Freedom Of Information Law Report

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FOI Act Cannot be Applied Retrospectively, Judge Rules

In the High Court of Lagos State

In the Ikeja Judicial Division

Before Justice Y.O. Idowu (Mrs.)

Sitting at Court No. 10, General Civil Division Ikeja

Wednesday, 14th March 2012

Suit No. ID/211/2009

Between:

Incorporated Trustees of the Citizens Assistance Centre) – **APPLICANT**

And

1. Hon. S. Adeyemi Ikuforiji
2. Lagos State House of Assembly) **- RESPONDENTS**

The Applicant in the suit brought a motion on notice dated November 22, 2011 pursuant to Order 40 Rules, 3 and 5 of the High Court of Lagos State (Civil Procedure) Rules, 2004, Sections 1(1), 2, 3, 4, 20, 21, 22 and 25 of the Freedom of Information Act, 2011, Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Article 13 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap DA9, LFN (2004) and the inherent jurisdiction of the Court, praying for:

- An order of mandamus compelling the Respondents to release or make available to the Applications, the information requested in the letter dated July 14, 2011 or "Exhibit Citizens Centre 1"
- And for such further or other order(s) as the Court may deem fit to make in the circumstances.

However, the Respondents have filed a Notice of Preliminary Objection dated November 30, 2011 on the following grounds:

- That the Applicant lacks the requisite legal capacity/locus standi to commence this action.
- That the Applicant in the Suit is an improper party.
- That the Applicant is not a juristic person.
- That the Applicant has no reasonable cause of action.
- That the application for mandamus is speculative, academic, frivolous, vexatious and an abuse of the Court process.
- The relevant statute (Freedom of Information Act, 2011) relied upon by the Applicant.

The Respondents contended that the Applicant in the applications for an order of mandamus fails on the following grounds:

1. That the statute is not retrospective.
2. That by Section 14(1)(6) the Respondents herein are precluded over exemption of personal information from publication as demanded by the Applicant (exception to the rule).

The preliminary objection was supported by a 20-paragraph counter-affidavit dated December 5, 2011 wherein the deponent averred that the Applicant in the Suit is not a registered organization, unknown to law, hence cannot maintain or institute proceedings before a court of law.

It was also averred that the overhead costs sought to be published cannot be published without creating crisis in the interest of the state and its security.

It was further averred that the law relied upon by the Applicant, the Freedom of Information Act, took effect from May 28, 2011 and as such cannot suffice for the Applicant requesting for information on overhead costs from 1999 to September 2011.

The Respondent said it could deny the Applicant information where the subject of the information includes personal information maintained with respect to the Respondents' employees, appointees and/or support staff.

It was also averred that the Respondents and their staff, appointees and/or elected officials will suffer irreparable injury and/or prejudice if the information is made available to the Applicant who may likely publish it in the media; and no indemnity can cure the damage that will result from such grant.

The Respondents submitted for determination the following issues:

- Whether or not the Applicant has the requisite legal capacity/locus standi to commence the action.
- Whether or not the Applicant in the suit is a proper party.
- Whether or not the Applicant is a juristic person.
- Whether or not the Application discloses any reasonable cause of action.
- Whether or not the application is an abuse of Court process.
- Whether the Freedom of Information Act 2011 relied upon by the Applicant is retrospective.
- Whether the Respondents are clothed by the enabling law relied upon by the
- Applicant with power to exempt certain personal information from disclosure to the public.

Justice Idowu noted that the gravamen of the preliminary objection to be considered is whether the Applicant's motion on notice is properly before the court with regards to Sections 20 and 21 of the Freedom of Information Act, 2011 and said it would form her focus in considering the application. She added that she would also adopt the issues for determination raised by the Respondents.

Justice Idowu noted that locus standi means the legal capacity or authority to sue in a cause or matter and that for a plaintiff to sue in a matter, he has to disclose his interest in the matter. She cited Ayorinde v. Kuforiji (2007) 4 NWLR (Pt. 1024) 341.

The judge said it is trite law that only juristic persons can sue or be sued. She said they include natural persons, incorporated companies, corporations with perpetual succession and unincorporated associations granted the status of legal persons by law. She referred to Gov. Kwara State v. Lawal (2007) 13 NWLR (Pt. 1051) 347.

Justice Idowu noted that locus standi means the legal capacity or authority to sue in a cause or matter and that for a plaintiff to sue in a matter, he has to disclose his interest in the matter.

On whether there is a reasonable cause of action, she said that there must be a controversy between parties that a court is called upon to resolve in a suit, otherwise the court will lack jurisdiction to entertain the suit.

She said: "In other words, there must exist a cause of action between the parties, which term may be described as a civil right or obligation for the determination by a court of law or a dispute in respect of which a court of law is entitled to invoke it judicial powers to determine."

The judge noted that the grouse between the parties is quite apparent which is on the refusal to grant information requested by the Applicant adding that this answers the issue of locus standi and cause of action of the Applicant in the affirmative.

She also noted that the Applicant has in their counter-affidavit exhibited their certificate of incorporation thereby laying to rest the issue of it not being a juristic person.

Citing the preamble to the Act, the judge said: "I must say here that this clearly answers the issue of whether this act is meant to be retrospective in nature. This would have been clearly stated here if intended. The commencement date of operation of the Act follows as the 28th day of May, 2011. This again lays to rest the issue of whether the Act is intended to be retrospective in nature."

She noted that in arguing their preliminary objection, the Respondents stated that the Applicant has not shown any reasonable interest for wanting the information and thus cannot be obliged with it.

The judge said it is trite law that only juristic persons can sue or be sued. She said they include natural persons, incorporated companies, corporations with perpetual succession and unincorporated associations granted the status of legal persons by law.

The judge said: "I must say here that this assertion is unfounded as section 1(2) of the Act reads that an Applicant under this Act need not demonstrate any specific interest in the information being applied for. Once it is a public information, no interest or purpose to which the information is to be used is required to be shown."

She also noted that the Respondent did not deny the Applicant's allegation that it never gave the Applicant a written refusal to its request for the information and that it was only in court in the Respondent's preliminary objection that the Applicant learnt the basis of the refusal.

The judge said section 7(1) of the Act is quite clear and unambiguous and that "the Applicant has a right to challenge the decision refusing access and have it reviewed by a court."

But she said she agreed with the Respondent's argument that what is open for an Applicant to do is to bring an action to court, asking it to consider the refusal, reasons for it and review it, and not make a straight up application for mandamus.

Noting the Respondent's argument that the Applicant delayed beyond the 30 days approved by section 20 of the Act before filing the action, the judge said the primary concern of the court in the construction of statutes is to ascertain the intention of law makers as deducible from the language of the statute being construed, and cited A.G. Federation v. Abubakar (2007) 10 NWLR (Pt. 1041) 1.

The judge said… "it is a well settled principle that where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy."

In order words, she said, a court can only determine the intention of the Legislature as expressed in a particular provision of the Constitution or a statute by critically examining the words used to couch that particular provision. Thus, she said, the Court can only interpret the words according to their literal meaning, and the sentences therein, according to their grammatical meaning.

The judge said the court in Dangote v. C.S.C. Plateau State (2001) 4 S.C. Pt. II, 43 at 56 held that "it is a well settled principle that where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy."

She therefore held that the non-observance of section 20 by the Applicant is fatal to their application.

According to her, "Mandamus is an extraordinary and residuary remedy that ought to be granted only when there is no other means of obtaining justice. It lies to secure the performance of a public duty, in the performance of which the Applicant has a sufficient legal interest. Consequently, irrespective of the fact that an applicant for an order of mandamus has satisfied other requirements for securing the remedy, the Court will not grant the order if a specific alternative remedy which is equally convenient, beneficial and effectual is available." She referred to Atta v. C.O.P. (2003) 17 NWLR (Pt.849) 250 and Fawehinmi v. I.G.P. (2000) 7 NWLR (Pt. 665) 481.

According to her, "Mandamus is an extraordinary and residuary remedy that ought to be granted only when there is no other means of obtaining justice. It lies to secure the performance of a public duty, in the performance of which the Applicant has a sufficient legal interest. Consequently, irrespective of the fact that an applicant for an order of mandamus has satisfied other requirements for securing the remedy, the Court will not grant the order if a specific alternative remedy which is equally convenient, beneficial and effectual is available."

The judge outlined the conditions precedent to grant an order of mandamus as follows:

- The order of mandamus lies to secure the performance of a public duty, in the performance of which the Applicant has a sufficient legal interest. The Applicant must show that he has demanded the performance of the duty and that performance has been refused by the authority obliged to discharge it.

- The duty to be performed must be of a public nature. She referred to C.B.N. v. S.A.P (Nig.) Ltd (2005) 3 NWLR (Pt. 911) 152.

- The public duty, the performance of which may be commanded by an order of mandamus is one that must be imposed upon the person against whom the order is sought. Such public duty need not to be imposed by statute only. It maybe a duty under that common law and even a duty under customary law. She referred to C.B.N. v. S.A.P. (Nig.) Ltd (2005) 3 NWLR (Pt. 911) 152.

The judge said a Court may refuse to make an order of mandamus:

- Unless it has been shown that a distinct demand for performance of the duty has been made and that the demand has deliberately not been complied with;

- If there is undue delay;

- Where the motives of the Applicant are unreasonable. She referred to Atta v. C. 0. P. (2003) 17 NWLR (Pt.849) 250

She said a Court before whom an application for mandamus is made has a discretion to grant or refuse it but that the Court must however exercise its discretion judicially and judiciously and again cited Atta v. C.0.P (2003) 17 NWLR (Pt.849) 250.

According to her, "Courts, tribunals and administrative bodies, in general have a duty to exercise their statutory discretions one way or the other when the circumstances calling for the exercise of those discretion arise but are not normally under any duty to determine that matter or exercise such discretion in particular way." She referred to Atta v. C.O.P. (Supra).

However, she said, a Court does not make an order which it cannot enforce, relying on Fawehinmi v. I.G.P (Supra).

The judge said abuse of the process of Court simply means that the process of the Court has not been used bona fide and properly. She explained that it is a term generally applied to a proceeding which is frivolous, vexatious or oppressive and that it could also mean abuse of legal process. She referred to Iwuagolu v. Azyka (2007) 5 NWLR (Pt. 1028) 613.

She disagreed with the Respondent's contention that the Applicant's application is an abuse of Court process, saying that where a procedure for redress is provided by the law and a litigant fails to follow the procedure, this could not be termed as an abuse of Court process.

On the issue of whether the Act is retrospective in nature, the judge referred to the paragraph of the preamble which she had highlighted in the judgment, saying it which answers the question succinctly.

She noted that "although the legislature has the authority and competence to make retrospective legislation within the constitution which allocates legislative functions to it, in which case the retrospective nature of the legislation may be partial or total, merely procedural or substantive, an interpretation giving retrospective effect to a statute should not be readily accepted where that would affect vested rights or impose liability or disqualification for past events."

She noted that in Adesanoye v. Adewole (2000) 9 NWLR (Pt. 671) 127**,** the Court held that "although the legislature has the authority and competence to make retrospective legislation within the constitution which allocates legislative functions to it, in which case the retrospective nature of the legislation may be partial or total, merely procedural or substantive, an interpretation giving retrospective effect to a statute should not be readily accepted where that would affect vested rights or impose liability or disqualification for past events."

The judge said that there are three kinds of statutes that can be said to be retrospective, namely:

- Statutes that attach benevolent consequences to a prior event;
- Statutes that impose a penalty on a person who is described by reference to a prior event but the penalty is not a consequence of the event; and
- Statutes that attach prejudicial consequences to a prior event. She cited Adesanoye v. Adewole (Supra).

She noted that the Applicant is seeking for information from May 1999 to September 2011 and held that since the commencement date of the Act is May 28, 2011, and the Act is clearly not retrospective in nature, the application could never have been granted.

On whether the Respondents have the power to exempt certain information from the public, the judge said she would answer the question affirmatively by reason of Section 14 of the Act as raised by the Respondent.

Justice Idowu said "when a suit is instituted, its contents may be considered either from the points of view of its inherent benefits to the proponent of the action or from the benefit derivable jurisprudentially speaking, by the society at large such as in a case on constitutional or administrative law. Speaking analytically, it is safe to postulate that the determination of justice while demonstrating the latitude of individual liberty ought generally to be consistent with the welfare and ethic of the society."

Quoting Section 14 (1) of the Act, she said a public institution must deny an application for information that contains personal information and information exempted under the section which includes personnel files and personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such positions.

She also cited the proviso in Section 14(2) of the Act that a public institution shall disclose any information that contains personal information if the individual to whom it relates consents to the disclosure or if the information is publicly available as well as the provision that where the disclosure of any information referred to in the section would be in public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom a request for disclosure is made shall disclose such information subject to Section 14(2) of the Act.

The judge therefore agreed with the Respondents' argument that the overhead expenses sought by the Applicant fall under information precluded from public knowledge by section 14(1)(b) of the Act.

She said the term "judicial review" means a Court's power to review the actions of other branches or levels of government, especially the Court's power to invalidate legislative and executive action as being unconstitutional. She referred to A.G. Fed v. Abule (2005) 11NWLR (Pt. 936) 369.

Justice Idowu said "when a suit is instituted, its contents may be considered either from the points of view of its inherent benefits to the proponent of the action or from the benefit derivable jurisprudentially speaking, by the society at large such as in a case on constitutional or administrative law. Speaking analytically, it is safe to postulate that the determination of justice while demonstrating the latitude of individual liberty ought generally to be consistent with the welfare and ethic of the society." She referred to Magit v. University of Agric, Makurdi (2005) 19 NWLR (Pt. 959) 211.

Saying that Section 20 of the Act is clear as to the time limit and procedure to be adopted in bringing this kind of application and ought to be complied with, the judge said she agreed with the Counsel for the Respondents that the extension obtained was to bring the mandamus application before the Court and not in view of Section 20 which requires that extension may be got from Court before the expiration of the 30 days to bring an application for judicial review as to refusal of the request for information."

The judge said that "it is trite that where the words of a statute are clear and unambiguous, the function of the Court is to apply the words in their simple and ordinary meaning."

She noted that the Applicant's letter was dated July 14, 2011 but that the action was not commenced until well after the required 30 days.

The judge said that "it is trite that where the words of a statute are clear and unambiguous, the function of the Court is to apply the words in their simple and ordinary meaning." She cited Awolowo v. Shagari (1979) All NLR 120.

She said in view of the foregoing, she agreed with the objection of the Respondents and thereby held that the application for mandamus failed for the following reasons:

- That the application is clearly out of the time specified to be brought by Section 20 of the Freedom of Information Act 2011;
- A Court does not make an order which it cannot enforce;
- That the statute is not retrospective; and
- That by Section 14 (i) (b) of the Act, the Respondents are precluded over exemption of personal information from publication as demanded by the Applicant.

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