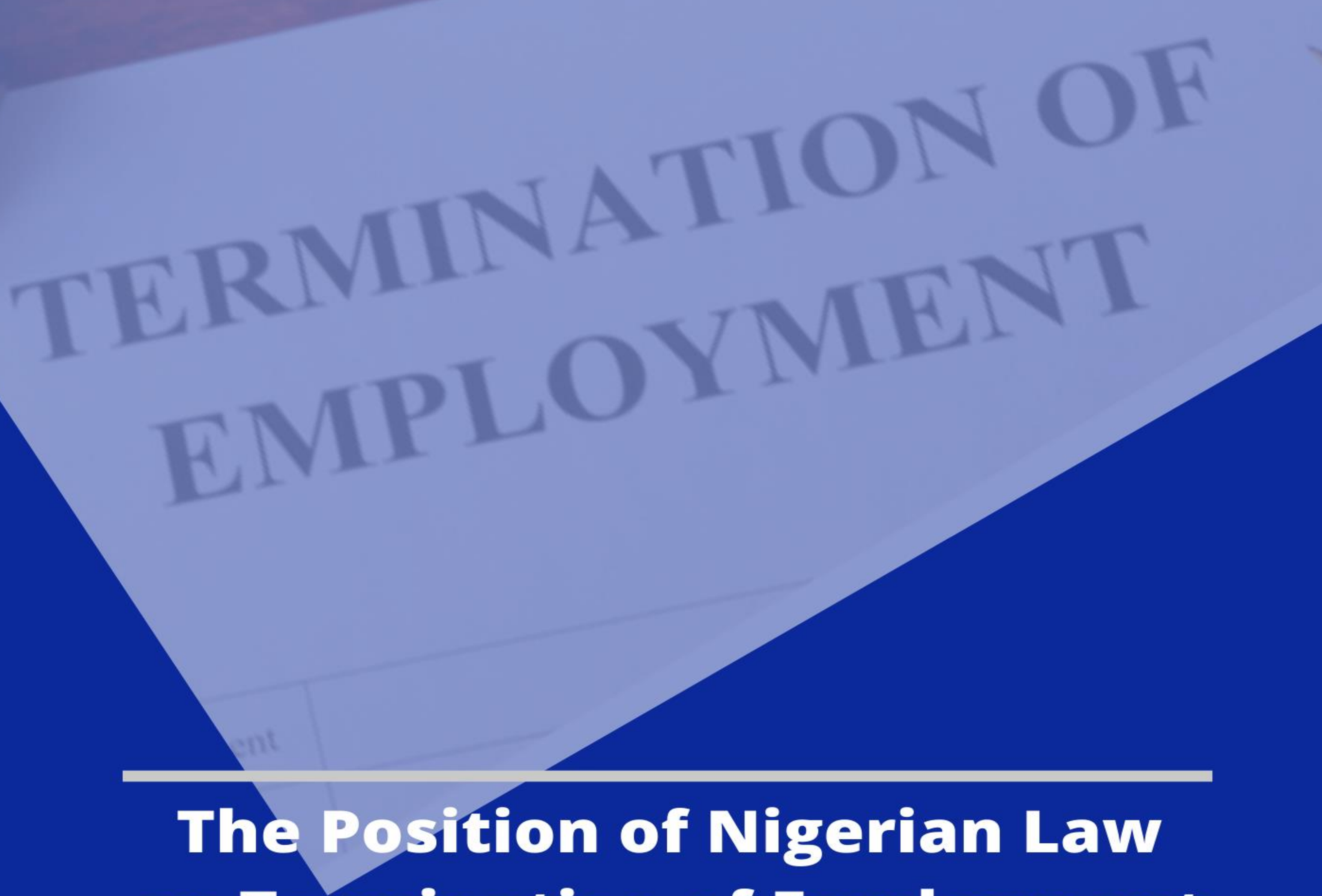

The Position of Nigerian Law on Termination of Employment Without Reason: A Better View

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Introduction

On 1 April 2021, the Nigeria Employers' Consultative Association ("NECA") issued a memo to its members titled, 'Status of the Law on Termination of Employment' which stated in part that, "*the practice where an employer could terminate contracts of employment with or without reason, provided the termination is with notice or payment in lieu of notice, is no longer the position.*" No reason was provided, but NECA's position is not without judicial backing, as recent jurisprudence from the National Industrial Court of Nigeria ("NICN") suggests that an employer may no longer terminate an employee's employment without reason. We shall, in this paper, interrogate NECA's position together with the recent decisions of the NICN, and ultimately demonstrate the basis for our considered view that these views do not represent the correct position of the law in Nigeria.

The NICN

The NICN is established by section 254A of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended). It is the newest superior court of record in Nigeria having been conferred with that status in 2011 when it was recognised as one of the 10 superior courts of record in Nigeria.[1] Section 254C CFRN confers the NICN with exclusive original jurisdiction over matters which principally pertain to labour, employment, and industrial relations.

From a review of the court's decisions in the last decade i.e. since its elevation, two things stand out. One, the NICN has, rightly or wrongly, been perceived as an 'employee-friendly' court. Two, the NICN has not shied away from reaching ground-breaking decisions, even in the face of contrary established precedents. Two of such instances are the positions pioneered by the cases of *Duru v. Skye Bank Plc*[2] and *Aloysius v Diamond Bank Plc*[3] – which held that an employer is bound to give reasons for terminating an employee's contract.

Before now, the law had always been clear that, except in cases of dismissal on grounds of misconduct, an employer was not bound to state the reason for terminating an employee's contract provided that such employer gives the employee the requisite notice (either as stated in the contract of employment or as required by applicable law) or, failing that, pays the employee the relevant salary in lieu of such notice. The law however required that where an employer elects to give reasons, it must be satisfactory to the court. The *locus classicus* on this is the case of *Shitta-Bey v. Federal Public Service Commission*[4]. This position was

reinforced in *Osisanya v. Afribank Nig. Plc*[5] as a well-settled position of the law and in the more recent case of *Obanye v. Union Bank*[6] where the Supreme Court per Kekere-Ekun, JSC again stated that an employer has the right to hire and fire and is entitled to terminate for good or bad reason or for no reason at all; provided that the firing must be done in accordance with the terms and conditions of the employment.

In our view, this is both consistent with authority and sound in principle. It has always been understood that an employment contract in effect creates a master-servant relationship and a master can terminate the employment of his/her servant at any time. Employees have historically also been free to walk away from their employment without the requirement of giving reasons, provided they give their employers the requisite notice or refund the relevant salary in lieu of notice. These flow from the clear positions that an employment relationship is basically a contract, albeit a special type; for a contract to subsist, there must be consensus *ad idem* between the parties; and what is formed by agreement can also be dissolved by agreement.

In the *Obanye* case, the Supreme Court held that if the conditions for the formation of a contract are fulfilled by the parties, and unless it is established that a party was fraudulently led into an agreement, the parties are bound by the terms of that contract. It is not the function of a court to make a contract for the parties or to rewrite one which they entered into. All other courts in Nigeria have generally upheld this principle which makes the NICN's recent position all the more curious especially when considered against the backdrop of the doctrine of judicial precedent.

Doctrine of stare decisis

Nigeria practices the common law system and there are a number of fundamental principles that run through the jurisprudence of most common law countries. One such doctrine is *stare decisis* [or judicial precedent]. It literally means "to stand by decided matters".[7] The Supreme Court per Onnoghen JSC espoused the doctrine in *Ardo v. Nyako & ors*[8] and stated the failure of courts below to follow previous decisions of the Supreme Court would only promote anarchy, chaos and judicial rascality.

The Supreme Court is at the apex of the pyramid of courts in Nigeria, followed by the Court of Appeal and then the various High Courts. The NICN is on the same level as the High Courts and therefore bound to follow the decisions of Court of Appeal and by extension the Supreme Court. In light of this, it would be somewhat puzzling as to how the NICN has

arrived a different decision on the same or related principle of law.

For the effective application of the *stare decisis* doctrine, a judgment is divided into *obiter dictum* and *ratio decidendi*, where the former is non-binding while the latter – the reason for the decision – has a binding effect. A lower court is bound to follow only the *ratio decidendi*. Similarly, a previous decision is not to be followed where the circumstances i.e., the facts or applicable law in that decision are distinguishable from those in the latter case. It therefore becomes necessary to interrogate the NICN decisions in *Duru* v *Skye Bank Plc,* and *Aloysius* v *Diamond Bank Plc* to determine whether distinguishable facts existed for the court to have departed from well-established positions of the law.

Critique of the NICN's recent decisions

The position taken by the NICN, in this recent line of cases, is that following the constitutional alteration, a new jurisprudence emerged which empowers the court to apply international best practices and therefore the old line of authorities that entitled employers to terminate without reason no longer constitutes binding authority. In this regard, the NICN relied on section 254C CFRN which confers it with exclusive jurisdiction to deal with any matter pertaining to the application of any international convention, treaty or protocol which Nigeria has ratified relating to labour, employment, workplace or industrial relations, or any civil causes or matters relating to international labour standards or international best practices in labour, employment and industrial relations. The NICN also referenced the Termination of Employment Convention 1982 (No. 158) and Recommendation No. 166 of the International Labour Organisation ("ILO") which require employers to give valid reasons for the determination of their employees' employment. In the court's opinion these represent current international best practices which the court is empowered and obliged to apply, regardless of the provisions of the parties' contract.

The NICN cases also purport to dislodge the principle on the measure of damages, available to an employee whose employment is terminated without the requisite notice. In *Western Nigeria Development Corporation v. Jimoh Abimbola*[9] where the contract of employment stated clearly that either party may terminate by giving one month's notice or by paying one month's salary in lieu of such notice, the Supreme Court per Ajegbo, JSC categorically posited that where such employee was given one month's notice before termination of his

appointment, he would have had no claim whatever on the employer, but where he was not given notice, all he is entitled to as damages is the one month's salary in lieu of notice. Although the apex court reinforced that position in *Mobil Oil Nigeria Limited v. Abraham Akinfosile*[10] and once again in *Obanye v. Union Bank,* the NICN has nevertheless decided that it can, in some instances award as much as the equivalent of two years' salary to employees as damages for wrongful or unlawful termination/dismissal.

In *Sahara Energy Resources Ltd v. Oyebola*[11] the Court of Appeal in upholding the above position stated that the previous Supreme Court authorities are not "the Rock of Gibraltar which cannot be moved", and that in the light of the Third Alteration to the Constitution, the principle established in the cases prior to the said alteration is no longer the regnant law; and that a new labour jurisprudence has been introduced in our legal system which demands a departure from the previous principle. The court further stated that section 254C (1) & (2) CFRN enjoin the NICN in the exercise of its jurisdiction, to "*have due regard to good or international best practices in labour or industrial relations*" and then concluded that it would be wrong for the courts to disregard this innovation and continue to deal with the measure of damages in total disregard of the changes wrought to the law by legislation. For the reasons outlined in the subsequent parts of this paper, we think, with respect, that the Court of Appeal and the NICN missed the point.

The Third Alteration to the CFRN– what does it actually empower the NICN to do? In the *Sahara Energy* case, the Court of Appeal acknowledged that the Constitution empowers the NICN to apply international best practices in labour and employment conventions and treaties ratified by Nigeria. The operative phrase is "ratified by Nigeria". As of today, the ILO Convention No. 158 and Recommendation No. 166 have not been ratified by Nigeria. Further the Convention states that ILO Member States are entitled to exclude the application of the Convention to certain classes of employees including those engaged for a specified period or time; those on probation or qualifying period; and those engaged on a casual basis for a short period. This can only be done at the stage of ratification.

In *Raphael Obasogie v. Addax Petroleum*[12]– one of the cases where these views were first tested – the NICN held that for a court to apply international best practices or conventions, there must be evidence that such conventions have been ratified and domesticated in Nigeria.

The court restated that parties are bound by the terms of a valid contract voluntarily entered into; that courts do not create a contract for parties but merely apply the terms of their agreement; and that when determining the rights and obligations of the parties to a contract, a court must respect the sanctity of the contract and not allow a term on which there was no agreement to be read into the contract. Above all, the court held that apart from not being part of Nigerian law, the ILO Convention No. 158 does not form part of the terms of the parties' agreement and must therefore not be allowed to negatively affect the parties' binding contract. The same NICN in these other cases sought to distinguish between international conventions ratified by Nigeria as referenced in section 254C (2) CFRN and international best practices under section 254C (1) (f) & (h) CFRN which need not necessarily be ratified by Nigeria before the court can apply them. We are unable to find constitutional backing for this distinction.

It is beyond cavil that in the interpretation of statutes, including the Constitution, the courts are bound to give the legislation at issue, its ordinary meaning. A literal reading of section 254C (1) (f) & (h) CFRN will reveal that all those provisions do is to confer exclusive jurisdiction on the NICN in disputes relating to international best practices in labour, employment, and industrial relation matters or international labour standards and nothing more. Nothing in those provisions should be read as authorising the NICN to accord the force of law to unratified conventions and treaties.

Section 12 CFRN is categorical on the non-effect of unratified international conventions and treaties in Nigeria. It is settled that in a case of an apparent conflict between the provisions of the Constitution that are general in nature and those that are specific, the specific provisions prevail for *generalibus specialia dorogant*[13]. On the question of the legal effect of unratified international conventions and treaties, section 254C (1) (f) & (h) CFRN which deal with jurisdiction of the NICN are the general provisions while section 12 CFRN which deals with the non-binding effect of unratified international conventions and treaties is specific and must necessarily prevail. We are of the considered view that it is immaterial that 254C (1) begins with the phrase "notwithstanding anything to the contrary in this Constitution …" and that this phrase only applies to a jurisdictional conflict between the NICN and any other court in Nigeria.

It is our view also, that international best practices (especially those that have no force of law in Nigeria) must be expressly incorporated

into contracts before they have the effect of changing the terms of the parties' agreements. It could not have been the intendment of the law to have the terms of an employment contract freely entered into by the parties to be governed by some obscure provision in an unratified treaty drafted by strangers in some far-flung parts of the world, and there is certainly nothing in the Constitution that grants the court a carte blanche to import extraneous terms into parties' agreements. The Supreme Court has long cautioned courts to be wary of looking outside the terms of contracts of employment in interpreting them as parties are bound by their contracts and to look outside the terms to avoid termination makes no meaning of the contract[14]. In *John Oforishe vs Nigerian Gas Company Ltd.*[15] the apex Court warned that once parties enter into a contract, on no account should extraneous terms, on which there was no agreement, be read into the contract.

Conclusion

In ending, it is instructive to note that the judgments in both the *Oforishe* case and in *Obanye v. Union Bank* were delivered by the Supreme Court after the NICN decisions albeit these cases were not interpreting 254C (1) (f) & (h) and (2) CFRN. Nonetheless, the Supreme Court repeated the well-established position that parties are bound by the terms of their agreements and that an employer is entitled to bring the appointment of his employee to an end for any reason or no reason at all. It therefore appears to us that we are now faced with an unfortunate situation where the Supreme Court and the NICN appear to be developing jurisprudence that fundamentally contradict each other.

In the famous words of Oliver Wendell Holmes, the prophecies of what the courts will do, in fact, and nothing more pretentious are what is meant by the law. Unfortunately, the ability of legal practitioners to predict with reasonable certainty and advise a client on the position of the law is now significantly impaired by the concurrent development of diametrically opposite lines of cases on the same question of law. This lack of clarity and legal certainty is also not conducive for doing business in Nigeria. We have considered this issue, and do not believe that, on this point, the Third Alteration to the CFRN has any earth-shaking effect being attributed to it or which warrants a departure from well-established positions of the law.

We restate that there is a clear procedure for the ratification of international conventions and treaties in Nigeria and until such a procedure is followed, courts in Nigeria cannot

validly apply such, to override express terms of parties' agreements freely entered into. Additionally, and assuming that the Constitution indeed empowers the NICN to apply unratified international conventions and treaties as international best practices, such practices must be expressly incorporated into the parties' contract. This point appears to have been overlooked.

While we agree that best practices (local and international) require employers to provide reasons for terminating the employment of their workers, the position of Nigerian law, despite the best intentions of the NICN, remains that it is entirely within the prerogative of the employer or indeed employee to decide whether or not to provide reasons for termination. Alternatively, potential employees are perfectly entitled to negotiate the terms of their prospective employment contracts to require the provision of reasons for termination.

In the final analysis, while NECA may have taken the reasonably prudent step – on the basis of what it presumes the law to be – of directing employers to provide reasons for terminating, in our considered opinion the law has not changed. Under Nigerian contractual legal framework, parties are bound by the terms of their contracts freely entered into, and what is formed by agreement can also be dissolved by agreement. Employment contracts are no exception. Within the bounds of an employment contract, an employer or employee may terminate the employment relationship for any reason or for no reason at all. Similarly, where parties have agreed to one month's notice or salary in lieu of notice, all that is required of such party is to give the agreed notice or pay salary in lieu of such notice. Courts in Nigeria are not empowered to award damages in excess of what the aggrieved party would get had the proper procedure been adopted in the termination of employment.

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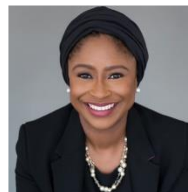

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End Notes

[1] Please see section 6(3) & (5) CFRN.

[2] *Duru v. Skye Bank Plc [2015] 59 NLLR (Pt. 207) 608 at 687-704.*

[3] *Aloysius v Diamond Bank Plc [2015] 58 NLLR 92.*

[4] *Shitta-Bey v. Federal Public Service Commission (1986) 1 SC 26.*

[5] *Osisanya v. Afribank Nig. Plc [2006] 1 NWLR (Pt. 1031) 565 SC.*

[6] *Obanye v. Union Bank (2018) LPELR-44702(SC).*

[7] It is an abbreviation of the Latin phrase *stare decisis et non quieta movere* which means to stand by decisions and not to disturb settled matters.

[8] *Ardo v. Nyako & ors (2014) LPELR-22878(SC).*

[9] *Western Nigeria Development Corporation v. Jimoh Abimbola (1966) NMLR 381 at 382.*

[10] *Mobil Oil Nigeria Limited v. Abraham Akinfosile (1969) 2 Sc. 115 at 119-120.*

[11] *Sahara Energy Resources Ltd v. Oyebola (2020) LPELR-51806(CA).*

[12] *Raphael Obasogie v. Addax Petroleum* (Unreported NICN judgment) in Suit No. NICN/LA/257/2013) delivered on 12 April 2018.

[13] Special things derogate from general things. Please see *Edet Akpan v. The State (1986) 3 NWLR (Pt 27) 225).*

[14] *Layade v. Panalpina World Transport Nig. Ltd (1996) LPELR-1768(SC); Osoh & ors v. Unity Bank Plc (2013) LPELR-19968(SC).*

[15] *John Oforishe vs Nigerian Gas Company Ltd. (2017) LPELR - 42766 (SC)*