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## FRUSTRATION OF CONTRACT IN NIGERIA

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## **FRUSTRATION OF CONTRACT IN NIGERIA**

*Frustration of contract is a defence available to a defendant who would otherwise be liable for breach of contract for non-performance of contractual obligations but for the occurrence of a fundamental event that makes it impracticable or impossible to perform the contract. This defence is not readily available to all defendants in an action for breach of contract, and the existence of a frustrating event on its own does not avail the defendant.*

*This Article seeks to examine the doctrine of frustration of contracts in Nigeria, whether the doctrine applies to all contracts, circumstances where frustration does not occur, what the court considers in establishing frustration, the effect of frustration on a contract in Nigeria, and its relationship with force majeure.*





## MEANING OF FRUSTRATION OF CONTRACT

Frustration of Contract has been defined by the apex court in Nigeria to mean a premature determination of an agreement between parties lawfully entered into, owing to the occurrence of an intervening event, or change of circumstances so fundamental as to be regarded by law both as striking to the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement.<sup>1</sup>

A contract is thus frustrated where, after its conclusion, events occur which make performance of the contract impossible, illegal, or something radically different from that which was in contemplation of the parties at the time they entered it. In other words, where the performance of the contract is dependent on the continued existence of a state of affairs, the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract. The courts have restricted the doctrine of frustration to:

- a. Situations where the supervening event destroys a fundamental assumption on which parties had contracted on; and
- b. Where force majeure clauses are drafted into the contract.<sup>2</sup>

The underlisted situations or events have been held by the courts at one time or the other to constitute frustrating events:

- a. Subsequent legal changes or statutory impossibility.
- b. An outbreak of war.
- c. Destruction of the subject matter of the contract or literal impossibility.
- d. Government acquisition of the subject matter of contract.
- e. The cancellation by an unexpected event. E.g., the death or permanent incapacitation by ill health or imprisonment of a party to a contract for personal service.<sup>3</sup>

## THE APPLICABILITY OF FRUSTRATION OF CONTRACT

It has been decided in a plethora of cases that the doctrine of frustration of contract is applicable to all types of contracts. However, the Supreme Court was faced for the first time in deciding whether frustration of contract is applicable to lease agreements in the case of *Araka V. Monier Construction Co (Nigeria) Ltd.*<sup>4</sup>

The facts of the case are as follows; the defendant entered into a tenancy agreement with the plaintiff on its property in Port Harcourt, Nigeria. The tenancy was a renewable yearly tenancy

<sup>1</sup> *Mazin Engineering Limited v. Tower Aluminium (Nigeria) Ltd* (1993) 5 NWLR (pt. 295) Pg. 526. See also. *A.G Cross Rivers State V. AG of the Federation and anor* (2012) LPELR-9335 (SC); *NBCI V. Standard (Nig) Eng. Co. Ltd* (2002) 1 NWLR pt. 768 Pg. 104; *Gold Link Insurance Company Limited V. Petroleum (Special ) Trust Fund* (2008) LPELR-4211 (CA) Pg. 9-10; *Addax Petroleum Development Nigeria Limited V. Loycy Investment Company Limited & anor* (2017) LPELR-42522 (CA).

<sup>2</sup> *Diamond Bank Limited V. Prince Alfred Amobi Ugochukwu* (2007) LPELR-8093 (CA).

<sup>3</sup> *A.G Cross Rivers State V. AG of the Federation and anor* (2012) LPELR-9335 (SC); *Nwaolisah v. Nwabufoh* (2011) LPELR-2115 (SC); *Jacob V. Afaha* (2012) LPELR-7854 (CA); *Weco Engineering and Construction Company Limited V. Dufan Nigeria Limited & anor* (2019) LPELR-47211 (CA).

<sup>4</sup> (1978) LPELR-531 (SC).



subject to any express intention not to renew. The trial court made a finding of fact that the defendant vacated the premises six months before the expiration of the tenancy due to the order of the then Biafran Government to leave that part of the country on account of the Nigerian civil war and dismissed the plaintiff's claim. On appeal to the Supreme Court, the Supreme Court made a finding after an examination of the lease agreement, and correspondence exchanged, that the occupation of the property by an expatriate employee of the respondent was the foundation of the tenancy agreement. It then held that the action of the Government of Biafra made it impossible for the expatriate staff of the respondent to occupy the house, thus frustrating the contract.

The Court then went on to deal with whether the contractual doctrine of frustration applies to a lease of land given the nature of a lease which creates an estate as well as a reversionary interest in the land in favour of a lessor and held thus:

"We think that it may tantamount to injustice to deny a tenant the benefit of frustration in cases where, owing to circumstance of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, it has become impossible for the tenant to enjoy the fruits of his lease and at the same time to expect him on account of the abstract estate concept to honour his obligations under the lease."

From the foregoing, it is safe to conclude that the doctrine of frustration of contract applies to all contracts provided that the performance of the contract has been rendered impracticable or impossible as a result of a fundamental intervening change or event striking at the root of the contract and entirely beyond the contemplation of the parties.

## WHERE FRUSTRATION OF CONTRACT WILL NOT OCCUR

Frustration of a contract will not occur where the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement; or that the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising;<sup>5</sup> or one of the parties had deliberately brought the supervening event by his own choice.<sup>6</sup>

In the case of *Jacob V. Afaha*<sup>7</sup>, for instance, the court held that self-induced frustration is no frustration but a breach of contract. The parties to this case had entered into a hire purchase agreement, the subject of which was a motorcycle. Six days into the agreement, the motorcycle was stolen. The court held that the frustration of the contract resulting from the theft of the motorcycle was self-induced and amounted to a breach of contract.

Also, a contract is not frustrated where the execution by one party becomes merely difficult or expensive than originally anticipated and has to be carried out in a manner not envisaged

<sup>5</sup> Federal Ministry of Health V. Urashi Pharmaceuticals Limited (2018) LPELR-46189 (CA).

<sup>6</sup> Gold Link Insurance Company Limited V. Petroleum (Special) Trust Fund (Supra).

<sup>7</sup> (Supra).



at the time of its negotiation.<sup>8</sup> In the case of *B.O Lewis V. United Bank for Africa Plc*,<sup>9</sup> the appellant had argued that the termination of his employment by the respondent had frustrated the repayment of the personal loans he took from the respondent. The Supreme Court held that the employment contract and the contract for personal loans between the appellant and respondent are two distinct contracts with distinct subject matters. The Court also held that the duration of both contracts is not co-existent; neither can it be said that one is dependent on the other. As such, mere hardship, inconvenience, or other unexpected turn of events that have created difficulties in the repayment of the loan cannot constitute frustration.

## THE EFFECT OF FRUSTRATION ON A CONTRACT

Upon establishment of frustration of a contract, its implications are of three folds. The first effect is that a contract that is discharged on the ground of frustration is brought to an end automatically by operation of law, irrespective of the wishes of the parties. This was the decision of the Supreme Court in the case of *A.G Cross Rivers State V. AG of the Federation and anor*.<sup>10</sup> This decision was based on the judgement of the International Court of Justice on the cessation of Bakassi and the Cross River estuary to Cameroon, which consequently made Cross Rive State a non-littoral state and thus no longer entitled to be paid derivation revenue. The Court held thus:

“This, unfortunately, is now the fate of the agreements between the parties which have been automatically terminated by the implementation of the judgement of the ICJ. The Court cannot close its eyes to this existing situation and declare that the plaintiff should continue to enjoy the benefits and privileges of a littoral state when it is no longer one by subsequent legal changes.”

The second effect is that the question of breach of contract will not arise as none of the parties can be held responsible for the occurrence of the frustrating event or circumstances.<sup>11</sup> However, where breach of contract occurs before the frustrating event, then the frustrating event cannot be relied on.<sup>12</sup> In the case of *Nospecto Oil & Gas Limited V, Kenney & ors*,<sup>13</sup> the appellant argued that the action of the inter-governmental agency leading to the seizure of its licence, the freezing of its account, etc., were frustrating events that made it incapable of meeting its obligations to its investors. The court after an examination of the pleadings and depositions of parties held as follows:

“The pertinent question is whether the frustration doctrine avails the appellant. It can only be of assistance to the appellant if the

<sup>8</sup> *Nwaolisah V. Nwabufoh* (Supra); *Malik V. Kadura Furniture & Carpets Company Limited* (2016) LPELR-41308 (CA).

<sup>9</sup> (2016) LPELR-40661 (SC).

<sup>10</sup> (Supra); *George I.U Obayuwana V. Governor, Bendel State & anor* (1982) LPELR-2160 (SC); *Sunday Odum V. Nwoye Chibueze* (2015) LPELR-40895 (CA).

<sup>11</sup> *Onuigbo V. Azubuike* (2013) LPELR-22796(CA).

<sup>12</sup> *Augustine Asibe & Ors. V. Owerri Municipal Local Government* (2012) LPELR-9820 (CA).

<sup>13</sup> (2014) LPELR-23628 (CA).



frustration occurred before its obligation under the contract became due. In the instant appeal as borne out by the pleadings and depositions, the frustrating event occurred on 4/12/2007 when the appellant's account was frozen by Investments and Securities Tribunal vide a motion ex parte. By the appellant's deemed admission, the respondent's refunds became due before December 2007. In such a situation as decided in the case of *Chandler V. Webster* (supra) relied upon by the appellant, in so far as the contract obligation has fallen due before the frustrating event, each party must fulfil its obligation under the contract."

A third effect of frustration of contract is where sums of money have been paid and received by a party for the performance of an obligation which has failed or has been rendered impossible. The law frowns on unjust enrichment, and it is trite law that where money has been paid and received by a contracting party for a consideration that has failed, the money ought to be returned.<sup>14</sup> A complete failure of consideration occurs where one of the contracting parties fails to receive the benefit of valuable consideration, which springs from the root and is the essence of the contract.<sup>15</sup> However, where the contract has been partly performed, or payment and performance were agreed in milestones, then the money to be returned will be based on the value of the unperformed obligation.

## FORCE MAJEURE

Force Majeure has been described by the Court of Appeal in *Globe Spinning Mills Nigeria Plc V. Reliance Textile Industries Limited*<sup>16</sup> to be a common clause in contracts which provides that one or both parties can cancel a contract or be excused from either part or complete performance of the contract on the occurrence of certain specified events or events beyond the control of the parties.

The force majeure clause has the same effect as frustration of contract, save for the opportunity it provides to parties to contractually control the effect of the occurrence of the force majeure event. The force majeure events are the frustrating events listed by the parties that can affect the performance of the obligations in the contract. The force majeure clause would thus usually provide for the occurrence of certain frustrating events, the duration of the force majeure event, notice for triggering force majeure, and the effect on the contract, such as suspension on performance of obligations and/or the option to terminate the contract. The force majeure clause may also exclude certain obligations from being affected by the frustrating event.

Upon the occurrence of a force majeure event, contracting parties must comply with the conditions provided in the force majeure clause before invoking force majeure such as the requisite notice period and compliance with the duration of the force majeure event;

<sup>14</sup> *Onuigbo V. Azubuike* (Supra); *UBA Plc V. BTL Industries Ltd* (2006) LPELR-3404 (SC).

<sup>15</sup> *Akinade V. Nigerian Law School Lagos Campus Staff Co-Operative Thrift & Credit Society Limited* (2015) LPELR-41705 (CA); *Osayemeh V. NDIC & anor* (2009) LPELR-8846 (CA).

<sup>16</sup> (2017) LPELR-41433(CA).





otherwise, such a party may be liable in an action for breach of contract. In the *Globe Spinning Mills* case, the appellant entered into a sale and purchase agreement and agreed to supply to the respondent cotton yarn not less than 250 metric tonnes per month. The respondent agreed to take a minimum of 220 metric tonnes per month for a three-year period. During the contractual period, the appellant served the respondent a notice declaring force majeure in clause 28 of the agreement. The declaration was based on the failure of the government to curb illegal importation of textile fabrics and the resultant loss of market, and frequent and unpredictable interruptions in gas supply.

The Court agreed with the decision of the arbitrators that the eventualities listed by the appellants did not constitute force majeure as they are vicissitudes of trading in Nigeria. The Court held that there was no force majeure in line with clause 28 of the agreement as one cannot do business in Nigeria and not put into consideration the endemic issues of epileptic electricity, fluctuation of the price of diesel and gas, and the porosity of our land borders. The Court further held that the respondents were not provided with 48 hours' notice as required in the force majeure clause neither did they furnish such relevant information as is available concerning the events as required in the force majeure clause.

In the absence of a force majeure clause in a contract, or a contract entered by any other means other than in writing, the occurrence of an event which truly prevents a party from performing an obligation in a contract will be a defence in any action for breach of contract under the general doctrine of frustration. The advantage of having a force majeure clause in a contract is that it gives contracting parties some level of control upon the occurrence of a frustrating event but does not make it any less of a defence for breach of contract where it is not provided for.

## WHAT THE COURT CONSIDERS IN DETERMINING THE DEFENCE OF FRUSTRATION

A party can rely on a frustrating event or a force majeure event to terminate a contract or not perform its obligation; it is however, for the courts to state whether and when frustration has occurred.

The first consideration of the court in determining the defence of frustration is the pleadings of the defendant. The defence of frustration is a special defence which must be specifically pleaded by the defendant.<sup>17</sup> Although it need not be specifically pleaded by the use of the word "frustration," it is sufficient that the party raising it plead facts alleging impossibility of performance of a contract and the occurrence of one or more events that led to such impossibility of performance.<sup>18</sup> The party relying on frustration must in addition to pleading same, lead evidence on the frustrating event, as the onus of proof is on him. Failure to lead evidence on the frustrating event will make the defence suffer the same fate of pleadings without evidence.<sup>19</sup> The party relying on the defence of frustration is also required to show

<sup>17</sup> *Pulseline Services Limited V. Equitorial Trust Bank Limited* (2010) LPELR-4886 (CA).

<sup>18</sup> *Kadura Furniture & Carpets Company Limited* (Supra).

<sup>19</sup> *Weco Engineering and Construction Company Limited V. Dufan Nigeria Limited & anor* (Supra); *Onuigbo V. Azubuike* (Supra).



the willingness and capability of performing its obligation under the contract but failed due to the frustrating event.<sup>20</sup>

In determining whether there is frustration of contract, the court decides this ex post facto on the actual circumstances of the case. The court will consider the following:

- a. The contract document: to elicit the nature of obligations of the party (some contractual obligations are absolute, and some may be excused on the happening of a force majeure event), and any provision on force majeure.
- b. An examination of the frustrating event or force majeure event within the scope of the party's obligations.
- c. The practicability of performing the obligation.

The court would thus make a finding of fact on the frustrating event, as the frustrating event or force majeure event is something which happens in the world of fact. The effect on the contract depends on the nature of the contract, which is a matter of law, and whether there is frustration or not, in any case, depends on the application of the frustrating event to the contract.<sup>21</sup>

## CONCLUSION

The occurrence of a frustrating event or a force majeure event without more does not discharge a party from its obligations in a contract, as each contract must be treated on its merit. Parties to contract therefore need to exercise caution before triggering the force majeure clauses in their contracts, or when reneging on contract obligations due to perceived frustrating event otherwise, they may be exposed to the liabilities associated with breach of contract. There is thus a need for commercial contracts to be properly examined before contracting parties renege on contract obligations on the grounds of frustration or before declaring force majeure.

<sup>20</sup> Gold Link Insurance Company Limited V. Petroleum (Special) Trust Fund (Supra).

<sup>21</sup> Araka V. Monier Construction Co (Nigeria) Ltd (Supra).



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