ENHANCED PROTECTION FOR INVESTORS PARTICIPATING IN PRIVATE PLACEMENTS? – THE DECISION IN STANBIC IBTC BANK PLC v. LONGTERM GLOBAL CAPITAL LIMITED & ORS.

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INTRODUCTION

Private placement refers to the issuing of securities by a company to a small number of select persons. In Nigeria, where the company issuing the securities (the "issuing company") is a public company, the ***Securities and Exchange Commission Rules and Regulations 2013*** ("*SEC Rules*") require such company to obtain the approval of the Securities and Exchange Commission (*SEC* or "*the Commission*") before it offers its securities to the select participants under private placement.[3]

The public company must have reasonable grounds to believe that the person to whom the securities are to be offered (the "*offeree*") is sufficiently knowledgeable and experienced in financial business matters to appreciate the merits and risks of the prospective investment; and can bear the economic risk of the investment.[4] Where the company reasonably believes that the preceding has been satisfied, the *SEC Rules* further require the issuing company to provide the offeree with a placement memorandum containing verifiable information necessary for a proper understanding of the company's business.[5]

It is a common practice in the Nigerian capital market for a sophisticated investor to, by agreement, waive his right to receive the placement memorandum and take on the responsibility of obtaining the information it needs to decide whether or

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[3] See *Regulation 340(1)* of the *SEC Rules*.
[4] See *Regulation 341* of the *SEC Rules*.
[5] See *Regulation 342* of the *SEC Rules*.

not to participate in a private placement. The case of ***Stanbic IBTC Bank Plc. v. Longterm Global Capital Limited & Ors***[6] has, however, changed this practice.

In that case, the Court of Appeal affirmed the decision of the Federal High Court ("the trial Court") to the effect that an offeree (including sophisticated investors) cannot by contract, waive his right to receive the offeror company's placement memorandum. Consequently, where the placement memorandum is not provided to the offeree, the sale of shares contracted through private placement may be rescinded by the offeree.

This case implies that there is now a higher level of protection available to investors in the Nigerian capital market, while an additional responsibility has been placed on public companies intending to raise capital through a private placement. However, we are of the view that this protection is at the expense of the principle of freedom of contract which has been held sacrosanct by the Supreme Court in a long line of cases. Going by the court's decision, in this case, it is also not very clear what the advantage of this new rule is, especially as the persons being further protected seem to enjoy sufficient regulatory protection under the *SEC Rules.*

This article examines the decision in ***Stanbic IBTC Bank Plc. v. Longterm Global Capital Limited & Ors.*** in the light of its implications as highlighted above and argues that more protection is not necessarily a good thing for the Nigerian capital market. Sophisticated investors, who had earlier waived his right to receive the offeror company's placement memorandum, may turn around to rescind the private placement on that same basis when the investment fails to yield the desired returns.

FACTS OF THE CASE

In 2008, Starcomms Plc. (Starcomms) carried out a private placement exercise for the sale of its shares and engaged Stanbic IBTC Bank Plc. (the Bank) to act as one of the Joint Issuing Houses who will market the shares to investors. During the private placement, Longterm Global Capital Limited, Lakeside Mews Limited,

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[6](2018) LPELR-44053 (CA); Unreported Suit No. FHC/L/CS/1383/2013 at the Federal High Court.

Patrick Akinkuotu and Oluyinka Akinkuotu (the Longterm Parties) applied for 25,000,000 units of shares in Starcomms by completing four separate Forms of Commitment attached to an Investor Letter dated 24th April 2008. The Longterm parties paid a total of ₦1.3 Billion to Starcomms, which allotted to each of the Longterm Parties, 25,000,000 units of its shares, making a total of 100,000,000 units of shares.

The investment of the Longterm Parties in Starcomms failed, and by 2012, the shares had lost almost all value. The Longterm Parties then instituted an action at the Federal High Court (the trial Court) against the Bank and Starcomms, seeking an order of the trial Court to rescind the contract for the sale of shares on the grounds of fraudulent misrepresentation.

The position of the parties at the trial was that the Longterm Parties had, by the Investor Letter, invested in Starcomms' shares by individually completing the four Forms of Commitment attached to it. The Investor Letter provided that the Longterm Parties, in agreeing to invest, waived their rights to receive any information on Starcomms and its business. It further stated that the Longterm parties, as sophisticated investors, undertook to obtain any necessary information on the viability of the investment by themselves.

The Longterm Parties argued that, at the time they agreed to purchase the shares, it was indicated in the Investor Letter that although SEC had not approved that Letter, the Investor Letter and the Forms of Commitment attached to it would be approved at the latest on 31st May 2008 or the purchase price would be refunded in full. The Longterm Parties also argued that while the Bank had represented to them that the Investor Letter was the sole document upon which the private placement would be conducted, the Bank and Starcomms subsequently conducted the private placement via a placement memorandum which was deliberately withheld from them but was made available to other investors in Starcomms.

The Longterm Parties further alleged that if they had the opportunity to view the information in the private placement memorandum, they would not have invested Starcomms as the memorandum contained information that would have adversely impacted their decision to invest. They, therefore, sought to rescind the purchase of shares and requested a refund of the sums paid on the ground that the Bank and Starcomms had fraudulently misrepresented the facts of the private placement to them.

The Bank, on the other hand, argued that the Longterm Parties had represented themselves as sophisticated investors, and by the terms of the Investor Letter signed by them, had assumed the responsibility for obtaining all information necessary to make an informed decision on whether or not to participate in the private placement. Effectively, the Longterm Parties had expressly waived their rights to receive the placement memorandum and any information the Bank and Starcomms were obliged to provide regarding the placement transaction.

The Bank further contended that at no time did it undertake to secure SEC's approval to the Investor Letter and that it merely promised that the SEC's approval would be obtained for the private placement, failing which, the purchase price would be refunded in full. The Bank also denied representing to the Longterm Parties that the Investor Letter was the sole document upon which the private placement would be conducted. Rather, the Longterm Parties had contractually relieved the Bank and Starcomms of any obligation to provide them with any additional document (aside from the Investor Letter).

Interestingly, the Longterm Parties did not present any documentary evidence of the alleged representation that the Investor Letter would be the sole document upon which the private placement would be conducted and relied heavily on the oral testimony its sole witness to prove its claim. Furthermore, the Investor Letter did not expressly state that it (i.e. the Investor Letter) would be approved by SEC, as asserted by the Longterm Parties, but that SEC would approve the sale of shares by way of private placement by 31st May 2008.

The trial Court decided in favour of the Longterm Parties and rescinded the contract of sale of Starcomms' shares by private placement to them on the ground that the failure of the Bank to bring the existence of the Private Placement Memorandum to the knowledge of the Longterm Parties, and the material differences between the Investor Letter and the Private Placement Memorandum, constituted fraudulent misrepresentation on the part of the Bank and Starcomms to the Longterm Parties. Accordingly, the trial Court ordered the Bank to, jointly and severally with Starcomms, refund the sum of N1.3 billion paid by the Longterm Parties, together with pre-judgment and post-judgment interests.

Aggrieved, the Bank filed an appeal at the Court of Appeal, and the Court of Appeal heard and dismissed the appeal. In its judgment, the Court of Appeal held that notwithstanding the agreement of the Longterm Parties to waive their right to information and to obtain such information by their investigation and due diligence, the failure of the Bank and Starcomms to provide them with the Private Placement Memorandum amounted to fraudulent misrepresentation.

The Bank has appealed this decision at the Supreme Court where the appeal is pending.

IMPLICATIONS OF THE COURT OF APPEAL'S JUDGMENT

The principle that can be gleaned from the Court of Appeal's decision in this case is that the mere fact that an investor was not provided with a placement memorandum is sufficient basis to rescind the contract of sale of shares under a private placement, even if the information contained in the placement memorandum was publicly available and could be sourced by the investor through due diligence, and particularly where the investor had expressly contracted to obtain the said information on his own as happened in this case.

The decision, in this case, serves to provide further protection to investors in the Nigerian capital market. However, the question arises on whether the benefits of such protection justify its cost.

What SEC sought to achieve by requiring that placement memoranda be provided to all investors is the provision of a fair opportunity to such investors to make an informed decision on their proposed investment in a company. The test for whether an investor is adequately protected in any given transaction is whether or not such an investor had a fair opportunity and resources to make an informed decision.

In the instant case, we are of the opinion that a fair opportunity was indeed provided to the Longterm parties to make an informed decision on the merits of investing in Starcomms. The Longterm Parties signed the Investor Letter and freely agreed to obtain the information contained in the Private Placement Memorandum, through their investigation and endeavour.

We believe that the Bank was entitled to presume that the Longterm parties, being sophisticated investors, had obtained all the information which they required to make an informed decision on the investment, particularly after having bound themselves to do so.

What is more, under the terms of the Investor Letter the Longterm Parties agreed to consult with their lawyers, advisers and other relevant professionals before deciding to invest in the shares. We are therefore of the view that a fair opportunity had been duly provided to the Longterm Parties to make an informed decision on their investment in Starcomms. No further protection under the law was therefore due them in our view.

It is also important to note that the Investor Letter did not expressly state that it (i.e. the Investor Letter) will be approved by SEC, as asserted by the Longterm Parties; what it said was that SEC would approve the sale of shares by way of private placement by 31st May 2008. SEC's approval of the private placement was indeed obtained before 31st May 2008. It, however, appears that the failure of the trial Court to appreciate the difference between obtaining SEC's approval for the Investor Letter and obtaining SEC's approval for the private placement played a significant role in its decision.

Furthermore, we are of the view that the failure of the Court of Appeal to give effect to the contract of the parties in this case, as set out in the Investor Letter, contradicts a long line of decisions of the Supreme Court on the sanctity of the parties' contracts. In *Arjay Ltd. & Ors. v. A.M.S. Ltd.*,[7] the Supreme Court per Tobi J.S.C. stated as follows [at page 67, paras A-E]:

[7](2003) LPELR-555(SC); see also the cases of *Northern Assurance Co. Ltd. v Wuraola* (1969) 1 NMLR 1; (1969) NSCC 22; *Aouad v Kessrawani* ([956) NSCC 33; *Oduye v Nigeria Airways limited* (1987) 2 NWLR (Pt. 55) 126; *Niger Dams Authority v Chief Lajide* (1973) 5 SC 207; *Bookshop House v Stanley Consultants* (1986) 3 NWLR (Pt. 26) 87.

It is an elementary law that where parties have entered into a contract or an agreement, they are bound by the provisions of the contract or agreement. Accordingly, a party cannot ordinarily resile from a contract or agreement just because he later found that the conditions of the contract or agreement are not favourable to him. This is the whole essence of the doctrine of the sanctity of contract or agreement. The court is bound to construe the terms of the contract or agreement and the terms only in the event of an action arising therefrom.

CONCLUSION

It would be interesting to note the outcome of the Bank's appeal to the Supreme Court in this case as the decisions of the trial Court and the Court of Appeal, in this case, are in our respectful view, based on a misconception of relevant facts, as set out in the preceding sections.

Nonetheless, until the Supreme Court reverses the decisions of the lower courts, however, public companies engaging in a private placement of their shares are advised to ensure that the placement memoranda underlying their private placements are provided to all investors irrespective of any contractual arrangements between them that do not make the provision of the memoranda mandatory.

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