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# THE POLICE IS YOUR FRIEND; DON'T ABUSE THE PRIVILEGE

## BREACH OF CONTRACT AND (UN) SECURED TRANSACTIONS.

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### BACKGROUND

A contract has been defined as a promise or set of promises which the law will enforce.<sup>1</sup> A breach of contract is said to occur where a party to the contract refuses to honour the promise<sup>2</sup> jointly understood and agreed by the parties. In recent times, incidences of breach of contract have been rife, due in part to the outbreak of the COVID-19 pandemic and its attendant harsh economic effects from Q2 2020. To contain the spread of the pandemic, Nigeria, like every other country, declared a lockdown by closing its borders (sea, air, and land) and directing all citizens and residents (save for those rendering essential services) to stay indoors. As a consequence, the economy was affected, as businesses were shut down. Thus, several contractual promises and obligations could not be honoured and the security given to incentivize the lender, unenforceable.

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<sup>1</sup>l. Sagay, *Sagay: Nigerian Law of Contract*, 1st edn, Sweet & Maxwell, London, 1985, Pg. 1. A contract will be deemed to exist where, in the absence of any vitiating element:

- a. One party has made an offer (or a counter-offer) with respect to certain issues.
- b. The offer (or counter-offer) has been accepted (either expressly or by conduct) by the other party.
- c. There is in fact an exchange of value or a promise to that effect; both parties must be giving or doing something, refraining from giving or doing something, or otherwise promising something.
- d. Both parties are agreed on the exchange (of items, services, or promise(s)). There is no contract without an agreement in the minds of both parties.
- e. Neither of the parties is disabled in law to enter into a contract. Such legal disability includes when either or both parties are underaged, of unsound mind, or bankrupt.

Once all five elements exist, a contract is deemed to have been formed, whether or not the said contract is written.

<sup>2</sup> Such promises made pursuant to the contract are not mere promises and are in fact obligatory. The obligatory nature of the promises is the reason they are enforceable by law. See *Larmie v. Data Processing maintenance & Services (D.P.M.) LTD* (2005) 12 SC (Pt. 1) 93 at 103.

Following the ease of the lockdown, it has become notable that many parties to a short term, relatively low volume financial contracts apparently relied on post-dated cheques as a means to secure their transactions.<sup>3</sup> The “ease of realisation” of post-dated cheques and a possible lack of a thorough understanding of the provisions of the Dishonoured Cheques (Offences) Act<sup>4</sup> may have played a pivotal role in the use of these post-dated cheques in such contractual transactions.

#### Accordingly, this Article will:

- a. examine the relevant legislations that regulate secured transactions in moveable assets in Nigeria as well as the provisions of the Dishonoured Cheques (Offences) Act; and conclude that contracts are best secured by not only taking adequate security but perfecting such security; and
- b. affirm that the appropriate venue to obtain a remedy for a breach of contract is the court having jurisdiction, and not the Police.

### What is a Secured Transaction?

Secured transactions are business arrangements where an obligor gives an assurance to the obligee that certain obligations under the contract will be performed. Usually, the obligor gives this assurance by creating a security interest over an asset<sup>5</sup> in favour of the obligee.

In Nigeria, where security is created over a moveable asset, such transaction is, (to the extent that creditors/obligees submit themselves) regulated by the Central Bank of Nigeria (“CBN”) by virtue of the Secured Transactions in Movable Assets Act (“the Act”).<sup>6</sup> The Act applies to “all security interests in movable assets created by an agreement that

secures payment or the performance of an obligation”. A “National Collateral Registry” (“the Registry”) was created pursuant to the Act to *inter alia* act as a depository where information about security interests in movable assets are registered.

Information which is registered at the Registry constitutes public information which may be accessed by any member of the public upon conducting a search and paying the requisite fees. In this regard, the Registry functions like the land registry where information about mortgages and charges created over land are registered and can be verified by any member of the public upon making the necessary payment.

To perfect a security interest, creditors/obligees are required to, (with the consent of the grantor/obligor), register a Financing Statement (in a prescribed form) at the Registry. The grantor’s consent is deemed to have been duly obtained, if such consent is contained in the security agreement.

### The Dishonoured Cheques Act

The Dishonoured Cheques Act criminalises the issuance of a cheque which is returned unpaid on grounds that there are insufficient funds in the account; and prescribes punishment for the issuer in the event that there is a conviction for having issued a cheque which is returned unpaid. Many people, in view of the aforementioned provision of the Act, happily accept post-dated cheques in the hope that if same is presented and returned unpaid, the police may be called upon to exert pressure to force the repayment of the debt through a criminal action initiated against the obligor.

Section 1 (3) of the Act however provides for an important exception through which obligors may escape criminal liability as follow:

<sup>3</sup> Large volume, longer term financial contracts involving banks and other financial institutions will typically be secured by mortgages over immoveable assets.

<sup>4</sup> Cap D11, Laws of the Federation of Nigeria, 2004

<sup>5</sup> This is known as “security”

<sup>6</sup> This Law was signed into law and gazetted in the year 2017

“A person shall not be guilty of an offence under this section if he proves to the satisfaction of the court that when he issued that cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period specified in subsection (1) of this section.”

Based on the above provision, obligors have been known to escape liability, simply by arguing (to the satisfaction of the court) that they indeed believed that the cheque would be honoured. Some obligors also, after obtaining benefit under a contract, are known to request that the obligee refrains from tendering the cheque, as they now have cause to believe that the account will not be sufficiently funded. Where this is done, they may likely avoid criminal liability, thus leaving the obligee in the position of an unsecured creditor.

It must however be noted as will be discussed subsequently, that the role of the Police strictly relates to the detection and prevention of crime, and not to the enforcement of the contract between parties, or any other interference in civil affairs between persons. For this reason, the party who intends to report the issuer of a dud cheque must ensure that the Police is not being invited to enforce the contract between the parties itself. This is because the courts have consistently frowned at and discouraged the use of the Police to enforce contracts, terming such act as an illegal exercise of powers.

Indeed, where there are good grounds to believe that the obligor deliberately deceived the obligee by issuing a dud cheque in furtherance of the perpetration of fraud, the jurisdiction of the Police can be triggered for the investigation of the fraudulent act.

### **Post Dated Cheques and the Role of Law Enforcement Agencies.**

Contrary to the well-stated position of the law, many aggrieved parties upon the incidence of breach of contract file a complaint with the Police<sup>7</sup> to enforce the contract, even where there has been no crime committed. Whilst this approach may appear pragmatic on the face of it,<sup>8</sup> it is in fact an abuse of an institution of the State and an illegal exercise of power, as the enforcement of contracts is completely out of the constitutional and statutory powers and functions of the Police.<sup>9</sup> Section 4 of the **Nigeria Police (Repeal and Re-enactment) Act 2020** provides expressly for the functions and powers of the Police. It reads:

“The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or outside Nigeria as may be required of them by, or under the authority of this or any other Act.”

<sup>7</sup> Police as used here, extends to other Law Enforcement Agencies, such as the EFCC etc.

<sup>8</sup> The party in breach, in a bid to avoid Police harassment and possible arrest may make haste to perform their obligations under the contract, and to remedy the breach.

<sup>9</sup> Section 214 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) expressly provides that the Police shall have such powers and duties as are conferred on them by law. No law in Nigeria confers the Police with the powers to enforce contracts. Thus, engaging in such action is legally beyond their powers, and any arrests made pursuant to such illegal exercise of power is liable to be set aside.

Clearly, the Police's duty relates simply to the enforcement of laws, the prevention and detection of crime, and the apprehension of offenders. Thus, whilst the Police have a duty to enforce laws, they are not empowered to enforce contracts or other private arrangements between citizens, to the extent that no breach of law has been committed. The Court pronounced on this as far back as the year 2002 in the case of **Ken McLaren & Ors vs James Lloyd Jennings**,<sup>10</sup> and have continued to reiterate this position.

Recently, In **Kure v COP**,<sup>11</sup> the aggrieved party to a contract, decided to file a complaint with the Police against the breaching party rather than employ all legitimate options available at his disposal. After reviewing the provision of Section 4 of the Police Act<sup>12</sup> and declaring the Police's involvement illegal and unconstitutional, the Court then pronounced on what the Police ought to do when they have been approached in such instances as follows:

“The remedy of the nominal complainant was in a civil suit for damages for breach of contract or for an order for specific performance. **It was the duty of the Police to advise her accordingly and to decline to proceed with the complaint.** The role of the Police is clearly spelt out in Section 4 of the Police Act Cap. P19 Laws of the Federation of Nigeria 2004...”

Furthermore, persons who file a complaint with the Police to enforce a civil transaction have not been spared. In a Court of Appeal matter decided in 2019,<sup>13</sup> the High Court had rightfully held that the Police acted beyond its powers when it arrested the 1<sup>st</sup> Appellant pursuant to a civil transaction between the 1<sup>st</sup> Appellant and the 5<sup>th</sup> Respondent. The Court however exonerated the 4<sup>th</sup> and 5<sup>th</sup> Respondents (the aggrieved parties to the contract) on the ground that they merely filed a report with the Police, but did not partake

in the arrest and detention of the 1<sup>st</sup> Appellant. In partly upholding and overturning the decision of the High Court, the Court of Appeal completely agreed that the Police had no business getting involved in the transaction. The Court then completely disagreed that the 4<sup>th</sup> and 5<sup>th</sup> Respondents are without liability. In resolving the issue and finding for the Appellants, the Court, speaking of the act of the Respondents in reporting the Appellants to the Police, held:

“They made a report in bad faith knowing that it is a civil matter outside the competence of the police. In the circumstance, the action of the 4<sup>th</sup> & 5<sup>th</sup> Respondents is beyond just reporting a matter. Technically, it seems so but substantially and legally it is more than that. While the finding of the lower Court was right to the effect that the matter involved in this appeal is a civil matter but the conclusion that the 4<sup>th</sup> & 5<sup>th</sup> Respondents are not liable is wrong. The lower Court was therefore in error in holding that the 4<sup>th</sup> & 5<sup>th</sup> Respondents are not liable. They initiated the process which led to the violation of the Fundamental Right of the Appellants. If not for the initial action of the 4<sup>th</sup> & 5<sup>th</sup> Respondent in reporting a civil matter to police, the police would not have wrongly exercised their powers. The lower Court was therefore wrong in exonerating the 4<sup>th</sup> & 5<sup>th</sup> Respondents.”

<sup>10</sup> (2003) 3 NWLR (Pt. 808) 471 @ 484  
<sup>11</sup> (2020) LPELR-49378 (SC)

<sup>12</sup> Cap P19 LFN 2004 (*im pari materia* with the provision of the Nigeria Police (Repeal and Re-enactment) Act 2020)  
<sup>13</sup> *Okafor & Anor v. AIG Police Zone II Onikan & Ors* (2019) LPELR-46505(CA)

Such has been and continues to be the attitude of the Courts to a person who reports a civil matter without any suspected criminality to the Police and to the Police itself, when it allows itself to be used as an instrument of oppression. The Police Act, 2020 also now provides for personal liability for any Police officer who partakes in misuse of power.<sup>14</sup>

Further to the above, and perhaps more importantly, it should be noted that the objective of the aggrieved party also determines the appropriate approach to be taken to enforce the contract. Generally, the criminal jurisdiction of the Courts is not exercised for the purpose of restitution. Thus, where the Police charge the breaching party to court under some pretext, and even if the Court finds the breaching party guilty of some offence, the matter is likely to result in either the imposition of a fine (which will be paid to the state, not the aggrieved party), imprisonment, or both.

If the objective however is to enforce the contract in some way, then the aggrieved party is better off instituting a civil action either in court or before an arbitral tribunal where such party will be entitled to either or all of damages,<sup>15</sup> injunction<sup>16</sup>, specific performance<sup>17</sup>, or rescission<sup>18</sup>, depending on the circumstances.

## Conclusion

To comprehensively deal with the issue of breach of contract as well as any criminality which may be involved, the best approach is to initiate a criminal action at the Police by filing a complaint/petition, and then instituting an action in court for the enforcement of the contract itself. It is also advised that all contracts be reduced to writing to avoid any ambiguities on the rights and obligations of the parties<sup>19</sup>. In addition, to avoid a scenario of helplessness in the event of breach by the other party, it is advisable to secure a financing transaction by taking adequate security and where appropriate, perfecting such security at the Collateral Registry.

Finally, where a breach of contract has occurred, the appropriate venue to obtain a remedy for the breach is in the Court having jurisdiction, and not the Police. However, where a crime is suspected to have been committed in furtherance of the breach, the Police can be invited to investigate the crime, but an action must still be initiated for the enforcement of the contract itself.

For any comments and additional information on the issues discussed, please contact any of the under-listed persons:

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<sup>14</sup> See Section 341 of the Police Act, 2020.

<sup>15</sup> Monetary compensation awarded in favour of the innocent party for the breach

<sup>16</sup> Generally, a restraining order preventing the doing of certain actions which may breach the contract

<sup>17</sup> An order compelling the breaching party to honour the contract

<sup>18</sup> An empowerment to the innocent party to terminate the contract without any negative consequences

<sup>19</sup> Indeed, the Secured Transactions in Movable Assets Act, 2017 provides that the way to create a security interest is by an agreement between the parties