for criticisms.

Equitable estoppel in itself, which the appellant in *Azubuike* sought to invoke, is riddled with controversy.[22] At common law a public authority will not be estopped by previous conduct to deter its obligation to exercise its statutory powers or duties nor will such estoppel allow it to exceed its powers[23] or prevent it from bringing to an end *ultra vires* acts/affairs.[24] Lord Denning sought to modify the principle in *Wells v. Minister of Housing and Local Government*[25]when he said: "I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid." One submits with respect that this is not possible where the public authority has exceeded its powers by reason of incapacity. Recently in *R v. East Sussex CC, ex parte Reprotech,*[26] the English House of Lords indicated that the applicable principle in such cases is not estoppel as same is not applicable to conflict between a public authority's representations and its statutory duties or discretion and that the applicable principle should be the doctrine of legitimate expectation that prevents a public body from going back on a representation without justification. Even then, relief under the doctrine of legitimate expectation is not settled as the precincts of when a representation may bind a government authority contrary to statute are yet unclear, especially in the light of the rule that the legitimate expectation doctrine cannot be invoked contrary to statute.[27] Consequently, the benefit of the commercial practice of

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[22] See E. O. Ezike, "Equitable Estoppel and the "Shield" Theory", *Journal of Private & Property Law* Vol. 25 (2004) pp. 88-101 at p. 89.

[23] *Chitty on Contracts, op. cit.,* above note 4, p. 671 citing *York Corp. v. Henry Leetham & Sons* [1924] 1 Ch 557; *Sunderland Corp. v. Priestman* [1927] 2 Ch 107; *Stockwell v Southgate Corp.* [1936] 2 All ER 1343; *Maritime Electric Co. v. General Diaries Ltd.* [1937] AC 610; *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 WLR 465; *Southend Corp. v Hodgson (Wickford) Ltd* [1962] 1 QB 416 and *Co-operative Retail Services Ltd v.Taff-Ely BC* (1979) 39 P & CR 223.

[24] *Islington Vestry v Hornsey UDC* [1900] 1 Ch 695.

[25] [1967] 1 WLR 1000, 1007.

[26] [2003] 1 WLR 348.

[27] *AG Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629.

requiring representations on contractual powers of government authorities is unsettled in law.[28]

5. Conclusion

It may well be that the decision in *Azubuike* is unfair to parties contracting with government authorities but there is indeed a need to balance the contracting parties' interests alongside the conflicting interests of the greater public good that disdain for due process, probity and accountability prevalent in government procurement and contract awards be deprecated. Corruption and nepotism have been the bane of government expenditure for goods and services in Nigeria. Several laws and regulations have been enacted to check this. Most significantly is the Public Procurement Act 2007 which aims at ensuring transparency, probity and accountability on government spending. Upholding contracts that breach this rule will make nonsense of the law. More so, the interest of the general public that contracting processes be transparent far outweigh any individual right to the fruit of a contract even where the contractor had no knowledge of the due process for entering into contracts with government. It is submitted that the decision of the court hinged on a presumed knowledge of the general public of the due process for contracting with government, so that, as in criminal responsibility, ignorance of the law is no excuse. A majority of Nigerian business men who contract with government and its agencies have no idea of the underlying legal regime. It is therefore imperative that they consult legal practitioners. The same goes for foreign investors.

On the other hand, one cannot ignore the legitimate expectations of innocent contractors that government and its organs/agents will honour their contractual obligations and indeed promises/representations. In the United Kingdom, for instance, the *ultra vires* doctrine has been modified in some cases by the Local Government (Contracts) Act 1997. The Act provides that where a local government issues a certificate signifying it has capacity to enter into a particular contract, the contract will have effect as if the

[28] Usual instances include waivers of legal limits of the authority's contractual capacity or of procedural requirements for contract awards and waivers of limitations on the authority of agents. See *Chitty on Contracts, op. cit.*, above note 4 p. 671.

local government indeed had such capacity.[29] Where the court declares the contract *ultra vires* it has discretion to give effect to the contract if severe consequences would result on the financial provision of the authority or the provision of services to it. Should the court not give effect to the contract the contractor is entitled to compensation for loss incurred or loss of profits. The court may further adjust the rights and liabilities touching on the assets or goods relating to the contract.[30]

Mitigating the hardship which the *ultra vires* doctrine inflicts on innocent contractors is necessary. Nigerian courts faced with *ultra vires* contracts of government authorities should therefore consider whether such contract is one that indeed dissipates or is potentially likely to dissipate public funds. Where a determination is made that the public policy of preventing dissipation of public funds which is the rationale of the *ultra vires* rule is not jeopardised by a contract, the courts should allow enforcement of the contract. Facts which the courts may consider include:

- the contract price is *prima facie* not inflated and appears reasonable;
- there is nothing on the face of the contract that suggests undue advantage to the contractor as against other persons likely to have been interested in procuring that same contract;
- the contract in question is not so irregular as to support a finding that both the government authority and the contractor knew the contract was *ultra vires* and yet persisted in entering same, and
- the benefit to the general public is not severely outweighed by the advantage bestowed on the contractor.

In the *Azubuike case* for instance, evidence of *prima facie* irregularity includes that other members of the committee were said to have protested, drawing attention to the committee's incapacity to enter into that contract on behalf of the Government of Enugu State and yet the committee chairman persisted and proceeded to solely

[29] Local Government (Contracts) Act 1997, s. 4.
[30] *Chitty on Contracts, op. cit.,* above note 4, p. 671.

execute the contractual document. The court was right, therefore, in refusing to enforce the contract.

In contracting with corporate entities, it may be useful to investigate whether the entity is intended to constitute a perpetually ongoing concern or whether it is specified to be a special purpose vehicle (SPV) with a limited lifespan. This is borne out of the decision in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,[31] where the appellant's bid to enforce an agreement for arbitration by holding the Government of Pakistan responsible was rejected by the courts, because the agreement had been between the appellant and an SPV incorporated to exist until a certain date by the Government of Pakistan. After that date, the SPV ceased to be a legal entity and there was no privity between the appellant and the Pakistani Government. Where the contract is incompatible with the statutory purpose of the government authority, it will be clearly unenforceable.[32]

[31] [2010] UKSC 46.

[32] *York Corporation v. Henry Leetham& Sons Ltd.* [1924] 1 Ch 557. Cf. *Birkdale District Electricity Supply Co. Ltd. v. Southport Corporation* [1926] AC 355.