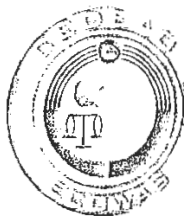


COMMUNITY COURT OF JUSTICE,
ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO

TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO



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IN THE COMMUNITY COURT OF JUSTICE, ECOWAS, HOLDEN IN ABUJA, FCT

SUIT NO. ECW/CCJ/APP/01/08

STARCREST INVESTMENT LTD.-----PLAINTIFF

V.

1. PRESIDENT, ECOWAS COMMISSION-----1ST DEFENDANT

2. FEDERAL REPUBLIC OF NIGERIA-----2ND DEFENDANT

3. STARCREST NIGERIA ENERGY LIMITED-----3RD DEFENDANT

4. EMEKA OFFOR-----4TH DEFENDANT

Judgment No. ECW/CCJ/JUD/06/11

Dated Friday 8th July 2011

Before:

Hon. Justice Hansine N. Donli-----Presiding

Hon. Justice Awa Nana Daboya-----Member

Hon. Justice Anthony A. Benin-----Member

Assisted by Tony Anene-Maidoh-----Chief Registrar

JUDGMENT OF THE COURT

Parties and representation

1. The Plaintiff is a company registered under the laws of the Federal Republic of Nigeria. The first defendant is the head of the Ecowas Commission, one of the institutions of the Economic Community of West African States (ECOWAS), indeed he operates as the chief executive officer of the institutions. The second defendant is a member state of the community. The third defendant is also a company registered under the laws of the Federal Republic of Nigeria. The fourth defendant is the Chairman of the third defendant company. The plaintiff was represented by their counsel Chief Emefo Etudo. The first defendant was represented by a legal officer of the Commission, Mr Daniel Lago. The second defendant was represented by a State Counsel Mrs. Pamela Oabor. The third and fourth defendants were represented by their Lawyer Mr U. N. Udechukwu, SAN.

Facts

2. The initial application brought by the plaintiff did not include the third and fourth defendants; the latter were joined at their own instance. A number of the pleadings were withdrawn and struck out, leaving virtually no claim against the second, third and fourth defendants, yet they remain parties to the end. It is thus necessary to state what remains of the suit before the court and against which defendant/s.

3. The principal claim as set forth in the application filed in this court on 6th February 2008, but was later amended, was against the first defendant for his failure and/or refusal to place the plaintiff's petition dated 13th March 2007 before the Authority of Heads of State and Government of ECOWAS, hereinafter called the Authority. The entire case centres on this. The plaintiff contends that officials of the Federal Republic of Nigeria, second defendant herein, colluded with some persons representing foreign companies to deprive them of their legitimate interest in oil block number OPL 291, for which they had put in a bid in response to an international tender advertised by the second defendant. The plaintiff claimed the Nigerian officials took a bribe of \$35 million in order to award the tender to some other named companies

including Starcrest Nigeria Energy Ltd, which in their view did not qualify in terms of the tender invitation.

4. Being dissatisfied with this state of affairs in the Federal Republic of Nigeria, the plaintiff addressed a petition to the first defendant on 13th March 2007, requesting him to place same before the Authority. However, the first defendant refused or failed to accede to the plaintiff's request; hence this application. The reasons alleged against the first defendant may be found in paragraph 5.8 of the originating application, as amended, and is set out here as follows. The first defendant has failed to harmonise, promote and coordinate community development programmes so as to eliminate bad policies in erring member states, has failed to promote transparent policies especially when he failed to react to the plaintiff's letter dated 13/03/07. In the meeting of the Authority dated 15/06/07 he also failed to table the subject matter or anything relating to Nigeria. The plaintiff further averred that the first defendant has also failed to implement the policies of ECOWAS, decisions of the Authority and regulations of the council relating to the protection of the plaintiff, corporate governance and popular participation in development in the community. The plaintiff stated further that these failures are returning the community including Nigeria to the bad old days as reported in so many media as no individual state can unilaterally survive the vices of globalization and corrupting of local officials, which vices are defeating the vision and goals of ECOWAS and causing huge financial hardship and losses to the corporate bodies including the plaintiff.

5. The plaintiff averred also that the first defendant has a duty to promote policies that could have eradicated the corrupt hijack of the oil block, which duty he failed to exercise. The first defendant also failed to implement policies and programmes that would ensure their right to carry on business without discrimination and under equal opportunity, resulting in damages to the plaintiff.

Reliefs sought

6. The plaintiff accordingly sought the following reliefs:

- i) A declaration that the plaintiff can validly claim damages against the 1st defendant for failure/refusal to table her petition before the ECOWAS

Authority which failure is an unlawful breach of the defendant's duties under Article 19(1), (2) (3e) and (3i) of the ECOWAS Revised Treaty and also amounts to an unlawful violation of the plaintiff's right to petition the Authority under Articles 7, 55, 21(2) and 21(5) of the African Charter on Human and Peoples' Rights (ACHPR), adopted by ECOWAS under Article 4(h) of the Revised Treaty.

- ii) General damages of US\$5,000 (five thousand US Dollars) against the 1st defendant for injury to the rights of the plaintiff by his subject matter 'failure to act'.
- iii) An order compelling the 1st defendant to table the subject matter petition on corruption and non transparent policies in Nigeria before the Authority and other relevant institutions of the community.
- iv) An order removing Addax/Starcrest Nigeria Energy Ltd. from OPL 291 pending the decision of the Authority. There was an alternative to this last relief which is not material to recount here since it was seeking interim measure which was not taken.

7. From the reliefs sought, it is clear that the first three are all against the 1st defendant. The 2nd defendant has an interest in the third relief in so far as allegations of corruption and non transparency are made against the country in the petition. The 3rd and 4th defendants are interested in the fourth relief.

Defence

8. All the defendants entered defence to the claims by the plaintiff. They all challenged the claims by the plaintiff. The second defendant denied any corrupt practice in the bid process. They also denied that the plaintiff was even qualified to take part in the OPL 291 bid which was reserved for operators in the deep offshore, which plaintiff was not. These issues involve oil law in Nigeria. And the allegation that there was a \$35 million dollar bribe clearly belongs to the realm of criminal law, which only the domestic courts have jurisdiction over. These are not matters the court will be called upon to delve into in these proceedings, which principally are the failure and/or refusal of the first defendant to place the plaintiff's petition before the Authority.

Issues

9. Consequently, the court will confine itself to the core issue which is the petition of 13th March 2007 and decide whether the plaintiff was entitled to the request made therein, whether the 1st defendant owed the plaintiff any duty or obligation, and, if so whether the plaintiff committed any error or breach of his duty by failing and/or refusing to table the petition before the Authority.

Consideration of the issues

10. First, concerning the alleged obligation or duty owed the plaintiff by the first defendant. The plaintiff claims it has a right under some specified paragraphs of Article 19, cited above, of the Revised Treaty to bring her petition before the Authority. She also claims that the said failure by the 1st defendant to present her petition before the Authority was in violation of specified provisions of the ACHPR. In his final address filed on 15 March 2011, Counsel for the plaintiff stated *inter alia*, that "it is the duty of the 1st defendant to prepare the meetings of the Authority (see Article 19(3) of the Revised ECOWAS Treaty) and convene the meetings of the Council and table his findings for further decisions and regulations of the Authority and Council (Article 19<3e> of the Revised ECOWAS Treaty; it is his duty to submit reports to the Authority and Council".

11. These provisions which the plaintiff's counsel relied upon have since 2006 been repealed by Supplementary Protocol A/SP.1/06/06 amending the Revised Treaty. Indeed the entire Article 19 of the Revised Treaty was repealed. Article 33(1)(c) of the Court's Rules of Procedure enjoins a plaintiff to provide a summary of the pleas in law on which the application is based. It follows that where the application does not state the plea in law, or where the application is founded on a non-existing law, the entire application is flawed as being without a legal justification. Where a party has chosen to rely on some portions of an enactment, the court cannot decide the case on other portions of that enactment; in this court the party will succeed or fail having regard to the plea in law he has chosen.

12. The new Article 19(1), (2) and (3) of the Revised Treaty have nothing to do with the 1st defendant's duty to organise any meeting of the Authority or Council. The provisions cited by the plaintiff in the repealed Article 19(3)

whereby the then Executive Secretary of ECOWAS was responsible for preparing the agenda for the meetings of the Authority have not been repeated in the new Article 19. The practice in ECOWAS since this amendment is that it is the Council of Ministers, as constituted by this same amending Protocol, which sets the agenda for the meetings of the Authority; the ECOWAS Commission only facilitates the organisation of such meetings. This practice has since crystallised into a rule in 2010. Rule 17(2) of the Rules of Procedure of the Authority provides that

'The provisional Agenda of an ordinary session shall be drawn up by the Council of Ministers' session preceding the session of the Authority'.

The President of the Commission is thus not obliged and indeed does not have the duty under the Revised Treaty, as amended, to prepare the agenda for meetings of the Authority, and consequently has no right to place any matter before the Authority without the mandate of the Council of Ministers. The role the Commission has been playing and is still mandated to play is to transmit the draft provisional agenda drawn up by Council to Member States of the Community, see Rule 16(5) of the Rules of Procedure of the Authority. Thus in so far as the 1st defendant is not mandated to set the agenda for meetings of the Authority, he could not be compelled by any third party to place any matter before the Authority.

13. Let us for a moment agree that the 1st defendant has the duty to set the agenda for the meetings of the Authority; even there he is not obliged to place every issue before it; he has discretion to choose which matters should be placed before the Authority given the limited duration of such meetings, except those matters which are obligatory by law.

14. An essential element in the exercise of power or a statutory function is that it should be exercised by the authority upon whom it is conferred, and by no one else. The 1st defendant therefore cannot replace Council in drawing up agenda for any meeting of the Authority. Interestingly, the duty to set agenda for even Council meetings has been entrusted to the Chairman of Council, and it is exercised through the Administration and Finance Committee, with the 1st defendant playing a facilitator's role. Be that as it may, the entire provisions of

the Revised Treaty on which this application is based were non-existent as at the time the action was commenced.

15. Next, concerning plaintiff's claim in human rights. The plaintiff also relied on the provisions of Articles 7, 21(2), 21(5), and 55 of the ACHPR in submitting that they have a right to petition the Authority which has a duty to consider her petition. The ACHPR, is applicable in this court by virtue of Article 4(g) of the Revised Treaty, and not Article 4(h) as pleaded by the plaintiff. However, Article 10(d) of Protocol A/P1/7/91 as amended by Article 4 of Supplementary Protocol A/SP.1/01/05 grants access to this court in human rights cases to only individuals, meaning human beings as distinct from corporate bodies and other legal entities. This provision contrasts sharply with the immediate preceding one namely Article 10(c) of the 1991 Protocol (*supra*) as amended, which grants access to individuals and corporate bodies in certain actions before this court. The maxim '*expressio unius est exclusio alterius*' is clearly applicable here. By granting access to both individuals and corporate bodies in Article 10(c), and failing to mention both in the succeeding paragraph (d), the ECOWAS authorities clearly intended to exclude corporate bodies from the purview of human rights causes.

16. The Preamble to the 1948 Universal Declaration of Human Rights gives a clear indication that human rights are human centred. It provides that the '*recognition of the inherent dignity and the equal and inalienable rights of the human family is the foundation of freedom, justice and peace in the world.*' Equally instructive is the definition of Human Rights provided in Black's Law Dictionary, 9th edition at page 809 as "*the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live.*"

17. This court thus held in the case of **The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. President of the Federal Republic of Nigeria and 8 ors** Suit no. ECW/CCJ/APP/08/09, delivered on 10th December 2010, unreported, that no action could lie against a corporate body in human rights cases before this court. By parity of reasoning, the converse of the decision just cited is equally true and that is, no corporate body can bring a human rights case before this court as a plaintiff as an alleged

victim of human rights abuse. Thus the provisions of the ACHPR do not avail the plaintiff in this court in so far as they complain about human rights abuse against them as a company.

18. Finally, the alleged violation by the second defendant of the Protocol on Democracy and good governance. The plaintiff also cited some provisions of Protocol A/SP1/12/01, On Democracy and Good Governance in their pleas in law. But as to how relevant they are to their case, the only reference made in the pleadings that specifically addresses that issue is to be found in paragraph 5.8.2.2(i) of the Amended Statement of Claim wherein they refer to Article 38 of the Protocol as imposing an obligation on the 2nd defendant to tackle corruption. The plaintiff's case is that in order that the 2nd defendant might fulfil the obligation imposed on them by Article 38 of this Protocol, the Authority could apply diplomatic pressure by virtue of Article 77(1) of the Revised Treaty. The said Article 38 provides that

1. Member States undertake to fight corruption and manage their national resources in a transparent manner, ensuring that they are equitably distributed.

2. In this regard, Member States and the Executive Secretariat undertake to establish appropriate mechanisms to address issues of corruption within the Member States and at the Community level.

19. Article 38 paragraph 2 quoted above recognises corruption at two levels, namely at the national level and at the level of the Community. In the context of this case, it is clear that it is where a Member State fails to set up appropriate mechanisms to fight corruption within its territory that it is in breach of these provisions. It is not the plaintiff's case that the 2nd defendant has failed to establish institutions or mechanisms to fight cases of corruption in Nigeria. An isolated case of an allegation of corruption does not suffice to set in motion application of sanctions against a Member State. Consequently the 2nd defendant could not be said to be in breach of Article 38 of this Protocol.

Decision

20. The court concludes that the 1st defendant has no duty or obligation to table the plaintiff's petition before the Authority since he does not set the

agenda for meetings of the Authority. And even if he could influence the setting of the agenda, he has discretion over what matter to ask Council to place before the Authority. And in the circumstances of this case where the core underlying issue of bribery is criminal and therefore belongs strictly to the domestic jurisdiction of the 2nd defendant, the 1st defendant could not be faulted for refusing to advance the petition beyond his office desk. Besides, the plaintiff, being a corporate body, cannot bring an action before the court as a victim of alleged human rights abuse. Finally, the 2nd defendant committed no breach of Article 38 of the Protocol on Democracy and Good Governance.

Conclusion

21. In the light of the foregoing reasons,

- (i) The principal case which is against the 1st defendant has not been sustained and as a result the court dismisses it in its entirety.
- (ii) It follows that there is nothing against the 2nd 3rd and 4th defendants too, so the case made against them is also dismissed.

Costs

22. Parties shall bear their own costs.

This decision has been rendered in public sitting at the Community Court of Justice, ECOWAS, at Abuja this Friday the 8th day of July 2011, before:

Hon. Justice H. N. Donli-----Presiding

Hon. Justice Awa Nana Daboya-----Member

Hon. Justice Anthony A. Benin-----Member

Assisted by Tony Anene-Maidoh-----Chief Registrar