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**FAILURE TO OBTAIN WORK PERMIT IN  
NIGERIA AND OTHER LEGAL ISSUES:**

**A Review of Batalha v West Africa  
Construction Company Limited**

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## Introduction

The Court of Appeal (CA) in the case of Batalha V West Africa Construction Ltd considered whether the breach of section 8 of the Immigration Act 1963 and the effect of the failure of an employer to obtain work permit on a contract to be performed by an expatriate. The CA held that the breach of section 8 of Immigration Act 1963 does not make the contract void and it is the duty of a company or an employer seeking to employ the services of an expatriate to ensure that the necessary work permit is sought and obtained from the Nigerian Immigration Service (NIS). The CA held further that any contract entered into by an employer and an expatriate without necessary authorization shall be enforceable against an employer, who refuses to obtain necessary work permit for the expatriate.

## Brief Facts

The Appellant, a Portuguese national was employed by the Respondent, West Construction Company Limited, as a Project Engineer at the Respondent's head office in Benin City, Edo State in 1992. Shortly thereafter, the Appellant withdrew his services and filed an action claiming for certain sums of money being arrears of his salaries, allowances and interests.

In defence, the Respondents, (Defendants in the lower court) contended that the Contract of Employment (CoE) with the Appellant was unenforceable because the expatriate (Appellants) did not have a valid work permit to work in Nigeria at the time the contract was made. At the end of the trial, the High Court ruled in favour of the Respondent on the ground that, the CoE was illegal for non-compliance with sections 8 and 34 of the Immigration Act 1963 amongst others.

Dissatisfied with the decision of the High Court, the Appellant appealed to the CA and sought the determination of the following issues:

- i. Whether the learned trial judge was right in holding that the Appellants CoE was illegal for non-compliance with section 8 (1) of the Immigration Act
- ii. Whether on a true construction of sections 8 and 34 (1) of the Immigration Act, the contract of employment was illegal and therefore unenforceable at the instance of the plaintiff
- iii. Whether the learned trial judge was right in holding that the contract was unenforceable having held that the duty to obtain a permit was on the respondent and the said respondent had benefitted therefrom.



The Respondents also formulated two issues for determination namely:

- i. Whether the CoE of the appellant was tainted with illegality punishable under the Immigration Act by virtue of non-compliance with the said Act and as such cannot be enforced by either party to the contract.
- ii. Whether appellant's issue 2 is incompetent and ought to be struck out.

### **The decision of the Court of Appeal**

Upon consideration of the arguments of the parties, the CA allowed the appeal and held inter alia (among others): that there is no evidence before the court to substantiate the claims of illegality of the contract of employment under Section 8 (1) and 34 (1) of the Immigration Act, because where a contract is not ex facie illegal and the question of its illegality depends on the surrounding circumstances, as a general rule, the Court will not entertain the question of its illegality, unless it is raised in the pleading, in such circumstances, any evidence adduced to its illegality clearly goes to no issue.

The CA held further that the breach of Section 8 (1) of the Immigration Act does not make the contract void ab initio. The purpose of Section 8 (1) is to protect certain business from Non-Nigerians and make sure that Nigerians are not at any disadvantage. While Section 8 imposes no penalty for failure to apply apart from deportation, since the expatriate has not been deported, it is only when a penalty is imposed that the whole transaction will be void.

Additionally, it was held that it is duty of the Company to comply with the provision of Section 34 (1) of the Immigration Act by applying to the Director of Immigration for the work permit for the expatriate, and where the company has failed to do so, the doctrine of equity and fair play will not allow the Company to benefit from its own illegality as it is morally despicable for a person who has benefited from an agreement to turn round and say the agreement is null and void.

### **Analysis of Issues**

#### **The validity of a Contract of Employment**

The general rule is that a contract made in express contravention of law is a void contract and is unenforceable. However, where a party who ought to discharge duty in compliance with law fails to do so but has enjoyed benefits from such an illegal contract, such a party will not be allowed to deny his obligations under the contract by raising the defence of illegality.

The Courts have, therefore, held that *"it is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement is null and void"*. And, that *"...certainly equity will not permit a person to benefit from his illegality"*.



## **Obligation of Persons other than a citizen of Nigeria in relation to taking up Employment and doing Business in Nigeria**

Section 8 (1) of Immigration Act 1963 (now section 36 (1) of the Immigration Act 2015) places an obligation on every non-Nigerian not to accept employment with the government without the written consent of the Director of Immigration (now Comptroller General of Immigration). Additionally, such person must not on his / her own account, in partnership with anyone practice a profession or establish or take over any trade or business whatsoever or register or take over (i.e. buy out) any company ...without the consent of the Minister of Interior.

The referenced consent of the Minister of Interior is issued in the form of a business permit which allows a non-Nigeria to conduct business in Nigeria. A question that arose when interpreting this section is whether a 'person' as envisaged by law include both natural and artificial persons. The answer to that question would be in the affirmative as the meaning of 'person' per the Interpretation Act, 1990 includes a body of persons corporate or unincorporated.

Furthermore, the Minister of Interior must give approval before a non-Nigerian can practice a profession or take part in any trade or business.

## **Obligation of an Employer in relation to the employment of a non-Nigerian**

Section 36 (1) of Immigration Act 1963 (now section 38 (1) of Immigration Act 2015) also provides that any person (individual or corporate), in Nigeria, who desires to employ a national of another country must obtain permission from the Comptroller General of Immigration (CGI) before doing so. Information regarding provisions to be made for the repatriation of such foreign nationals and dependants must also be provided to the CGI.

Careful consideration of section 36 (1) (now section 38 (1) of Immigration Act 2015) places the obligation on an employer to first seek authorisation from the Director of Immigration (now Comptroller General of Immigration) in writing.

The above position is confirmed in practice coupled with the preconditional obligation to obtain expatriate quota approval from the Minister of Interior. Both sections 8 and 36 are reproduced in Immigration Act 2015 which repealed the 1963 Immigration Act under which the case under review was decided.

## **Penalty on Conviction for Default**

The Immigration Act 2015 prescribes that any foreigner who accepts employment in Nigeria or practice a profession, establish or take part in any business or register a company without the written consent of the CGI (formerly Director of Immigration) commits an offence. On conviction, such foreigner shall be liable to a fine of ₦1,000,000 (One Million Naira) or deportation or both as a prohibited immigrant.



In the case of an employer who employs a foreign national without authorisation, a fine of ₦5,000,000 (Five Million Naira) or imprisonment for a term of 5 (five) years or both may be imposed.

There are known instances where defaulting foreign nationals have been repatriated and employers fined for contravention of the law.

### **Conclusion**

From a review of the subject matter and relevant provisions of extant Immigration laws, any expatriate seeking to work in Nigeria must ensure that his prospective employer has in place appropriate authorisation to employ him or her in Nigeria. On entry to Nigeria to take up employment, both foreign nationals and employers must take a step further to regularise the immigration status of the foreign national within the stipulated period. Regularisation of immigration status is done by obtaining the work and residence permit within 90 days of entry to Nigeria to avoid any infraction of extant laws.

The above steps will also ensure that the CoE between the parties is not tainted by any shade of illegality for non-compliance of the requirements of the law, which could attract dire consequences for both employer and expatriate alike.

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