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An Appraisal Of The Extent Of The Protection Offered By The Public Officers Protection Act, 2004: Co-Defendant's Rights In View

Introduction

It will not be out of place to conclude that in majority of the cases commenced against employees in Government (Federal, State or Local) Agencies, Ministries and Parastatals, the first point of call by the concerned officer is often recourse to the provisions of the Public Officers Protection Act, Cap P. 41, Laws of the Federation 2004 ("POPA or the Act") for possible defence based on the immunities provided in the Act.

Nigerian courts have over the years given their approval for the continued application and or reliance of public officers on the protection, particularly as it relates to limitation of cases commenced in Court against public officers, notwithstanding the belief by some scholars and writers that the Act has become anachronistic and deserves to be repealed or nullified.

However, the questions that remain largely unanswered as far as this statute is concerned and which this paper shall attempt to resolve are:

- Does the Public Officers Protection Act truly confer the blanket privileges and immunities it is professed to confer?
- Does the statute protect individuals who are not public officers but sued jointly with a public officer?

The first part of this paper will appraise the provisions of POPA vis-a-vis the nature of the protection provided by the Act. The second part will be dedicated to examining the exceptions created from the protections by courts over the years while the third part will answer the fundamental question on the extent of the protection offered by POPA which shall include the right of a private individual sued as co-defendant with a public officer to take benefit from the protection offered by the Act.

Nature and Scope of the protection offered by the Public Officer Protection Act, 2004

The POPA is one of the statutes recognized as an existing law under section 315 (4) (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) having been enacted on 21st September 1916. The Act was enacted to provide protection for public officers in respect of actions taken by them in the execution of public duties. It was also enacted in a bid to ensure that public officers are not distracted from their public functions and duties at the instance of many litigations pending against the officer.

The Act contains 2 sections. However, the most referenced of the two sections is section 2 which provides as follows:

2a. Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance of execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect-

Limitation of time

(a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof.

Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be communicated within three months after the discharge of such person from prison.

Extent of the protection offered by POPA.

The courts have held consistently that for a person to enjoy the protection provided under POPA, such person must be a “public officer” and the act done must be “in pursuance or execution of a law, public duty or authority”. This was clearly stated in *Hassan v. Aliyu & Ors (2010) 17 NWLR (Pt.1223) 547*. Furthermore, in *NEPA v Olagunju, (2005) 3 NWLR (Pt. 913) 602*, the court held that it is not every corporate body created by statute that is entitled to take benefit from the provisions of the Public Officers (Protection) Act, as the benefit is only applicable to public corporation specifically proved to be a public office under section 2(a) of the Act.

Consequently, a review of recent decisions of courts has shown that Nigerian courts have widened the net of the protection offered by POPA in some cases, while they have shrunk the net in others. These different approaches have resulted in discordant tones on the extent of the protection offered by the Act as it relates to the “persons” who are entitled to the protection as well as the circumstance(s) that will warrant the protection. Some of the recent developments in the interpretation of the Act are highlighted below.

Are there recognized exceptions to section 2(a) of POPA.

While the Act has been generally viewed as being draconian in nature, it is imperative to point out that the protection offered by the Act has both intrinsic derogations/exceptions provided in the Act itself as well as extrinsic/external derogations created by courts. Some of these exceptions are considered below:

1. Cases of Continuance of Damage or Injury.

In the interpretation of section 2 of POPA, the courts have held that where the act or omission of the public officer complained of is continuous in nature, the public officer cannot rely on the provisions of POPA to escape liability for such act or omission. The right to rely on POPA in cases of continuous damage will only crystallize where the affected individual fails to commence an action in Court within 3 months from the date of the cessation of the continuous act. This position was emphasized in *RRBN v. MHWUN & Anor (2021) LPELR-52745(CA)*.

However, it has been interpreted by the courts that the injury contemplated under section 2(a) of POPA is continuance of legal injury, and not merely continuance of the injurious effect of legal injury. This means that where a person is injured by a public officer, the right to file a case against such public officer arises on the date the injury was caused and not the date the pain or anguish suffered as a result of the injury stopped. The position was affirmed by the court in the case of *Michael Obiefuna v. Alexander Okoye (1961) All NLR 357*.

2. Fraudulent Concealment/Action Outside Statutory Duty/Criminality/Judicial acts

A criminal action which is generally outside the public officer’s duties does not fall within the scope of POPA. This exception has also been extended to cover cases where the act or omission was actuated with malicious intent or where the public officer acts outside the colour of his office. This position was also emphasized by the Supreme Court (hereinafter referred to as “SC”) in *Attorney-General of Rivers State v. Attorney-General of Bayelsa State & Anor (2013) 3 NWLR (Pt. 1340) 123 at page 149*.

Further, POPA will not apply where there is fraudulent concealment, collusion or deceit on the part of the public officer/defendant. The position was reiterated in *Salahudeen & Ors v Ajibola & Ors (2019) LPELR 47412 (CA)*.

Also, it is pertinent to note that Section 2(a) of POPA does not bar relief sought in connection with an error committed in purely judicial capacity. See *Nigeria Army v. Yakubu (2013) 8 NWLR (Pt.1355) 1*.

3. Cases of Recovery of Land

It has been decided in many cases that POPA does not apply to cases of recovery of land and land disputes. In *Attorney-General of Rivers State v Attorney-General of Bayelsa State & Anor (Supra)* where the Attorney General of Rivers State sought for declaratory and injunctive reliefs for boundary delineation and Rivers State's entitlement to derivative funds from disputed Oil fields/ Oil Wells, the SC rejected the objection of the Bayelsa State on the ground of the protection offered by POPA relied on by the Attorney General of Bayelsa State on the ground that the defence offered by POPA does not apply to cases bordering on lands.

4. Breach of Contract/Claims for work and Labour done

An action for breach of contract or claims for work and labour has also been held not to fall within the purview of the protection offered by section 2 (a) of POPA. In *FGN v. Zebra Energy Ltd (2002) 18 NWLR (pt.798) 162 at 196* the court held that the provisions of the POPA are not absolute and that they do not apply to cases relating to breaches of contract, claims for work and labour done.

Recent Trends in the Interpretation of POPA

Must a Public Officer rely on an existing law to enjoy protection under POPA?

Until the recent decision of the SC in the case of *Sanni v. President, FRN*¹ the general position of the law used to be that for a public officer to take benefit from the provisions of POPA such public officer must show that he acted in his capacity as a public officer and in pursuance of an existing law. The position was emphasized in the cases of *Ekeogu v. Aliri (1991) 2 NWLR (Pt. 179) 258*; *Onuh v. C.O.P (1994) 1 NWLR (Pt. 323) 671*

However, with the decision in *Sanni v. President, FRN*², it appears that it is no longer required of a public officer whose action is being challenged to show that he acted in pursuance of an existing statute before he can seek protection under POPA. All that is necessary for a public officer to show is a reasonable belief in the existence of the law pursuant to which he acted, even though the law or the duty, does not exist.

¹ (2020) 15NWLR (Pt. 1746) 151SC

² (ibid)

While the SC remains the apex court whose decisions form binding precedence on all courts in Nigeria, until revisited by the same court, it is opined that this new position created by the Court ought to be followed by lower courts with caution bearing in mind that public officers may act indiscriminately with the aim of raising the defence that they honestly believe that there exists a statute which allow them to so act, when in fact they knew at the time of taking the action that they were not empowered to so act.

A justification can be made for this decision based on the literal interpretation of the provisions of section 2 POPA to the effect that the protection extends to intended execution of any Act or Law, which may be interpreted to mean the “honest believe to act in execution of an existing law” even though such law does not exist. It is the believe in the existence and not the actual existence of the law that POPA protects. This accords with the criminal law principle that a man will not be guilty unless his intentions are guilty. Also, POPA does not specifically require the action to be in pursuance of an Act or Law at all times. The word “or” used in POPA means that the protection also extends to act done in the execution of public duty which need not be premised on any law.

However, this justification, though reasonable, may result in an unbridled abuse of privilege by public officers if not cautiously followed by lower courts. It is therefore suggested that the SC revisits the decision when the opportunity presents itself and hold that where a public officer bases his defence on the fact that he acted in pursuance of an existing law, he must show that the law exists, failure of which he would be denied the right to rely on POPA.

Who can enjoy the protection offered by POPA?

The word “*any person*” used in section 2 of POPA has been a subject of endless controversies. Until the decision of the SC in the case of *Ibrahim v. JSC*³ the word was interpreted to refer to only legal persons i.e. individual public officer, and not juristic person such as ministries, parastatals, and agencies of government.

A new specie of controversy which appears to have arisen in recent time is whether the word “*any person*” applies to non-public officers sued as co-defendant with a public officer whose action is being challenged in court. An analysis of the decision on this topic would show that the approach of courts on the issue has been quite inconsistent and deserving some expositions and or clarification. A review of decisions of the SC in respect of the conditions that must be fulfilled before any person can place reliance on the provision of POPA would show that the Court has been consistent in holding that the two preconditions that must be met are:

- i. The person seeking to benefit from the protection must be a public officer.

³ (1998) 14 NWLR (Pt. 584) 1

- ii. The act done by the person in respect of which the action is commenced must be an act done in pursuance or execution of any law, public duty, or authority, or in respect of an alleged neglect or default in the execution of any such law, duty or authority.

See the case of *CBN v. Okojie (2004)10 NWLR (Pt. 882) 488*.

It is however important to note that the parties who sought to rely on the act in the above cases and indeed in almost all the cases where the position was reiterated were public officers. The dissent in the superior courts' position were in cases where non-public officers sued with public officers sought to rely on POPA where the public officers failed or refused to rely on same.

In *Offoboche v. Uko(2016) 3 NWLR (Pt. 1498) 104*, the case involved the acquisition of lands in the Ogoja Local Government by the Nigerian Army and payment of compensation to the Appellant on behalf of some of the Respondents. The Appellant was sued as co-defendant with the Nigerian Army and other public officers for the recovery of compensation for the acquisition of land. The Appellant raised the protection provided in POPA to the effect that the action was commenced outside the 3 months provided by POPA. The Court of Appeal in its judgment refused the Appellant reliance on POPA on the ground that the Appellant was not a public officer to enjoy the protection offered by the Act.

However, the Court of Appeal in the case of *Akinsanya & Ors v. Shoneye & Ors (2016) LPELR-41939(CA)* without referring to its earlier decision in *Offoboche's case* held that a non-public officer who is sued as co-defendant with a public officer is entitled to benefit from the protection offered by POPA. The Court relied on the decision in *Ibrahim v. Lawal (2015) LPELR-24736(SC)* where the Supreme Court held thus:

"The expression in the Section reproduced "...against any person for any act..." demonstrates the fallacy in the contention that the protection under the Act is restricted to the public officer whose act or neglect gave rise to the suit. In my view, a defendant sued alone or together with the public officer whose act or omission is questioned is entitled to raise and rely on the defence under the Act, irrespective of its title. However, a non-public officer raising the defence in a purported status of a public officer would lose not because he is not entitled to it but because he does not possess the status in which he raised the defence."

Conclusion and Recommendations

It is bad enough that POPA offers protection from litigation or claims against public officers on the ground that the action to remedy the grievance was not commenced within three months of the accrual of the cause of action. It would occasion a great mischief if a private person sued along with a public officer, who himself is not a public officer is allowed to rely on the provisions of the Act solely because he was sued as a co-defendant with the public officer.

Apart from the obvious purpose that POPA has been enacted to achieve, which is the protection of public officers, circumstances may arise that may render the whole idea of permitting a non-public officer to benefit from the provision of POPA imprudent on the ground that such person was sued as a co-defendant with the public officer, these circumstances including:

1. If the public officer who is the beneficiary of the protection decides to waive such right and/or decides not to raise the protection offered by the Act in a proceeding where it ought to have been raised, it will amount to crying more than the bereaved if a non-public officer is allowed to raise and enjoy the protection in such situation. See the case of *Ntuk v. Longwak* where this issue was raised and rightly rejected by the Court.
2. If the action is against the private person for inducing the act of the public officer which resulted in the breach of the right of the Claimant and the Claimant decides to join the public officer to be able to prove his case. It will be against proper reasoning to strike out the action based on an objection by the Defendant (a non-public officer) on the ground that the substratum of the complaint of the Claimant relates to an act done by a public officer.

Based on the above, it is suggested that the frontiers of the protection offered by POPA be restricted to the protection of public officers alone and not be extended private individuals sued as co-defendants with public officers.

Also, it is suggested that the length of time (3 months) provided in the Act be reviewed. This is because the period of three month appears to be too short and gives no room for an aggrieved individual to explore engagement or dialogue with the various public offices and other officers to settle the grievance or wrong amicably or mitigate the damages before approaching the court.

In view of the transient nature of the tenure of some public officers, it is advised that individuals who are affected by the actions of any public officer promptly commence actions against such public officer before the expiration of the public officer's tenure.