Contract Law

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Can Parties Be Bound To A Contract By Conduct?

1. Introduction

More often than not, parties to a contract expect that where they intend to enter into a written contract, until the terms of their agreement to contract are reduced into writing and signed by them, they are not bound by whatever they might have agreed to as the terms of their contract, presumably because there was no express intention to create legal relations.

However, situations do arise where parties intended to execute a written contract and either inadvertently or through the mischievous machinations of one party failed to do so, but nevertheless continued their relationship as though they had fully agreed to the terms of their proposed contract. Then, when liability arises, the party liable would seek to deny liability by asserting that they are not bound by the terms of their proposed contract because the contract was not reduced into writing and signed by both parties.

In certain of such situations the law would presume that although the parties failed to reduce the terms of their contract into a writing and duly signed same, they had indeed concluded a binding contract by their conduct. The aim of this article is to review through some decided authorities some of the instances where the courts have held parties bound by the terms of their proposed contract by reason only of their conduct.

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2. Elements of a Valid Contract

The law is settled that for there to be a valid contract there must exist the essential elements of offer, acceptance, consideration, and capacity to contract, with the requisite intention to create a legal relationship.[3] An 'offer' is an expression of readiness to contract on the terms specified by the offeror (i.e. the person making the offer) which if accepted by the offeree (i.e. the person to whom the offer is made) will give rise to a binding contract. It is by acceptance that the offer is converted into a contract. The mutual exchange of value by the parties is the consideration for the contract. Capacity to contract means that the parties must be of full age and competent understanding whilst the intention to create legal relations requires that the parties must have intended to be legally bound by their bargain. For there to be a valid contract there must be a concluded bargain which has settled all essential conditions that leaves no vital element, term or condition unsettled. The important thing is that the parties are *ad idem* on the existence of the contract, which could be express or implied.

3. Contract by Conduct

Whether or not there is a legally binding agreement between parties, whereby the parties to the contract confer rights and impose liabilities on themselves will largely depend on whether there is mutual assent between them. Where there is doubt on whether the parties have concluded a legally binding agreement, the court has the responsibility to analyze the circumstances surrounding the alleged agreement and determine whether the traditional notion of 'offer' and 'acceptance' can be distilled from the purported agreement. The mutual assent must be outwardly manifested. The test of the existence of such mutuality is objective. When there is mutual assent, the parties are said to be *ad idem*.[4]

In **Shoprite Checkers (PTY) Ltd & Anor v. A. I. C. Ltd.**[5] the 1st Respondent, a South African company, entered into negotiations with the 1st Appellant with a view to setting up a joint business of opening and operating Shoprite retail markets in Nigeria. To that end the representatives of the 1st Appellant visited Lagos, Nigeria, and inspected possible locations of the retail outlets for the partnership project. They were satisfied with what they saw with respect to business opportunities in Nigeria, and then went back to South Africa and wrote positive reports on the business atmosphere in Nigeria as a prelude to the execution of the joint venture between them.

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3 I. E. Sagay, *Nigerian Law of Contract* (2nd Ed., Spectrum Books Limited 2000) at p. 8.
4 See, Sparkling Breweries Ltd v. Union Bank of Nigeria Ltd (2001) LPELR3109(SC).
5 (2020) LPELR-49905(CA) (pp. 35 - 43 paras A - F).

Pursuant to the above, the 1st Respondent incorporated a Nigerian company known as "Shoprite - AIC Nigeria Limited" in anticipation of the take-off of the partnership venture. Unexpectedly, the 1st Appellant abandoned the implementation of the joint venture and went behind the 1st Respondent to form the 2nd Appellant to operate the Shoprite outlet in the location identified by the 1st Respondent for the joint venture. It turned out that the same members of the 1st Appellant emerged as major shareholders with the 2nd Appellant and that the 1st Appellant used the 2nd Appellant as its surrogate to circumvent the joint venture.

The Respondents consequently sued the Appellants for breach of contract and the Appellants denied that there was a contract between them. The court was thus called upon to determine whether there existed a contract between the parties in the circumstances. The trial court in its judgment found that the various correspondence tendered in evidence showed that there was intention to create legal relations between the 1st Appellant and the 1st Respondent and therefore held the 1st Appellant in breach of its proposed partnership venture with the 1st Respondent. On appeal to the Court of Appeal, the Court of Appeal upheld the decision of the trial court and held that:

> *There is evidence in the record that the 1st Appellant allowed the Respondent to search for a suitable site for the partnership project and to apply for a lease of land for the partnership project. These involved time, energy and resources or money. The Respondent carried out these assignments. The Court below held that the conduct of the parties demonstrated intention to enter into a legal relation in respect of the partnership project. I agree. Because a reasonable person cannot consent for another to take the trouble, time and expense to search for a site for a project both of them intend to operate a business venture unless his mind is tuned to implementing the partnership project. One cannot therefore start sourcing or scouting for property to operate a business without first agreeing to operate the business: A site cannot be secured for the fun of it (so to speak). It is not done in vacuo. It is done when there is prior understanding between the parties to use it for the purpose they had agreed. It is assuredly presumed that businessmen are considered to be prudent and reasonable. They do not go on a wild goose chase, neither do they fancy any jamboree or frivolity. Businessmen are therefore deemed to be serious minded and focused. By not protesting that the Respondent should search and secure a site for the siting of the partnership business and to, also, do other things associated with it as stated in the judgment of the Court below, the 1st Appellant was taken to have had the intention to enter into legal relation with the Respondent by conduct with respect to the partnership venture, and I so hold.*

The Court of Appeal in its judgment relied on the Supreme Court case of **Trenco (Nigeria) Ltd. v. African Real Estate and Investment Co. Ltd. and Anor.,**[6] and stated that the basis for the imposition of a contract by conduct in the circumstances is that the 1st Appellant, by allowing the 1st

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6 (1978) 4 S.C. 9.

Respondent to expend time, energy and resources in the partnership endeavour and altering its position in the belief based on the impression created by the 1st Appellant of probability of both of them working together in partnership, good conscience will not allow the 1st Appellant to avoid liability for altering the position of the 1st Respondent. Consequently, even if there was no binding contract by conduct between the 1st Appellant and the 1st Respondent the dictates of good conscience grounded the liability of the 1st Appellant.

Similarly, in **ACMEL (Nig.) Ltd & Anor v. FBN Plc & Ors.,**[7] the Appellants were informed by the 2nd Respondent, an agent of the 1st Respondent, about the intention to sell a property (Plot 6, G. Cappa Estate, Maryland, Lagos) at an asking price of ₦20,000,000.00. The Appellants promptly issued a banker's cheque for that amount to the 1st Respondent through the 2nd Respondent. However, after retaining the cheque for 10 months, the 1st Respondent returned it, claiming a new asking price of ₦25,000,000.00. The Appellants issued a new cheque for the additional amount, totaling ₦25,000,000.00. Upon payment, they were let into possession of the property and spent an additional ₦5,000,000.00 on renovations. Seven months later, while waiting for formal processing of documents, the 1st Respondent returned the cheques, stating the need for the consent of the Central Bank of Nigeria (CBN). The Appellants, trusting the 1st Respondent, repurchased the cheques. After obtaining CBN approval, the 1st Respondent introduced a competitive bidding process without the Appellants' knowledge or authorization. The Appellants subsequently learned of the sale of the property to the highest bidder, with the Appellants' bid not being the highest. Efforts to settle the matter amicably failed, leading the Appellants to sue for specific performance and injunctive relief. The trial court rejected the claim of the Appellants and held that no enforceable contract existed between the Appellants and the 1st Respondent.

The Appellants' appeal to the Court of Appeal was dismissed and on further appeal to the Supreme Court, the Supreme Court relying on the principle of estoppel by conduct reversed the concurrent decisions of the lower courts and held that the 1st Respondent by its conduct was estopped from insisting that there was no valid contract between the parties. According to the Supreme Court, immediately it received and held on for seven months to the ₦25,000,000.00 banker's cheques delivered to it as purchase price demanded and paid for on the property, the 1st Respondent had clearly and unequivocally indicated that it approved the sale of the property in dispute, and it was only the CBN's approval that was left. It therefore meant that immediately the CBN approval was obtained, the 1st Respondent had a duty in law to complete the transaction by preparing the

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7 (2021) LPELR-61417(SC) (pp. 21 - 23 paras B - C).

necessary legal documents in favour of the Appellants and to request the Appellants to re-issue the cheques for the sum of ₦25,000,000.00 because the parties were *ad idem* on every item of the contract. The parties to the transaction were known, the property sought to be transferred was known, the nature of the interest to be granted was known and agreed upon and finally, the consideration for the contract was also known and agreed upon. All these according to the Supreme Court pointed to the irresistible conclusion that a valid contract was sealed when the 1st Respondent accepted the ₦25,000,000.00 cheques and put the Appellants in possession.

4. Conclusion

From the cases reviewed above it is apparent that the courts will in appropriate cases and based on the principles of good conscience and estoppel by conduct determine that parties can incur binding contractual liabilities without necessarily reducing the terms of such contract into writing. What the court does in such circumstances is to examine the total circumstances of the case including the conduct of the parties to see whether the essential elements of a contract have been satisfied by the parties. Once all the elements of a valid contract can be established from the conduct of the parties, they will be held bound by their bargain. It is therefore important for contracting parties to think carefully before taking steps in furtherance of a proposed contract if there is no real intention to follow through with a legally binding agreement, so as not to incur an unwanted liability.

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