Can a Foreign Company that is not registered in Nigeria maintain an action in Nigerian Courts?

This note briefly analyses the recent decision of the Nigerian Supreme Court in *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[1]on the issue of a foreign company that is not registered in Nigeria having the capacity to sue in Nigeria.

Generally, Section 78 of the Companies and Allied Matters Act, 2020 requires that a foreign company must be registered in Nigeria before it can carry on business in Nigeria. This provision is a carryover of the former Section 54 of the Companies and Allied Matters Act, 1990, which contains a similar provision.

However, Section 84(b) of the Companies and Allied Matters Act 2020, makes express provisions for a foreign company to sue and be sued in its corporate name or that of its agent (despite the fact that it is not a registered or incorporated company in Nigeria for the purpose of carrying on business (under Section 78). The same provision was previously enacted in Section 60(b) of the Company and Allied Matters Act 1990. Section 60(b) of the Company and Allied Matters Act 1990 has been applied by Nigerian courts in some cases prior to the enactment of the Companies and Allied Matters Act, 2020.

In *Companhia Brasileira De Infraestrututira (INFAZ) v Companhia Brasileira De Entrepostos E Commercio (COBEC) (Nig) Ltd*,[2] the plaintiff-appellant was a company allegedly registered in accordance with Brazilian law. The plaintiff-appellant was also a shareholder with some Nigerian persons, which constituted the defendant-respondent company. There was a change in the name of the plaintiff-appellant to Companhia Brasileira De Infraestutura Fazendaria, which was allegedly in accordance with Brazilian law. The plaintiff-appellant prayed for the winding-up of the defendant-respondent company. The application was dismissed by the trial court and the appeal to the Court of Appeal was dismissed as well. One of the issues for consideration was whether the plaintiff-appellant was competent to sue and be sued in Nigeria.

The Court of Appeal held that by virtue of Section 60(b) of the Companies and Allied Matters Act 1990, a foreign company not registered in Nigeria can sue and be sued in Nigerian courts provided that said foreign company was duly incorporated according to the laws of a foreign state recognised in Nigeria. But, if there is a change in the name of that foreign company, evidence of compliance with the law of the land where it was incorporated must be given. In the instant case, the Court of Appeal held that there was no material evidence placed before the court to establish the change of name of the plaintiff-appellant company, and the resolution for change of name in Brazil that was provided before the court was deemed insufficient.[3]

In *Edicomsa International Inc and Associates v CITEC International Estates Ltd*,[4] the plaintiff-appellant was a foreign company incorporated in the United States of America. However, it was not registered in Nigeria. The plaintiff-appellant was engaged by the defendant-respondent to provide some services. Subsequently, there was a disagreement between the parties on payments due to the plaintiff-appellant, which led to the action before the court. The defendant-respondent, *inter alia*, challenged the jurisdiction of the trial court on the basis that the plaintiff-appellant was not registered in Nigeria. The trial court upheld the submission of the defendant-respondent. The plaintiff-appellant appealed to the Court of Appeal, which unanimously allowed the appeal. The majority of the Court of Appeal rightly applied Section 60(b) of the Companies and Allied Matters Act 1990 to the effect that the plaintiff-appellant, though not registered in Nigeria, could sue in Nigeria.[5]

In the recent case of *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[6] the Nigerian Supreme Court did not consider Section 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act 2020), though its final decision was correct. In that case, the claimant/1st appellant claimed that it entered into a consultancy service agreement with the defendant/respondent which the latter unlawfully terminated. The plaintiff/1st appellant therefore filed an action via originating summons in the Federal High Court, Lagos State Judicial Division, seeking declaratory reliefs to that effect. It further claimed the total value of outstanding claims on invoices submitted by it, special and general damages. One of the issues canvassed at the Supreme Court was whether the Court of Appeal was right when it held that the

contract entered into by the claimant-1st appellant a foreign company without incorporation in Nigeria was illegal and unenforceable? The Supreme Court Justices unanimously agreed with Peter-Odilli JSC who held as follows in her leading judgment:

"I agree with learned counsel for the appellants that section 54 of the Companies and Allied Matters Act [Cap C20 LFN 2004][7] does not apply to the facts of this case because the situation before the court in this case is one of a firm registered in Nigeria and entering into contract with the respondent but subsequently to the execution of the contract incorporating itself outside Nigeria as a limited liability company".[8]

It is submitted that the Supreme Court should also have had regard to Article 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act, 2020) in holding that assuming the claimant-1st appellant was a foreign company that was not registered in Nigeria, it was capable of maintaining an action in Nigeria. This would have put to rest any question as to the capacity of a foreign company that is not registered in Nigeria to sue or be sued in Nigeria. It would also have made the Supreme Court's decision exhaustive in this regard.

[1] (2021) All FWLR (Pt. 1083) 359.

[2](2004) 13 NWLR 376.

[3]*Companhia Brasileira De Infraestrututira v Cobec (Nig) Ltd* (2004) 13 NWLR 376, 391, 395 (Aderemi JCA, as he then was) (overturned on the point of proof of change of the name of the foreign company, but the decision that the foreign company could sue and be sued was affirmed by the Nigerian Supreme Court in *INFAZ v COBEC* (*Nig*) *Ltd* (2018) 12 NWLR 127). See also *Watanmal (Singapore) Pte Ltd v. Liz Olofin and Company Plc* (1997) LPELR-6224(CA) 13 (Musdapher JCA as he then was); *NU Metro Retail (Nig) Ltd v. Tradex S.R.L & Anotherr* (2017) LPELR-42329(CA) 41-2 (Garba JCA as he then was).

[4](2006) 4 NWLR 114.

[5]*Edicomsa International Inc and Associates v CITEC International Estates Ltd* (2006) 4 NWLR 114, 125-26 (Rhodes-Vivour JCA, as he then was), 130 (Omage JCA). See also *B.C.N.N. Ltd. v. Backbone Tech. Net. Inc.* (2015) 14 NWLR (Pt. 1480) 511. *Cf. AG Butler (Nig) (Ltd) v The Sanko Steamship Co. Ltd* (2020) LPELR -51141 (CA). *Cf. Hung & Ors v. EC Investment Co. (Nig) Ltd* (2016) LPELR -42125 (CA) (Tur JCA dissenting).

[6] (2021) All FWLR (Pt. 1083) 359

[7] "Subject to sections 56 to 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 for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an 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." This provision is now contained in Section 78 of the the Companies and Allied Matters Act, 2020.

[8] ibid, 396.