

NIGERIAN PUBLIC OFFICERS AND BLIND TRUSTS:

How blind can the trust be?

Introduction

The phrase "Blind Trust" forced its way back into the Nigerian lexicon recently. The erstwhile Minister of Power averred that he put his interests in some companies in a blind trust upon his appointment as a public officer - an attempt to exonerate him of any possible conflict of interest with the companies placing bids on a couple of power companies slated for privatisation under his watch.

The Black's Law Dictionary defines a Blind Trust as "a trust in which the Settlor places investments under the control of an independent trustee, usually to avoid a conflict of interest." The American Heritage Dictionary goes a step further in defining blind trust as a "financial arrangement in which a person, such as a high-ranking elected official, avoids possible conflict of interest by relegating his financial affairs to a fiduciary who has sole discretion as to their management. The person choosing the trust also gives up the right to information regarding the status of the assets."

Three factors are discernible from the definitions of blind trust, namely: it is created to avoid conflict of interest; the management of the interests is out of the control of the settlor; and the settlor is blind to the affairs of the interests.

to short-circuit an established anti-corruption apparatus. In other words, what is the relevance and legality of blind trust in the Nigerian political and legal system?

The Constitution of the Federal Republic of Nigeria 1999 provides generally for the conduct of public officers in the Fifth Schedule – the Code of Conduct for Public Officers.

Paragraph 1 specifically prohibits a public officer from putting his personal interests in conflict with his duties and responsibilities.

Paragraph 2(b) of the Code of Conduct provides that a public officer shall not "except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade..."

Paragraph 11 generally enjoins every public officer to declare his assets IMMEDIATELY after taking office and thereafter at the end of four years and at the end of his term of office. Such declaration is to be done by submitting to the Code of Conduct Bureau a written declaration of all his properties, assets and liabilities and those of his unmarried children under the age of eighteen years.

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The utility of a blind trust lies in the (fictional) separation of ownership into legal and beneficial. The trustee is the legal owner whilst the settlor (the public officer) is the beneficial owner of the interests in question. In essence, the trustee can do all things in relation to the interests, being the legal owner. The qualification on the legal ownership is that the trustee is an agent for the beneficial owner, who reaps the benefits of the interests – the ultimate owner.

The blindness of the trust comes from the level of information that is disseminated to the settlor vis-à-vis the interests. The settlor is kept in the dark about the operations of the interests save for baseline information such as the worth of the interests at the end of the financial year etc. The problem with blind trust is that blindness of any sort is always going to be a subjective matter, leaving one with the question of how blind can blind be. The blindness of the settlor in relation to the trust must be total, if blind trust is to be effective in the hands of a public officer.

One is bound to ask if the setting up of a blind trust by a Nigerian public officer is an altruistic feat or a smart attempt

Paragraph 13 further provides that a public officer who does any act prohibited by the Code through a nominee, trustee, or other agent shall be deemed ipso facto to have committed a breach of the Code.

Section 57 of the Public Procurement Act (2007) specifically empowers the Bureau of Public Procurement to set up a code of conduct for public officers in public procurement and disposal of public assets.

Section 57 (9)(a) in effect provides that every public officer involved directly or indirectly in matters of public procurement and disposal of public assets shall "divest himself of any interest or relationships which are actually or potentially inimical or detrimental to the best interest of government and the underlining principles of this act".

Section 57 (9)(b) provides that a public officer shall "not engage or participate in any commercial transaction involving the Federal Government, its ministries... where his capacity as a public officer is likely to confer any unfair advantage – pecuniary or otherwise on him or any person directly related to him."

Section 57 (12)(b) defines conflict of interest to exist *inter alia* where a person “possesses a direct or indirect interest in or relationship with a bidder... that is inherently unethical or that may be implied or construed to be or make possible personal gain due to the person’s ability to influence dealings”.

For the avoidance of doubt, Section 57 (13) provides: “a person involved in the disposal of assets shall not either by a third party or by himself be interested in buying directly or indirectly these assets and shall not have or obtain any type of advantage or revenue from the disposal for a period of three years after the disposal”

By virtue of the foregoing, avoiding conflict of interest in public life is not just a matter of moral suasion but a legal obligation to the State. The primary duty of a public officer therefore is to declare his assets upon assuming office. Disclosure is the name of the game – disclosure at all times.

In the final analysis, with particular reference to paragraph 2(b) of the Code of Conduct on one hand, it would appear that a logical inference from the provisions of the Code of Conduct is that blind trust is a veritable and valid instrument employable by a public officer desirous of running his business whilst occupying a public office. On the other hand, with particular reference to Section 57 (13), the provisions of the Public Procurement Act 2007, seem to make nonsense of the concept of a blind trust, which cannot be in sync with the economic realities of modern day Nigeria.

Whilst the Code of Conduct defines a public officer as any one holding public office – from the President of the Federal Republic of Nigeria to every person employed by the three tiers of (federal, state, and local) government. The ambivalence of Nigerian law on the legality of blind trust vis-à-vis public officers stems partly from the lack of definition of

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The spirit behind the requisite laws on conflict of interest is simple: that no public officer should unduly enrich himself in the course of discharging his duty to the State whether by himself or through a proxy – by whatever name.

For blind trust to be effective in Nigeria, it must be set up after the public officer must have declared all his properties, assets, and liabilities in accordance with the Code of Conduct. Furthermore, the overall effect of the blind trust must not confer any undue advantage to the public officer settlor. The effect of Paragraph 11 (3) of the Code of Conduct in the Fifth Schedule of the 1999 Constitution is that a blind trust shall be subjected to scrutiny at the expiration of the tenure of the public officer (settlor). All such assets or property so acquired by the blind trust shall be deemed acquired in breach of the Code if indeed it benefited from a transaction that otherwise would have amounted to conflict of interest.

a “public officer” in the Public Procurement Act. It would appear that the Procurement Act gives “public officers” a narrow interpretation, restricting it to civil servants involved in public procurement. Perhaps the National Council on Public Procurement will do well in speedily establishing the Code of Conduct for the Bureau of Public Procurement, which may address the genre of public officers in the contemplation of the Act.

The concept of blind trust is a welcome development, which should encourage and protect entrepreneurs who venture into public offices. The concept should also protect the society from the wiles of unscrupulous public officers who are in public offices for the purpose of “feathering their own nests” or simply on the take. Certainly, blind trust as a concept is, at best, an added layer of protection to prevent conflict of interest by public officers, and not a substitute to the provisions of the law, which should be encouraged insofar as it engenders accountability in public offices.

“Does Nigeria have an insolvency law?” is perhaps a question that agitated many minds in September with the release of the list of toxic debtors by the Asset Management Company of Nigeria (AMCON) and the whimsical shutting down of businesses over debt related issues. Paradoxically, some of the toxic debtors emerged preferred bidders for some of the power generation companies put up for sale/concession by the Bureau of Public Enterprises. More questions agitate the mind. Can commerce thrive in a country with a lackadaisical attitude towards bankruptcy and insolvency? Is a company’s workforce and creditors readily dispensable under Nigerian law?

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