THE SCOPE OF "BANKING BUSINESS" DEFINED

Recently, Honourable Justice B.F.M Nyako of the Federal High Court, Lagos, Nigeria, was invited to determine the legality of a series of banking transactions, carried out partly in Nigeria and partly overseas, for the purpose of determining the enforceability of the contract and the Court empowered with Jurisdiction to adjudicate over the issues arising there from.

The applicant, Mr. Avinash Malhotra (Indian) by Originating Summons dated 19th July 2010, sought the determination of the following questions and reliefs:-

1. Whether Bank of Singapore Limited (formerly ING Asia Private Bank Limited), a Bank registered in Singapore can carry out Banking Business in Nigeria without license duly issued by the Central Bank of Nigeria.

2. Whether various visits to Nigeria by officers of the Bank of Singapore Limited to solicit for customers resident in Nigeria who upon being convinced completed account opening forms in Nigeria and placed various deposits with the Defendant are in contravention of the Companies and Allied Matters Act CAP. 20 Laws of the Federation of Nigeria 2004, Banking and Other Financial Institutions Act CAP B3 Laws of the Federation of Nigeria 2004 and the Immigration Act CAP 11, Laws of the Federation of Nigeria 2004.

If the answers to Question 1 and 2 are negative and in favour of the Plaintiff, then the Plaintiff seeks the following reliefs:-

a. A Declaration that all the transactions between the Plaintiff and the Defendant in Nigeria relating to opening of accounts, placement of deposits and instructions to invest the deposits through the various means are illegal, null, void and of no effect.

b. A Declaration that all the transactions between the Plaintiff and the Defendant in Nigeria relating to the opening of accounts, placement of deposits and instructions to invest the deposits through various means are unenforceable by the Defendant.

c. An Injunction restraining the Defendant by itself, servants or agents whatsoever from harassing, intimidating or threatening the Plaintiff in any way whatsoever and taking any steps in Nigeria to recover any sum of money with respect to the illegal and unenforceable transaction with the Plaintiff."

The applicant, alongside the Originating Summons, filed an Affidavit in Support, wherein he averred that in 2006, 2 (Two) employees of the Respondent Bank who are not resident in Nigeria visited and held meetings in Nigeria on behalf of the Respondent Bank where they persuaded several persons including him to open accounts and place deposits with the Respondent Bank; and a Written Address, wherein he raised 2 (Two) issues for determination:-

i. Whether the transaction between the parties are illegal and unenforceable under Nigerian law.

ii. Whether the Plaintiff is entitled to the Reliefs sought."

The Applicant argued that the transactions between the parties were in clear violations of the **Banks and Other Financial Institution Act (BOFIA) Cap B3 Laws of the Federation 2004, the Companies and Allied Matters Act CAMA Cap 20 Laws of the Federation of Nigeria 2004 and the Immigration Act Cap 11 Laws of the Federation of Nigeria**; and consequently urged the Court to declare the contract as illegal, null and void and unenforceable. The relevant provisions of the above cited laws are reproduced hereunder:-

"Section 2 (BOFIA) provides:-

No person shall carry on banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking license issued under this Act.

Any person who transacts banking business without a valid license under this Act is guilty of an offence and liable upon conviction to imprisonment for a term not exceeding ten years or to a fine of 2,000,000.00 or to both such imprisonment and fine.

Section 8 (BOFIA):-

Except with the prior approval of the Bank [Central Bank of Nigeria], no foreign bank shall operate branch offices or representative offices in Nigeria.
The Bank may, subject to such conditions as it may impose, from time to time, grant to any bank registered in Nigeria or a foreign bank a licence to undertake off-shore banking business from Nigeria.
…

Any person who contravenes the provisions of subsection(1) or (3) of this section is guilty of an offence and liable on conviction to a fine not exceeding 1,000,000.00 and in the case of a continuing offence to an additional fine of 10,000.00 for each day during which the offence continues.

Section 54 CAMA provides:-

Subject to sections 56 and 59 of this Act, every foreign Company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria or exercise any of the powers of a registered company and shall not have a place of

business or address for service of documents or processes in Nigeria for any purpose other than receipt of notices and other documents, as matters preliminary to incorporation under this Act

Any act of the company in contravention of subsection (1) of this section shall be void.
…

Section 8 Immigration Act provides:-

No person other than a citizen of Nigeria shall-

accept employment (not being employment with the Federal Government or a State Government) without the consent in writing of the Director of Immigration; or on his own account or in partnership with any other person, practice a profession or establish or take over any trade or business whatsoever or register or take over any company with limited liability for any such purpose without the consent in writing of the Minister given on such conditions as to the locality of operations and persons to be employed by or on behalf of such person, as the Minister may prescribe.

Any person desirous of entering Nigeria for any of the purposes in subsection (1) of this section, shall produce the consent to an immigration officer; and the failure to do so shall be an offence under this Act, and any person who commits such an offence shall be liable on conviction to deportation as a prohibited immigrant."

In response, the Respondent filed its Counter-Affidavit and Written Address dated 6th April 2011. The Respondent raised the following issues for determination:-

i. Whether or not the Originating Summons is the appropriate mode of commencement of this suit bearing in mind the facts and allegations in the Plaintiff's Affidavit in Support are not only bitterly disputed, but also grossly unsubstantiated.

ii. Whether or not the facts and allegations encapsulated within the Affidavit in Support of the Originating Summons is enough to ground the reliefs sought by the Plaintiff."

The Court was called upon to interpret the phrase **"banking business"** within the ambit of the **Banks and Other Financial Institution Act (BOFIA).** The Respondent relied on the case of **Ritz Pumperfabrik Gmbh & Co AG v Techno Continental Engineers & Anor [1999] 14 NWLR. Section 66 BOFIA provides:-**

> ***"banking business" means the business of receiving deposits on current account, savings account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance or such other business as the Governor may, by order published in the Gazette, designate as banking business.***
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> ***"deposit" means money lodged with any person whether or not for the purpose of any interest or dividend and whether or not such money is repayable upon demand upon a given period of notice or upon a fixed date."***

In support of the issues raised for determination, the Respondent urged the Court to dismiss the applicant's Originating Summons on the grounds that the Court lacked Jurisdiction to entertain the suit on the ground that the parties had, by agreement, stated that Singaporean Courts and Laws would regulate the transaction which for all intents and purposes was entered in Singapore.

We on behalf of the Respondent, canvassed amongst other points, that the account opening process involved a series of transactions involving several correspondences between the parties culminating in the final act, of account opening and receipt of deposit, being concluded at the Respondent's offices in Singapore.

In support of this argument, we relied on the case of ***State Aided Bank of Travencore Limited –v- Dhrit Ram Privy Council Appeal No. 5 of 1941 per*** **Lord Atkin**. In that case, Dhrit Ram as Plaintiff before the High Court of Bombay wrote to the Defendant Bank seeking quotes on fixed rates of interest. What's interesting is the fact that the Plaintiff was based in Bombay and the Defendant Bank was based and incorporated under the laws of the State of Travancore. The Defendant had no other offices, apart from a branch office in the State of Cochin.

The issue for consideration before the Privy Council was whether the contract between the parties was governed by Travancore Law. Lord Atkin said on this point that:

> ***"The learned Chief Justice, though he came to the conclusion that the contract was made at Travancore, was of the opinion that it was to be performed i.e discharged, at Bombay. Their Lordships cannot agree. With the greatest respect to the Chief Judge he does not appear to have given sufficient weight to the fact that this is a banking transaction entered into at the only office of the Bank where in ordinary matters banking business of this kind has to be completed. The decisions in Rex v. Lovitt (1912) A.C 212 and in Joachimson v. Swiss Bank Corporation (1921) 3 K.B 110 establish in the case of fixed deposit and current account, respectively, where payment is to be made."***

In a more recent Privy Council decision of ***Koh Kim Chai –v- Asia Commercial Banking Corporation Limited Privy Council Appeal Delivered on 12th March 1984,*** the Respondent Bank, registered and carrying on business in Singapore, obtained a charge on land located in Malaysia as security for a loan awarded to the Appellant. The issue in this case was whether the Respondent in obtaining the charge and in attempting to enforce the charge was transacting Banking Business contrary to Malaysia's Banking Act of 1973 and Exchange Control Laws. Incidentally, Sections 2 and 3 of the Malaysia's 1973 Banking Act are identical to respective Sections 66 (Banking Business Definition) and Section 2 of Nigeria's Banking and Other Financial Institutions Act. Lord Fraser held that the loan was made in Singapore and therefore the applicable law to the contract loan was that of Singapore. Interestingly, the eminent Lord stated that there was no evidence that any money was remitted to Malaysia by the Respondent Bank and therefore under the circumstances their Lordships were of the opinion that the only place where the banking business of making a loan to a customer was transacted was in Singapore.

In a considered Judgment delivered on 23rd May, 2012, the Court was of the opinion that the location in which the employees of the Respondent Bank met with the Applicant was of no significance, in light of the fact that the employees of the Respondent bank took the account opening forms to Singapore where the account opening process was completed.

The Court found that the Respondent could not be said to be operating ***"banking business"*** in Nigeria which requires a license from the Central Bank of Nigeria. The Court further held that the visits by the employees of the Respondent to the Applicant cannot be equated to personal banking by the Bank of Singapore. The transactions were therefore not illegal. In upholding our argument on behalf of the Respondent, the Court further held as follows:-

> ***"…the Respondent only facilitated the opening of an account offshore, for the account was neither credited nor operational in Nigeria. It does not appear to me that the Respondent is a bank operating in Nigeria. The mere act of filing forms in Nigeria which still need to be processed elsewhere with the possibility of even being rejected cannot be the basis of contending that a foreign bank was operating in Nigeria. At best the employees can be said to be touting. It is like applying for something on the internet and holding that as a binding contract. At best, it is an invitation to treat. The fact that the employees of the Respondent were going about with account opening forms only makes them likened to tourist carrying items from his country and selling to interested persons."***

As a result of the foregoing, the Court declined Jurisdiction in the suit on the grounds that the transaction was neither perfected in Nigeria, nor was the Respondent Bank situate in Nigeria and the transaction was therefore not governed by Nigerian law.

As a result of the liberal interpretation given to the phrase ***"banking business"***, foreign Companies can engage in certain activities preliminary to entering into a binding contract, without undergoing the rigors of obtaining operational licenses from the Regulatory authorities in Nigeria.

This case further confirms the position that parties can enter into Jurisdictional agreements, stating the applicable law and Court to adjudicate over disputes arising from the relationship created by the parties. The