

Nigeria

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Nigeria's telecoms dispute: challenges to investment

The recent dispute between Multi-links Nigeria and Helios Towers Nigeria reveals the enormous challenges to which companies operating in Nigeria are constantly exposed and underscores the need for effective due diligence and in-depth legal advice for companies wishing to invest in Africa.

While Helios Towers (backed by Helios Investment Partners and South Africa's

Shanduka Group) is seeking to enforce a 10-year tower rental agreement, Multi-links (owned by South Africa's Telkom Group) contends that the contract is invalid and unenforceable for failure to comply with the provisions of the Nigerian Land Use Act of 1978 (LUA) which require government consent in transactions relating to land. Section 22 of the LUA makes it unlawful for a holder of a statutory right of occupancy to alienate his interest by way of assignment,

mortgage, transfer of possession, sub-lease or other means without the consent of the governor of the state where the land is located. Transactions or instruments which fail to comply with the LUA are declared null and void.

The High Court hearing the case found that the co-location lease agreement and other site lease agreements did not confer title or interest as contemplated by the LUA to require governor's consent. The court also found that the agreement between the parties did not confer any right to exclusive possession on Multi-links to constitute the type of transfer of interest contemplated by the Statute.

It is doubtful whether the last has been

heard of the issue, as Multi-links may seek to exhaust its options on appeal in the hope of avoiding payment of the contract sum (estimated at \$250 million by the UK's *Daily Telegraph*). This case represents one of the few where the court failed to void a contract for unlawfulness arising from non-compliance with the statute. While the court in this case refused to accept the claim of illegality of the agreements before it, other courts may prefer to adopt the reasoning that the lease agreement constitutes a transfer of interest in the site, and despite the fact of non-exclusive possession, parties may be held bound to comply with the provisions of the LUA.

Where a court adopts the latter, the question would then turn on whether the contract is rendered unenforceable by both parties or only the party in breach of the statutory requirement, and whether there are restitutionary remedies available to the parties.

One decision which may lend some support is *Awojubagbe Light Industries v Chinukwe* (1995) 4 NWLR (PT 390) 410, which recognised parties' ability to make their agreement to alienate conditional upon obtaining consent; a party may be entitled to sue for performance in that instance.

A question however remains outstanding and that is what happens if parties continued performance without obtaining relevant consent? Would a court in Nigeria find such performance unlawful and unenforceable even when it would confer on the defendant a purely fortuitous and commercially unmeritorious defence to a claim brought against it under the contract as found in the English case of *Mahmoud and Isphani* [1921] 2 KB 716?

The Nigerian Supreme Court found in the case of *Savanna Bank v Ajilo* (1989) 1 NWLR (PT 97) 305 that failure to obtain requisite consents would render a contract unlawful. Noteworthy however, is the obiter decision in *Awojubagbe* that it is inequitable for a party to assert a claim of nullity after benefiting from a transaction. However, where the party seeking performance is the party in breach, it is uncertain whether Nigerian Courts would adopt a line of reasoning similar to *Mahmoud* or the Nigerian cases above.

If a court in Nigeria finds that the transaction between the parties in this instance is within the purview of the LUA which renders null and void transactions or instruments conferring interests or rights over land other than in accordance with its

provisions, the current reasoning that multi-links cannot be heard to complain of illegality when in fact it derived benefits from the transaction may fail on appeal.

Thus, the development reiterates the need for comprehensive legal representation in transactions, especially transactions of this magnitude in a country with such high telecoms growth opportunities as Nigeria.

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