

Article 41(f) of the 1992 Constitution of the Republic of Ghana and the requirement of locus standi and or capacity of parties to commence action under the Public Procurement Act, 2003 (Act 663) as amended by Act 914

Purpose of the article

The Purpose of this article is to examine the capacity and or locus standi of individuals and or corporate entities to commence civil action by way of a writ of summons for breach of the Public Procurement Act, 2003 (Act 663) as amended by Act 914 (hereinafter referred to as 'Act 663 as amended by Act 914') or the extent of Article 41(f) with respect to Act 663 as amended by Act 914.

It is also to examine whether any action can be commenced by a private individual who cannot establish a personal interest by way of being directly affected by any act and or omission by the Public Procurement Board which has caused and or has the potential to cause loss of revenue and or cause damages by way of improper use of funds.

The above, in recent times has become dire, considering perceived infractions and or breaches of Act 663 as amended by Act 914 and the civic duty of citizens to protect the public purse.

The 1992 Constitution of the Republic of Ghana (Constitution), specifically Article 41(f) in spelling out the duties of the citizen of Ghana makes it a requirement for a citizen do as follows:

'to protect and preserve public property and expose and combat misuse and waste of public funds and property.'

It is a notorious fact that, procurement is one of the means by which public funds are unlawfully dissipated through negligent, reckless or careless behavior and deliberate or conscious effort(s) by persons connected with public procurement activities in most instances to gain unfair advantage to the detriment of the state.

The citizen has a constitutional duty to protect and preserve public property as enshrined in the said Article 41(f). The Constitution is the fundamental law of the land and that fact is not in doubt. The Supreme Court has held in numerous cases that under Article 2(1) of the Constitution¹, any person who alleges that an enactment and or any act or omission is unconstitutional does not need to show personal interest when bringing an action on same. It is a truism that in constitutional matters properly so called, there is no requirement of locus standi. As held by Sophia Akuffo JSC² that:

¹ *Sam (No. 2.) v. The Attorney-General* [2000] SCGLR 305,

² *Adjei-Ampofo v. Accra Metropolitan Assembly & Attorney-General (No 1)* [2007-2008] SCGLR 611@620, *Ampiah J.S.C. in the case of New Patriotic Party. v. Attorney-General (CIBA CASE)*

"Whilst the outcome of an action under article 2 (1) is, invariably, primarily of benefit to the citizens in general, it may not necessarily inure to the direct or personal benefit of the plaintiff herein....For that reason therefore, every Ghanaian, natural or artificial, has locus standi to initiate an action in the Supreme Court to enforce any provision of the Constitution...'

It is in the light of the above constitutional provision that it has become necessary to examine whether in the exercise of the duty imposed by virtue of this said Article 41(f), a citizen can bring an action in respect of glaring instances where there is a breach of Act 663 as amended by Act 914 which has the potential to cause and or has caused damage and or avoidable wastage to public funds.

This article is also to examine whether it is possible for any person to commence any other civil action to challenge and or question and or halt any procurement exercise under Act 663 as amended by Act 914 which constitutes an infringement of law.

Locus standi and Capacity

Capacity to commence an action requires a party commencing the said action to have the legal basis to commence same whilst locus standi requires that a party has an interest in a matter to enable the party commence action. It is not in doubt that before a party commences action in court, that party has to have capacity to commence the action.

It is a further requirement that save for a constitutional action commenced under Article 2(1) of the Constitution which seeks an enforcement of the Constitution, a party is required to have locus standi before an action is commenced.

As held by the Supreme court in *Florini Luca v Mr Samir and Others*, where Pwamang JSC held as follows;

It is pertinent to recognize that though capacity and locus standi are closely related and in many instances arise together in cases in court they are separate legal concepts. Capacity properly so called relates to the juristic persona and competence to sue in a court of law and it becomes an issue where an individual sues not in her own personal right but states a certain capacity on account of which she is proceeding in court. But locus standing relates to the legal interest that a party claims in the subject matter of a suit in court.

In *Standard Bank Offshore Trust Co Ltd v National Investment Bank Limited & 2 Ors*³, The Supreme court in a unanimous decision per Benin, JSC held that:

"A person's capacity to sue, whether under a statute or rule of practice, must be found to be present and valid before the issuance of the writ of summons, else the writ will be declared a nullity. In the case of a company, it's authority to bring a

³ 2017-2018] 1 SCLRG 707 @726

lawsuit is one of capacity and not standing. Capacity to sue is a very critical component of any civil litigation without which the plaintiff cannot maintain any claim. The issue of capacity to sue has been the subject of several writings, commentaries and court decisions, such that every practitioner of the law should consider it before preparing a case for court. In an article titled 'IN LOCUS STANDI-A COMMENTARY ON THE LAW OF STANDING IN CANADA (TORONTO: CARSWELL, 1986)', Prof. Thomas Cromwell, who later became a judge of the Supreme Court of Canada, wrote at page 3 that: "Capacity has been defined as the power to acquire and exercise legal rights. In the context of the capacity of parties to sue and be sued, to say that a party lacks such capacity is to acknowledge the existence of some procedural bar to that party's participation in the proceedings—one that is personal to a party...and imposed by law for one or more of various reasons of policy usually quite divorced from the substantive merits.....It concerns the right to initiate or defend legal proceedings generally." (Emphasis supplied) This passage was quoted with approval in the Canadian case of PROVINCE OF NEW BRUNSWICK v. MORGENTALER, 2009, NBCA 26 at 43. That the legal authority to act is that which gives a party capacity was also affirmed in the case of DALLAS FORT WORTH INTERNATIONAL AIRPORT v. COX, 261 SW 3d 378 (Court of Appeals of Texas at Dallas, 2008), per Justice Ritchter who said "...a party has capacity when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy." It must be emphasized that the capacity to sue must be present before the writ is issued; such authority must appear in the endorsement and/or statement of claim accompanying the writ; it cannot be acquired whilst the case is pending; and an amendment cannot be sought to introduce it for the first time. A writ that does not meet the requirement of capacity is null and void. Nullity may be raised at any time in the course of the proceedings, even on a second or third appeal. The charge of tardiness that was raised by the respondent against the appellant is thus a red herring and does not hold water."

In *Republic vs. High Court, Accra, Ex parte Aryeetey (Ankrah) Interested Party*,⁴ the Supreme Court held as follows:

"Any challenge to capacity therefore puts the validity of a writ in issue. It is a proposition familiar to all lawyers that the question of capacity, like the plea of limitation, is not concerned with the merits so that if the axe falls, then the defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his rights."

As can be seen from the above decided cases, it is crucial that a party has to be clothed with not only capacity, but locus standi before an action is commenced where the action falls outside the ambit of Article 2(1) of the Constitution.

⁴ [2003-2004] SCGLR 398,

History of Procurement

The practice of Procurement is said to have existed for thousands of years. It is said that procurement practices ⁵

'...evolved from a function of subordinates to one that's been elevated to a management level. It's garnered such importance in the business world that major companies dedicate whole departments and executive positions to procurement (maybe even one you hold)'

The fact that the procurement practice is not new is further solidified by the fact that it is believed that:

⁶The practice of procurement-related tasks dates back as early as 3,000 BC. In Egypt, scribes responsible for pyramid design also functioned as clerks, using papyrus to record the amount of labor and materials needed for construction. Ancient Romans created contracts with scribes when the empire engaged in trade with private suppliers.'

It is accurate to state that as society becomes advanced, it is not far fetched as to why procurement function becomes more important, in that it not only reduces cost, but also brings in efficiency. It is further a truism that;

⁷There's a clear link between the social status of procurement professionals and the shape of the economy. When the economy is more robust, procurement becomes a vital strategy. As we move into the future, procurement will become even more important. This is especially true as purchasing becomes the main way to control company spending.'

Procurement Act, 2003 (Act 663) as amended by (Act 914)

In Ghana, public procurement is now governed by the Public Procurement Act, 2003 (Act 663) as amended by (Act 914). The preamble of Act 663 as amended by Act 914 is explicit when it states that the Act is to:

'provide for public procurement, establish the Public Procurement Board; make administrative and institutional arrangements for procurement; stipulate tendering procedures and provide for purposes connected with these'

⁵ <https://www.procurify.com/blog/a-brief-history-of-procurement-key-points-from-past-and-present/>

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As provided in section 13 of the Interpretation Act, 2009, Act 792,

'The long title and preamble form part of an Act intended to assist in explaining the intent and object of the Act.'

The title of the Act allays any doubt to the effect that Act 663 as amended by Act 914 deals with public procurement. The Act establishes the Public Procurement Board as the governing authority in charge of all public procurements.

The object of the Board is explicit when it provides as follows: ⁸

"The object of the Board is to harmonise the processes of public procurement in the public service to secure a judicious, economic and efficient use of state resources in public procurement and ensure that public procurement is carried out in a fair, transparent and non-discriminatory environmentally and socially sustainable manner"

As can be seen in the above section 2, the object is to ensure that there is a judicious, economic, and efficient use of state resources in public procurement. The objects of Act 663 as amended by Act 914 is to ensure that resources of the state are utilized in a judicious and efficient manner in so far as public procurement is concerned. It is to ensure a judicious use of *public funds*. *Public funds* according to Act 663 as amended by Act 914 ⁹ has been defined to:-

'include the Consolidated Fund, the Contingency Fund and such other public funds as may be established by Parliament'

As held by Court of Appeal in the *Akwasi Osei & Anor v The Republic*¹⁰ Act 663 as amended by Act 914 only regulates public procurement which involves the use of public funds. Appau JA (as he then was) who read the unanimous decision of the Court of Appeal, in allowing the appeal against the refusal of submission of no case by the Accused persons, held as follows:

"Again, the evidence led by the prosecution shows clearly that the National Investment Bank headed by the 2nd appellant is neither a procurement entity nor a public institution or company nominated by the Minister of Finance to undertake the said procurement. There is also no evidence on record that portrays in the

⁸ Section 2 of Act 663 as amended

⁹ Section 98 of Act 663

¹⁰ *Akwasi Osei Adjei & Another v The Republic* (2012) JELR 64455(CA)

least that the NIB is funded by Government or utilizes public funds. It is purely a Private Bank, a company limited by shares with the Government of Ghana being a shareholder.”

The Procurement Act governs and or regulates procurement entities, and a procurement entity is defined in section 98 of the Act 663 as amended by Act 914 as:

'procurement entity' means any entity conducting public procurement under this Act'

The functions of the Procurement Board include the following ¹¹

- (a) develop rules, instructions, other regulatory documentation on public procurement and formats for public procurement documentation;*
- (b) monitor and supervise public procurement and ensure compliance with statutory requirements;*
- (c) organise and participate in the complaints and administrative review procedures in Part Seven;⁷*
- (d) plan and co-ordinate technical assistance in the field of public procurement;*
- (e) investigate and debar from procurement practice under this Act, suppliers, contractors and consultants who have seriously neglected their obligations under a public procurement contract, have provided false information about their qualifications, or offered inducements of the kind referred to in section 32;*
- (f) maintain a list of firms that have been debarred from participating in public procurement and communicate the list to procurement entities on a regular basis;*

As can be seen from the above, the Public Procurement Authority is mandated to not only monitor and supervise, but to investigate and debar from procurement practice, **suppliers, contractors, and consultants** who have seriously neglected their obligations under a public procurement contract.

A *'procurement contract'* is defined as ¹²

*'procurement contract' means a contract between the procuring entity and a **supplier, contractor or consultant** resulting from the procurement proceedings'*

¹¹ Section 3 of Act 663 as amended

¹² Section 98 of Act 663 as amended

A 'procurement entity' is defined as ¹³

'procurement entity' means any entity conducting public procurement under this Act.'

As can be seen from the definition of a procurement contract, only 3 (three) classes of persons are stipulated in Act 663 as amended by Act 914 to have capacity and or locus standi to enter into a contract with a procuring entity. These 3 (three) classes of person are **supplier, contractor or consultant**. It should be noted that apart from these 3 (three) classes of persons stated specifically in Act 663 as amended by Act 914, no other person(s) has the capacity to enter into a procurement contract with a procurement entity.

It is not in doubt that part 7 (seven) of Act 663 as amended by Act 914¹⁴ deals with 'Complaints and Administrative Review'. It is stipulated in section 78 as follows;

'Any supplier, contractor or consultant that claims to have suffered, or that may suffer loss or injury due to a breach of duty imposed on the procurement entity by this may seek redress in accordance with this Part'

As can be seen again in section 78 of Act 663 as amended by Act 914, the class of persons who have the power and or right to seek redress for a breach of duty imposed on the procurement entity are again the same 3 (three) classes of persons namely, *supplier, contractor and consultant*.

It is further provided under section 80 of Act 633 as amended by Act 914 as follows: ¹⁵

- (1) A **supplier, contractor or consultant** entitled to seek administrative review may submit a petition to the Board if
 - (a) *the head of the procurement entity does not entertain the complaint because the procurement contract has entered into force; or*
 - (b) *the **supplier, contractor, or consultant** claims to be adversely affected by a decision of the head of the procurement entity under section 79.*
- (2) *The petition shall be submitted within twenty-one days after*

¹³ Section 98

¹⁴ Section 78 of Act 914

¹⁵ Section 41 of Act 914

- (a) *the **supplier, contractor or consultant** became aware of the circumstances giving rise to the complaint, or*
- (b) *the time when the **supplier, contractor or consultant** ought to have become aware of those circumstances, if the complaint cannot be submitted under section 79 because of the entry into force of the procurement contract.*

As can be seen from the above provisions, including section 80 of the Act 663 as amended by Act 914, the Act is specific with respect to the class of persons who can petition the Board with respect to any procurement breach, and once again, it stipulates that only these 3 (three) classes of persons, namely a supplier, contractor and or consultant, are mandated to seek a review by the Board of the Public Procurement Authority with respect to a decision or any act of a procurement entity.

In the often-cited case of *Boyefio v NTHC Properties*¹⁶ the Supreme court held as follows:

'For the law is clear that where an enactment has prescribed a special procedure by which something is to be done, it that procedure alone that is to be followed: Tularley v Abaidoo (1962) 1GLR 411 SC

The above position in consonance with Act 663 as amended by Act 914 makes it abundantly clear that it is only 3 (three) classes of persons who may petition for a breach. It is also a fact that Act 663 as amended by Act 914 is specific with respect to the class of persons who can submit a petition for internal review of a decision.

Criminal offence for breach of any provision of Act 663 as amended by Act 914

Act 663 as amended by Act 914 makes it abundantly clear that a breach or contravention of the said Act 663 as amended by Act 914 is a criminal offence. Section 92 states as follows:

- (1) *Any person who contravenes any provision of this Act commits an offence and where no penalty has been provided for the offence, the person is liable on summary conviction to a fine not exceeding two thousand five hundred penalty units or a term of imprisonment not exceeding five years or to both*
- (2) *The following shall also constitute offences under this Act:*

¹⁶ 1996-97 SCGLR 531@546, *Francis Owusu-Mensah & anor v National Board for Professional & Technical Examinations (NAPTEX[sic]) & 2 ors* [unreported; Civil Appeal No. J4/57/2017; 9th May 2018; SC]

- (a) *entering or attempting to enter into a collusive agreement, whether enforceable or not, with any other supplier or contractor where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case has there not been collusion between the persons concerned;*
- (b) *directly or indirectly influencing in any manner or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract;*
- (c) *altering any procurement document with intent to influence the outcome of a tender proceeding and this includes but is not limited to (i) forged arithmetical correction; (ii) insertion of documents such as bid security or tax clearance certificate which were not submitted at bid opening; and (d) request for clarification in a manner not permitted under this Act. (3) Despite anything to the contrary in an enactment, a person who contravenes a Regulation made under this Act is liable on summary conviction to a fine of not more than two thousand five hundred penalty units or to a term of imprisonment of not more than five years or to both.*

As can be seen above, a breach of Act 663 as amended by Act 914 constitutes a criminal offence for which a guilty party may suffer consequences including custodial sentence. It is only the Attorney-General who has the sole mandate to initiate and prosecute for breaches under the Act 663 as amended by Act 914.¹⁷ It is provided in Article 88(3) and (4) of the Constitution as follows:

- (3) *The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences*
- (4) *All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with the law.*

As can be seen above, the said Article 88(3) and (4) mandates only the Attorney General to commence all criminal actions. A citizen cannot therefore commence any criminal action for breaches of the Act 663 as amended by Act 914.

Suit number GJ/0104/2025, Africa Centre for Energy Policy (ACEP) & 14 others vs Electricity Company of Ghana & Fidelity Bank Ghana Limited

The above suit was commenced on the 29th day of October 2024 in the High Court by 15 (fifteen) Civil Society Organizations against the Electricity Company of Ghana (ECG), a

¹⁷ Article 88 (3) of the 1992 Constitution

company incorporated as a limited liability company of which the government of Ghana is the sole shareholder and Fidelity Bank Ghana Limited, another limited liability Company engaged in the business of banking. Plaintiffs claimed for declarations for what they claimed were breaches of the Public Procurement Act 2003, Act 663 as amended by Act 914.

Defendants successfully struck out the writ of summons and statement of claim on the grounds of capacity and locus standi.¹⁸ The High Court, in dismissing the action held as follows:

"I find that the grievances claimed by the plaintiffs for which they have invoked the jurisdiction of this court are not grievances for which they as a group of plaintiffs qua plaintiffs can claim to be clothed with capacity and locus standi and for that matter a cause of action to bring before the court for redress.

The Act is clear and narrows persons who can seek redress "for a loss, injury of a breach of duty imposed by the PPA Act" to specific persons exclusive of the plaintiffs. I do not see throughout the Act any extension or expansion to these persons stipulated by the Act no matter how I apply the Provisions of the Interpretation Act ejusdem generis or otherwise to include the plaintiffs.

In so far as this court is prescribed by law to abide by statute and not to be seen or heard to allow persons by-pass the provisions of statute, the court, no matter how wide its arms may be cannot be seen to accommodate actions which are brought in violation of statute or the tenets of law.

As long as the plaintiffs/respondents have failed to convince the court that they have satisfied all the provisions provided by the PPA Act in relation to bringing this action for the reliefs claimed in their Writ of Summons and Statement of Claim, the court cannot entertain the suit. The action is accordingly struck out".

The writer is of the opinion that the High Court rightly ruled that Plaintiffs, namely the Civil Society Organizations did not have the capacity and or locus standi to commence the said action. This is because Act 663 as amended by Act 914 is very clear as to the persons who have the capacity and locus standi to bring an action. In so far as the Plaintiffs in the above case do not fit in the category of **supplier, contractor and or consultant**, they cannot have capacity and or locus standi to mount a civil action.

Judicial review action

The question which has to be addressed is whether there is another avenue or remedy by way of a judicial review application, available to any citizen in exercise of his duties

¹⁸ Ruling of the High Court, General Jurisdiction dated the 17th day of December, 2024.

under Article 41(f) or for any reason whatsoever, to personally commence action challenging a wrongful act with respect to a perceived procurement infraction. This is because it is not in doubt that the Public Procurement Authority is a public institution whose decisions are amenable to judicial review.

As has been held in numerous cases, in a judicial review application, lack of locus standi is not a bar and or prohibition to any person seeking a judicial review application. In ¹⁹ *The Republic v The High Court Winneba Ex-parte Professor Mawutor Avoke & 3 Ors [unreported]*, the Supreme Court per Appau JSC held as follows:

'The issue of capacity with regard to the role of a stranger to a judgment, ruling or decision in judicial review applications, particularly with regard to prohibition and certiorari, has been over flogged in this Court and given final judicial blessing. The authorities are legion that the remedies of certiorari and prohibition are not restricted by the notion of locus standi and that every citizen of the land has a standing to invite the Court to prevent some abuse of power. There is no need for such an applicant to show a personal interest or grievance in the matter brought for consideration. The only criterion is that the public must be interested in the matter. See In Re Appenteng {decd}; Republic v High Court, Accra; Ex-parte Appenteng [2005-2006] SCGLR 18; Republic v High Court; Ex-parte Charge D'Affairs, Bulgarian Embassy (Unreported judgment in civil motion No. J5/34/2015 dated 24th February 2016); Republic v High Court, Ex-parte Naa Otua Swayne (Unreported civil motion No J5/8/2015 dated 17th February 2016) and our recent unreported decision in the case of The Republic v High Court, Winneba; Ex-parte University Teachers Association of Ghana (UTAG)–Winneba Chapter; And Supi Kofi Kwayera and 2 Others (Interested Parties); Suit No J5/65/2017 dated 20th December 2017, which was referred to earlier on in this judgment.

We wish to re-echo the dictum of this Court on this question of capacity per Pwamang, JSC in the unreported judgment involving the University of Education, Winneba referred to supra, which case, incidentally, was conducted by the same lawyers in the instant application before us: "This Court has held repeatedly that applications for prerogative writs have a special public aspect to them and are therefore not restricted by notions of locus standi, i.e. one does not need to show that some legal right is at stake. They may be granted to a total stranger... Our opinion is that since the issues in this application are in respect of the proper administration of justice in conformity with the rules of court, a stranger to the proceedings in the High Court and an incorporated group of persons would have capacity to raise them since it is in the interest of the public that the machinery of the administration of justice works properly"

¹⁹ Suit number J5/45/2018

As can be seen from the above case, the avenue of judicial review is open to any citizen and or any person to challenge any decision and or act of the Public Procurement Board which is not in accordance with law in court. This is because the requirement of locus standi and or interest is not required in respect of a judicial review application.

Conclusion

It is the view of the author that, in so far as Act 663 as amended by Act 914 has laid down a dispute resolution mechanism and has stipulated the class of persons who can lodge complaints, only these persons have the capacity and or locus standi to commence a civil action by way of issuance of a writ of summons to challenge and or question a purported procurement infraction.

It is the further view of the author that this notwithstanding, any person may commence an action by way of judicial review including an application for certiorari to quash any decision of the Public Procurement Authority and seek an injunction to restrain the PPA from engaging in any act which sins against Act 663 as amended by Act 914 and or against law.