
A PEEP INTO SECURITIES LITIGATION IN NIGERIA- TRENDS, PATTERN AND RECOMMENDATIONS



Introduction

Securities litigation in Nigeria generally entails disputes between capital market operators, investors and clearing agencies, the Securities and Exchange Commission (SEC, a federal government agency), and investors, etc.; disputes arising from the administration, management and operation of investment schemes relating to securities transaction(s).

When a party files a complaint at SEC against an operator for any securities transaction, the complaint is referred to the Administrative Proceedings Committee for determination. The decision of the Committee is appealable to the Investment and Securities Tribunal (IST). The Investment and Securities Act 2007 prescribes that all actions must be concluded within 90 days at the IST.

Parties can also commence an action directly at the IST. The IST has exclusive jurisdiction to hear and determine:

- any question of law or dispute involving a decision or determination of SEC in the operation of the Investment and Securities Act;
- a dispute between capital market operators;
- a dispute between capital market operators and their clients;
- a dispute between an investor and a securities exchange or capital trade point or clearing and settlement agency;
- a dispute between a capital market operator and SEC;
- a dispute between the SEC and self-regulatory organisations;
- a dispute between an investor and SEC; an issuer and SEC;
- a dispute arising from the administration, management and operation of collective investment schemes, etc.

The decisions of the IST are appealable to the Court of Appeal and subsequently to the Supreme Court.

Types of Securities Claim Available to Investors

Securities claims available to investors in Nigeria can be categorised into statutory and common law claims. For instance, where an investor is of the view that losses arising out of their securities transaction were because of the operator's negligence, the investor is entitled under the law to seek claims against the operator based on the alleged failure. The investor, however, has the burden of proof to the Tribunal that the investor was negligent in handling the transaction.

The Tribunal also exercises jurisdiction in any other matter as may be prescribed by an Act of the National Assembly. Other types of claims also available to the investor include:

- misappropriation of clients' funds by a stockbroker;
- non-remittance of issue proceeds by an issuing house to the issuer or company;
- non-remittance of dividends by a registrar or public company or, stockbroker;
- late transfer and/or registration of shares or stocks by any stockbroker;
- disputes or claims arising from misrepresentations; or
- false statements in offer documents or in a securities transaction.

Differences between Claims Arising out of Securities Offerings and Claims Based on Secondary-Market Purchases.

No specific statutory provision or case law makes a difference about claims arising out of securities offerings from those on security market purchases. However, claims arising out of securities offerings primarily relate to the misrepresentation in the offering document, while claims on secondary market purchases generally feature negligence false trading, market manipulations and minority protection actions against the company.

Claims available for Publicly Traded Securities and for Privately Issued Securities.

Yes, there are differences in the claims available for both. For instance, in the publicly traded securities, the SEC and Nigeria stock exchange (NSE) can sanction the operators for negligent conducts while for the privately issued securities, the NSE and SEC generally have no jurisdiction over same. However, the standard of proof in obtaining damages against both on grounds of negligence is still based on balance of probabilities.

Elements of the Main Types of Securities Claim

The claims are either statutory claims or common law claims. For statutory claims, liability exists for untrue statements in a prospectus. Section 85(1) of the Investments and Securities Act provides that where a prospectus invites persons to subscribe for shares in a company, all persons who subscribe for shares or debentures are entitled to compensation for the loss or damage they have suffered by reason of their reliance on any untrue statement or misstatement included in the prospectus. The elements of a common law claim for negligent misrepresentation are as follows:

- there was a duty of care based on a 'special relationship' between the representor and the representee;
- the representation was false or misleading;
- the representee reasonably relied upon the misrepresentation;
- the representor acted negligently in making the misrepresentation; and
- the reliance was detrimental to the representee, in the sense that harm resulted.

Standard for Determining whether the Offering Documents or other Statements by Defendants are Actionable

The standard for determining whether the statements are actionable in Nigeria is whether the statements in the offering documents relied upon by the investor are untrue, false and misleading. However, an expert is exempted from both civil and criminal liabilities for misstatements in the offering documents not attributed to him or her as an expert during preparation of such documents. For claims emanating from common law as mentioned above, the onus is on the applicant to prove that he representation was misleading and inaccurate. The standard of proof is on the preponderance of evidence and on the balance of probabilities. Where the misrepresentation has criminal liabilities, it may be referred to the Attorney General of the Federation for criminal action to be instituted against the defendants. The standard of proof for the criminal action would be beyond reasonable doubt.

Standard for Determining whether a Defendant has a Culpable State of Mind

The requirement for determining whether the defendant has a culpable state of mind would generally depend on the nature of the claim. For instance, where the claim is to do with false trading and market rigging transactions, the applicant must show that

the defendant was reckless or negligent in disseminating false information and likely to induce the sale or purchase of securities or likely to have the effect of raising, lowering, maintain or establishing the market price of securities. On the other hand, where the claim relates to misstatements in the prospectus, the applicant should be able to prove that the defendant's principal officers, employees who participated in the production of the prospectus, issuing house, etc, omitted to state material facts in order to make the prospectus not misleading. In *Union Bank of Nigeria Plc (Registrar's Dept) v Securities & Exchange Commission Appeal No. IST/APP/O3/2003* the court held that the registrar, as custodian of shares, owed shareholders and other market operators a duty of care and due diligence and was therefore liable to restore the shareholders to their original position in the event of wrongful transfers. Failure to reverify dematerialised certificates sent back from the Central Securities Clearing System was held to be a breach of statutory duty to investors and other capital market operators who rely on information from the registrar. Failure to perform their duty made the registrar culpable and liable to pay compensation for damages.

Worth noting is that there are also some defences available to the defendant depending on the claim. For instance, in the former claim, if it is established that at the time when the defendant recorded or stored the information, he or she had no reasonable grounds for expecting that the information would be available to any other person, he or she may escape liability. See sections 107-108 of the ISA.

In the latter claim, the defendant may also not be liable if it can show that the prospectus was issued without his knowledge or consent and on becoming aware of its issue, reasonable notice was given to the public or after the issue of the prospectus and before allotment, he or she, upon becoming aware of the misstatement, withdrew his or her consent in writing. See section 85 ISA.

Proof of Reliance and Presumptions of Reliance Available to Assist a Plaintiff

By virtue of section 94 of the ISA, proof of reliance is not required for an applicant to bring an action for rescission of all allotments against the defendant if the prospectus contained a material statement, promise or forecast which was false or misleading. All the applicant is obligated to show by virtue of the provision is that the prospectus contained deceptive statement(s).

However, by virtue of section 85(1) of the ISA, while it does not also require the applicant to show that he or she relied on the untrue statement or misstatement to institute the action, defendants are liable to pay compensation to only persons who relied on the prospectus and incurred loss or damages by reason of the untrue statement. In *Dr Sunday Folorunso Kuku & 2 Ors v Geoff Ohen Ltd & 2 Ors in Suit No FHC/L/CP/25/12* delivered on 7 May 2018 the court found that one of the applicants and the third defendant participated in the production of a false document and thus held that the applicant could not benefit from the transaction.

Proof and Establishment of Causation

Section 85(1) of the Investment and Securities Act requires that the negligence or breach of duty that led to the misstatements are the direct cause of the loss or damages suffered.

Elements that Present Special Issues in Securities litigation

There is no specific statutory provision or case law that has been deemed a special issue in securities litigation.

One element that used to be noble was the issue of jurisdiction regarding securities litigation involving SEC. The issue has, however, been resolved in favour of IST as opposed to the Federal High Court.

Limitation Period, when does it begin to run, can it be extended or shortened?

The relevant limitation period in Nigeria is three years if the action is on the grounds of a misleading statement, an untrue statement or a misrepresentation on the prospectus. Where the action is based on breach of contract, it would be six years. Time begins to run from the date of discovery of the misrepresentation and cannot be extended after the relevant limitation period.

Defences that present special issues in securities litigation

The Investment and Securities Act provides for an exemption from liability for a director, an employee, the issuing house and its principal officers if the above mentioned persons withdrew consent in writing before the issue of the prospectus, and that it was issued without their authority or consent or the prospectus was issued without their knowledge or consent, and that on becoming aware of its issue, they immediately gave reasonable public notice that it was issued without their knowledge or consent. Defendants may also be able to limit liability by raising contributory negligence on the part of the investor.

They may also be able to deny liability entirely if they can show that they did not act negligently but the loss was as a result of market collapse.

Remedies available in Securities Litigation. What is the measure of damages?

An important remedy for an applicant in an action for misrepresentation is damages and the applicant is required to plead the particulars for special damages (if any) he or she suffered. It is within the discretion of the Tribunal to determine the quantum of general damages to be paid to the applicant irrespective of whatever amount he or she sought.

Any director convicted for fraud becomes prohibited from being a director by reason of a disqualification order obtained after conviction for a period of 10 years.

Pleading Requirements

The applicant is required to file an originating application. This statement sets out the necessary facts that support the claim and the applicant is also required to attach the documents it intends to rely upon, alongside necessary witness statements on oath. The applicant is required to Front load relevant documents he intends to rely on to support his claims.

Procedural defence mechanisms

The IST rules provides that even where the defendant has a preliminary objection that may dispose of the claim, it would only be entertained by the tribunal at the stage of adoption of the final arguments (ie, after the evidence of the parties). In essence, the IST does not entertain applications by the defendant to terminate the claim at an early stage of proceedings. However, where the Tribunal is of the view that the grounds of

the preliminary objection would most likely terminate the suit, it would entertain the preliminary objection by the defendant. In Suit No. IST/LA/05/18 Mr Benson Onokurhefe v LeadCapital Plc & Anor, the Tribunal entertained the preliminary objection at the preliminary stage on the grounds that the action was res judicata and the suit was struck out at an early stage of proceedings.

The Principles of secondary, vicarious or 'controlling person

The concept of 'controlling person' liability is recognised mainly with respect to prospectus liability. The liability extends to persons who were not directly involved in the preparation but were in positions to exert control over the misleading or untrue prospectus.

Securities Claims against Directors?

There are ongoing cases in court against directors for negligence and fraud with respect to securities transactions. Section 282 of the Companies and Allied Matters Act placed a duty of care and skill on directors; directors are required to exercise a reasonable degree of care, diligence and skill while carrying out the functions of the office. Subsection 3 of the above provision makes every director of a board individually and collectively liable for actions of the board, save where the director can, for example, justify his or her absence at a board meeting at which the alleged decision was reached. From the above, there need not be actual intention to issue misleading prospectus in civil cases; however, a major element for criminal liability is the intention to commit fraud.

Securities Claims against Underwriters

One of the special issues with respect to securities claims against underwriters is the refusal of the underwriters to pay claims. However, underwriters risk losing statutory deposits to the National Insurance Commission for the refusal to pay claims, the National Insurance Commission has also passed a resolution to sack the managing directors of the underwriting companies to serve as a deterrent to other underwriters.

Securities Claims against Auditors?

Auditors are bound in performance of their duties to exercise all such care, diligence and skill as is reasonably necessary in each particular circumstance. Thus, where a company suffers loss or damages as a result of the failure of the auditor to discharge his or her fiduciary duty, the auditor may be liable for negligence and the directors may institute an action against him or her. If the directors fail to institute an action against the auditor, any member of the company may do so after the expiration of 30 days' notice to the company of his intention to do so.

Collective proceedings

The circumstances for collective proceedings in Nigeria are as follows:

- the person, the class or some members of the class interested cannot be ascertained or cannot readily be ascertained;
- the person, the class or some members of the class interested if ascertained can not be found;

- though the person or the class and the members thereof can be ascertained and found; it is expedient for the purpose of efficient procedure that one or more persons be appointed to represent that person or class or member of the class, the judge may make the appointment. The decision of the judge in the proceedings shall be binding on the person or class of persons so represented; and
- the necessary permission of the court is obtained or direction is given.

In collective proceedings, are claims opt-in or opt-out?

The Nigerian law stipulates that in any class proceedings a person, class or some members of the class may apply to the court or a judge in Chambers to opt in or opt out of the class action. A court or judge in Chambers may on good and justifiable cause permit any person, class or members of the class represented in a class action to opt in or opt out.

Damages

Generally, damages are assessed individually. However, the nature of the injuries of the class action will determine the nature of assessment. There is no specific rule or procedure for assessment in Nigeria.

The Involvement of the Court in Collective Proceedings

In collective proceedings, the court is vested with the power to allow the application for class action, representative action and other similar actions provided the court is satisfied that the requirements

of the law as contained in the rules of court have been duly complied with. Where parties decide to explore settlement, they would need to obtain the approval of the court or Tribunal to enter the terms of settlement as consent judgment.

Role of Regulators, Professional Bodies and other Third Parties in collective Proceedings

There is no set-out role for regulators, professional bodies and other third parties in collective proceedings in Nigeria.

Options available to Plaintiffs to obtain funding for their claims

In Nigeria, third-party funding is frowned upon by the courts based on the common law principles of champerty and maintenance which: (i) prohibits a third party from funding litigation between disputants (in which the funder has no legitimate interest); and (ii) render an agreement to provide such funds illegal and void, on the ground of public policy. It is instructive to note that under Rule 50(4) Rules of Professional Conduct for Legal Practitioners, a lawyer shall not enter into a contingent fee arrangement without first informing the client of the potential effects. A contingency fee arrangement is only permissible in the following circumstances, where:

- it is a civil matter, whether contentious or non-contentious;
- the contract is reasonable in the circumstances of the case including risk and uncertainty of compensation;
- the contract is not vitiated by either fraud, mistake or undue influence; or
- the contract is not contrary to public policy.

Who is liable to pay costs in Securities Litigation? How are they calculated? Are there other procedural issues relevant to costs?

The general rule is that costs will follow event. Therefore, it is not in every case that the winning party will be paid for the expenses of litigation. Costs are usually at the discretion of the court. The successful party may be asked to pay cost if he or she conduct his or herself in an improper manner that caused delay, if the other party was successful on a part of his or her claim or if an action was done or an omission was made improperly. Some of the factors the court considers in awarding costs include the cost of legal representation and assistance of a successful party, the travel and other expenses of the parties and witnesses and such other expenses that the judge determines ought to be recovered.

Costs are usually determined by the judge, however, where the judge cannot determine the quantum, it will be referred to a taxation officer. Where the court awards costs, further proceedings are stayed until payment is made; there exists a right of appeal against costs, but such appeal can only be made with the leave of the court.

Claims available to Investors in a Fund against the Fund and its Directors and against an Investment Manager or Adviser?

The major investment funds in Nigeria are Unit Trusts, Venture Capital Funds, Open-Ended Investment Companies, Real Estate Investment Schemes and Specialized Funds. The volume of litigation involving investment funds in Nigeria is relatively low. The most notable claim relates to the breach of fiduciary duty of the fund's investment manager

Structured Finance Vehicles

The most common types of structured finance vehicles in Nigeria are mortgage backed securities, asset backed securities and credit risk. One major issue with structured finance vehicles in Nigeria is the high rate of interest and the cost of Securitization. This problem usually arises due to the low percentage level of assignment of investment grades to the vehicles.

Another issue is the systemic bias towards lower quality loans among securitized loans. Underwriting, credit rating and investor due diligence are not properly performed in Nigeria. There are, however, ongoing attempts by the credit reporting agencies to entrench due diligence in credit reporting, also there are calls for improvement in the area of credit ratings.

Requirements for Foreign Investors or Holders of Securities to bring a successful claim in Nigeria

It is settled law that a foreign company can sue and be sued in Nigeria, irrespective of the incorporation status of such a party. Section 60 of the Companies and Allied Matters Act provides that a foreign company can sue and be sued in its name or in the name of its agents, there has also been judicial pronouncements, one of which is in *Watanmal Singapore PTE v Liz Olofin & Co Ltd* (1998) 1 NWLR (Pt. 533) 311; and *Ritz & WKG v Techno Ltd* (1994) 4 NWLR (PT.598).

Requirements for Investors to bring Successful Claim against Foreign Defendants or Issuers of Securities Traded on a Foreign Exchange

In Nigeria, there is a general presumption against the applicability of a law that gives rise to a claim, where such a claim originated from transactions outside Nigeria. However, if it can be shown that there is a legislative intent that such a law is applicable to extraterritorial conduct, the presumption becomes rebuttable. Upon fulfilling the conditions negating the presumption, Nigerian courts can entertain such matters where the transaction had substantial effects in the jurisdiction.

Where the foreign defendant is in Nigeria, the claim based on extra-territoriality of a law will be possible. However, where the foreign defendant is not within the geographical territory of Nigeria, the claim may be subject to the principles of conflict of laws.

Multiple Cross-Border Claims

Whenever there are identical claims between the same parties in a foreign jurisdiction, the court may stay the proceedings if there is an existing treaty between the countries; otherwise, the Nigerian court will proceed with the matter. The court may also entertain matters on behalf of purchasers from other jurisdictions when the claims had been dismissed in proceedings outside Nigeria. However, if judgment has been obtained in the foreign jurisdiction and the court is informed of the development, the claim in Nigeria may not continue so far as the foreign judgment falls under the ambit of the Foreign Judgment (Reciprocal Enforcement) Act.

Enforcement of Foreign Judgements

Foreign judgments can be enforced in Nigeria through any of the following two ways, either by an action at common law, or by reciprocity or reciprocal enforcement. For enforcement by action at common law, the element of reciprocity is not required. Thus, such a foreign judgment may be enforced in Nigeria irrespective of whether or not the foreign court would reciprocally enforce the judgments of Nigerian courts. This distinguishes it from the other method of enforcing foreign judgments in Nigeria.

The foreign judgment creditor will commence an action in a High Court in Nigeria, using the reliefs given in his or her foreign judgment as the cause of action.

There is also no need for lengthy trial as the foreign judgement creditor can institute an action under the summary judgment procedure available in some High Courts in Nigeria. For the enforcement of a foreign judgment through an action at common law to be successful, the foreign judgment must satisfy the following requirements:

- the judgment must be final and conclusive;
- the judgment must have been delivered by a superior court of competent jurisdiction;
- the judgment must be for a definite sum of money, provided that it is not money recoverable as tax, a penalty or fine; and
- if the judgment is for a res other than money, the res must have been situating at the jurisdiction of the foreign court that gave the judgment, as at the time of delivery.

Not all judgments are enforceable by this method. Any foreign judgment to which Part I of the Foreign Judgment (Reciprocal Enforcement) Act applies cannot be enforced in Nigeria through an action at common law but can only be so enforced through registration under the Act (Reciprocity). That is, any judgment to which reciprocal enforcement applies cannot be enforced by an action at common law. See section 8, Foreign Judgment (Reciprocal Enforcement) Act.

Reciprocal enforcement, on the other hand, is based on the enforcement of judgments given by foreign courts in Nigeria which accord reciprocal treatment to judgments given in Nigeria. Such countries that are engaged in reciprocal enforcement with Nigeria are those to be listed in an order made by the Minister of Justice under Part I of the Foreign Judgment (Reciprocal Enforcement) Act 1961.

Alternative dispute resolution

The major alternatives to litigation are arbitration, mediation and conciliation. The Investment and Securities Tribunal has an ADR Centre; the primary aim of the Centre is to provide opportunities for parties to mutually settle disputes which will thereafter be entered as a judgment of the Tribunal. The various techniques adopted at the Centre involve mediation, neutral fact finder, early neutral evaluation, conciliation, judicial appraisal, negotiation, among others. These techniques are used to assist the parties based on the peculiarities of each case. Exploring a separate means of ADR is usually difficult if one of the parties is the Securities and Exchange Commission, this is so because of the existing framework of the IST ADR. Generally, the type of parties will determine the nature and process of ADR proceedings.

The IST ADR Centre is so far the common resort of parties involved in a securities dispute.

A major advantage of ADR in Nigeria is the speedy resolution of dispute however, the Investment and Securities Act stipulates that every dispute at the Tribunal must be disposed of within 90 days. This provision takes away the speedy resolution advantage of arbitration. However, this advantage holds sway in respect to matters at the Federal High Court. Another advantage is the availability of experts in arbitration proceedings; arbitrators are usually professionals in securities and they in turn have a greater level of expertise than the trial judge. The nature of securities disputes requires a requisite level of knowledge about the industry, hence the need for experts.

In practice, cost is a disadvantage of arbitration in securities litigation because there is no statutory legal fee structure in this jurisdiction. The parties have to bear the fees incurred by the arbitrators and other administrative expenses which would have been otherwise incurred by the state.



Recommendations

The delay in Securities litigation process in Nigeria is noticeable and detrimental to Securities litigation and Securities transactions in Nigeria. In the light of this, it is hereby recommended as follows:

- Appeals from the Investment and Securities Tribunal and the Federal High Court on Securities Litigation should go to the Court of Appeal as the final appellate body and nothing more.
- The Court of Appeal should create specialized Division or Panel on Securities Litigation.
- Judges of the Investment and Securities Tribunal should be appointed as Justices of the Court of Appeal since they are specialized in Securities matters.

References:

1. Investment and Securities Act 2004
2. Investment and Securities Tribunal Rules
3. Companies and Allied Matters Act 2004
4. Case Laws.

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