

**Key notes for Solicitors servicing potential foreign investors (Part 2 )**  
 – **Incorporation of Companies**

We had in Part 1 of this article looked at some basic relationship building tips for a Solicitor dealing with a potential foreign investor. This article reviews a few salient points as regards incorporating a Nigerian Company for a foreign investor.

**Can a foreigner carry on business in Nigeria without a Nigerian registered Company?**

A typical question is where a foreign investor wants to know if they must incorporate a Nigeria subsidiary. The general rule is stated in S54 of the Companies and Allied Matters Act (CAMA) which states that (1) “every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose and until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as a matter preliminary to incorporation under this Act (2) Any act of the company in contravention of subsection (1) of this section shall be void” This section is strict in its ramifications and renders void (as though never happened) any act of such a foreign company prior to incorporation. Which means a business transaction in Nigeria involving a foreign company may be held by a court to be void if at the material time a Nigerian company had not been incorporated and if it falls under the definition of “carrying on business”. Note the words “having the intention” connotes that the Nigerian company ought to be incorporated once the foreign company forms the intention. The general bent of this clause perhaps envisages a situation where a foreign company would of necessity carry out activities that are usual with a going business concern. “Carrying” on business denotes some continuing activity. Perhaps a foreign company that has a contract to supply expertise to a oil rig for a specific task may do so without having to register a Nigerian company, but the case may be different if that company engages in the business of outsourcing expatriate staff to the Nigerian Oil company for engagement on an agreed fixed duration contract. The Court of Appeal in *Ritz & Co KG v Techno Ltd (1999)* 4 NWLR part 598 defined carrying on business in this context as: “conduct, prosecute/continue a particular vocation or business as a continuous or permanent occupation. Acts of repetition may be sufficient. Also holding your self out to be engaged in the selling of goods and services.” There are some exemptions to the requirement for incorporation. S 56 allows certain companies to apply to the Government for exemption. These companies include those that are here based on some treaty, donor agency work, or foreign government owned companies engaged in export activities. Another exception is by virtue of Rule 212 of the Securities & Exchange Commission Regulations, which states the procedure for a foreign company to invest in Securities in Nigeria without incorporating a separate entity through

importation of capital, setting up of a non resident local currency account, and a foreign currency domiciliary account for ease of payment for the Securities and repatriation of dividends. Interestingly and note worthy is the fact that non registration does not preclude a foreign company from suing or being sued in Nigeria – S 60 (b) of CAMA states that “nothing in this Chapter shall be construed as affecting the rights or liability of a foreign company to sue or be sued in its name or in the name of its agent”. See: *CBDT v COBEC Nig Ltd* (2004) 13 NWLR Part 890 page 376 endorsing the decision in the Ritz case mentioned above. Just as an intellectual exercise one wonders if there is a conflict between Sections 60 (b) and 54 (2) of CAMA. The former has been interpreted to grant a foreign company (not registered in Nigeria) a right to sue and be sued in Nigeria, whilst the latter declares void any act of the foreign company within Nigeria except acts in the process of registration. The issue is whether a party can request judicial remedy on a subject matter that is void. A review of the cases however shows that in most cases (as in the Ritz case) the foreign companies suing were involved only in cross border transactions and had no intention of carrying on business here. Perhaps this should distinguish such situations with others where the company is actually in Nigeria canvassing for business. Undoubtedly many grey areas may arise in this regard.

### **What are some key issues in taking instructions?**

In taking instructions several things need to be considered. Some of them are:

#### **Reservation of Proposed names**

In many situations your client may be on an exploratory mission to Nigeria, and will only take the decision to incorporate a company when the opportunities begin to crystallize. In such a situation you may advise an immediate availability application on the proposed name of the company with the Corporate Affairs Commission. Why? The name may have been taken by the time they decide and is very often perpetrated by potential Nigerian partners who want to secure themselves against the possibility of their foreign partner pairing up with other people – and indeed these things happen. The name having been reserved can be revalidated each time the name reservation expires every 60 days.

#### **Share Capital**

A fair number of the foreign clients you would be dealing with would invariably be bringing in expatriate staff to man operations in Nigeria. In which case, the company would be applying for expatriate quota after incorporation. Make it a point of duty to ask, and to advise that the share capital of the company be a minimum of N10Million Naira because that is the minimum share capital required for a company applying for expatriate quota.

#### **Articles of Association**

Where the company to be incorporated is a subsidiary of a foreign company it is advisable to request for review a copy of the Articles of Association of the foreign company to ensure that in drafting the Articles of Association for the Nigerian company you avoid conflicts with that of the holding company. Many times the company to be incorporated is the product of a Joint Venture agreement with a Nigerian concern. In such a case request to review a copy of the Joint Venture Agreement and carefully ensure that the spirit of Joint Venture Agreement is reflected

in the Articles of Association Do not forget to specifically include in the object clauses an object permitting the company to enter into a joint venture.

### **Time saving devises**

Time is usually of essence with these transactions and it is useful to suggest some time saving devises. Firstly advise as many alternate names for availability to avoid lost time if one name is unavailable. You may also suggest the same day incorporation at the Corporate Affairs Commission which costs an additional N50,000. I recently had to use the same day incorporation and the Certificate was out the next day (not same day). Also in situations where the signatories to the registration documents are in different parts of the world and the logistics of getting the documents signed will take ample time suggest a Power of Attorney to be given to the Solicitor to execute the documents on behalf of the named persons. Do not forget to Notarise the Power in the country of origin. Some clients may want to see a draft of the Memorandum & Articles of Association. If your Memorandum is copy work from just any previous one and not situation specific there would be many questions raised by the client as regards such clauses and off course the lost time. Also watch out for typographical errors, they do your image no good.

### **Directors**

There is no bar on a foreigner being a director of a Nigerian company. He may however not hold the position of the Managing Director without a work permit. In many instances the question would arise whether the company necessarily needs a Nigerian director. The answer is NO! However certain advantages may be enjoyed if there is a Nigerian director initially. After the company has been registered, with a Nigerian director, that company may open a bank account; apply for tax clearance and do some other things that are necessary at the time. The bank account for example will enable the company import capital and obtain a Certificate of Capital Importation which is one of the prerequisites for an expatriate quota application.

Jemide is a Partner with Detail Solicitors.