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CASE COMMENT: SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA v. MINISTER OF PETROLEUM RESOURCES & 2 ORS (2022)

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Executive Summary

On 28 July 2022, the National Industrial Court of Nigeria ("the NIC"), delivered a judgment in *Shell Petroleum Development Company of Nigeria v. Minister of Petroleum Resources and 2 Ors* ("SPDC case"),[1] where the NIC held that the Guidelines for the Release of Staff in the Nigeria Oil and Gas Industry 2019 ("Guidelines") were valid and applicable to employment contracts in the petroleum industry.

The judgment in the SPDC case differs from an earlier decision of the NIC in *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) & 3 Ors v. Chevron Nigeria Limited* ("PENGASSAN case"),[2] in which the NIC held that the Guidelines were ultra vires the powers of the Minister of Petroleum and were therefore inapplicable to employment contracts in the petroleum industry.

This commentary considers the implications of the SPDC case in relation to the Guidelines and the propriety or otherwise of the NIC's application of the Petroleum Industry Act 2021 ("PIA") in validating the Guidelines.

Until the judgment in the SPDC case is reversed on appeal, all companies operating in the oil and gas industry may require the approval of the Minister of Petroleum Resources before disengaging any staff. Failure to comply with this directive attracts a fine of USD250,000.00.

[1] Suit No. NICN/ABJ/178/2022) per Hon. Justice B. B. Kanyip, PhD ("Kanyip J.")
[2] per Hon. Justice E. A. Oji in Suit No: NICN/LA/411/2020

Introduction

On 28 July 2022, the National Industrial Court of Nigeria ("the NIC"), delivered a judgment in *Shell Petroleum Development Company of Nigeria v. Minister of Petroleum Resources and 2 Ors* ("SPDC case"),[3] where the NIC held that the Guidelines for the Release of Staff in the Nigeria Oil and Gas Industry 2019 ("Guidelines") were valid and applicable to employment contracts in the petroleum industry.

The judgment in the SPDC case contradicts an earlier decision of the NIC in *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) & 3 Ors v. Chevron Nigeria Limited* ("PENGASSAN case"),[4] in which the NIC held that the Guidelines were ultra vires the powers of the Minister of Petroleum and were therefore inapplicable to employment contracts in the petroleum industry. For context, it is important to commence this commentary by providing a summary of the PENGASSAN case and then examining the NIC's judgment in the SPDC case.

The PENGASSAN Case

In September 2020, Chevron Nigeria Limited ("the defendant") embarked on a redundancy exercise because of the adverse effect of the coronavirus pandemic on its business operations. Its employees who are members of PENGASSAN were notified of the defendant's intention to reduce its workforce at a meeting held in Lagos. Following the defendant's decision to reduce its workforce by 25%, the claimants instituted an action at the NIC alleging that the defendant had embarked on the redundancy exercise without the written approval of the Minister of Petroleum in contravention of the Guidelines.

The NIC per Hon. Justice E. A. Oji, PhD held among other things that the Minister of Petroleum Resources ("Minister") is not empowered under Regulation 15A of the Petroleum (Drilling and Production) Regulations 1969 (as amended) ("the Regulations"), nor Section 9 of the Petroleum Act, Cap P10 LFN, 2004 to regulate and introduce terms into contracts of employment entered between parties in their respective capacities, and as such, the Guidelines were beyond the scope of the Minister's powers.

The NIC held further that the Guidelines were not referred to nor incorporated into the claimants' contracts of employment and cannot be read into them to obligate the defendant to obtain the written approval of the Minister of Petroleum Resources before embarking on any staff reduction and/or redundancy exercise. The NIC also held that even if the Guidelines were valid, the suit was premature as the said Guidelines prohibit the release of staff without approval of the Minister but do not prevent the process leading to the identification of persons to be so released.

[3] Suit No. NICN/ABJ/178/2022) per Hon. Justice B. B. Kanyip, PhD ("Kanyip J.")
[4] per Hon. Justice E. A. Oji in Suit No: NICN/LA/411/2020

The SPDC case

Shell Petroleum Development Company of Nigeria ("the claimant") terminated the employment of Mrs Gbenuade Joko Olanitori ("Mrs Olanitori") in a letter dated 2 June 2021. Mrs Olanitori then petitioned the Department of Petroleum Resources (DPR), now replaced by the Nigerian Upstream Petroleum Regulatory Commission ("the Commission"), arguing that her employment was terminated by the claimant without due process i.e. that the claimant did not follow the provisions of the Guidelines made under Regulation 15(a) of the Petroleum (Drilling and Production) (Amendment) Regulations 1988 ("the Regulations"), which were made pursuant to section 9 of the Petroleum Act 2004. The Guidelines make it mandatory for all companies operating in the oil and gas industry to seek and obtain the approval of the Minister of Petroleum Resources ("the Minister") through the erstwhile DPR (now the Commission) before releasing any staff and failure to comply with this directive attracts a fine of USD250,000.

Upon being queried by the DPR, the claimant maintained that it properly terminated the employment of Mrs Olanitori according to her contract of employment and that the Guidelines under which she complained to the DPR are inapplicable in the circumstance. Despite several correspondences between the parties in the matter, the Commission maintained that there was a violation of the Guidelines and imposed a fine of USD250,000 ("the fine") on the claimant. The claimant then approached the NIC to determine several questions against the defendants (the Minister, the Commission and the Attorney-General of the Federation) regarding the validity of the Guidelines and the actions taken thereby, having regard to sections 9 and 12 of the Petroleum Act, Section 15(a) of the Regulations, the PENGASSAN case, and the Supreme Court decision in *Shell Petroleum Development Company of Nigeria Limited v. Nwaka* ("Nwawka").[5]

In analysing the matter at hand, Kanyip J stated that "[b]ut for this fine, the claimant would not have come to this Court as it did in this matter, hence the claimant's cause of action." Therefore, he held that the Claimant's cause of action culminated only when the fine of USD250,000.00 was imposed on the Claimant on 28 January 2022, which means that the applicable law is the PIA and not just the Petroleum Act. He went further to state that though the PIA did not repeal the Petroleum Act, it supplanted it in several respects, and this was a distinguishing factor in comparison to the PENGASSAN case and others before it.

Specifically, Kanyip J referred to section 317(2) of the PIA, "all rules, orders, notices or other subsidiary legislation made under the Petroleum Act…shall continue to have effect as if made under the corresponding provisions of [the PIA]"; section 317(1) of the PIA saves everything done before 16 August 2021 (when the PIA came into effect) under the Petroleum Act, and that the same shall be deemed to have been done under the corresponding provisions of the PIA;

[5] (2003) 6 NWLR (Pt. 815) 184

section 317(3) of the PIA, "all references in any other enactment to provisions of the Petroleum Act…shall be construed as references to the corresponding provisions of [the PIA]."

On whether the Guidelines were made beyond the powers of the Minister in light of the provisions of section 9 of the Petroleum Act that enumerates the items on which the Minister may make regulations, Kanyip J posited that by virtue of sections 3(1)(a) and (i) (the Minister's power to formulate, monitor and administer government policy in the petroleum industry; and delegate in writing to the Chief Executive of the Commission or Authority any power conferred under the PIA), section 6 (Minister's responsibility to implement government policies in the upstream sector), section 10 (power to enforce regulations, policies and guidelines previously administered by the DPR), section 10(f) (power of the Commission to issue guidelines) and section 26(1) of the PIA (power of the Commission to require answers relevant to an inquiry, inspection, examination or investigation), the Guidelines are adequately accommodated and are not ultra vires the Minister's powers as they "represent government employment policy in the petroleum industry" which the Minister is empowered to enforce under the PIA.

On whether the Guidelines were validly made by the DPR considering that section 12 of the Petroleum Act forbids the Minister from delegating his powers to make regulations, Kanyip J held that once the aforesaid section is read along with sections 3(1)(a) and (i) of the PIA, it is apparent that the restrictions on the Minister's powers to delegate the making of regulations has been done away with, and as such, the Guidelines were validly made by the DPR having regard to the saving provisions of the PIA.

On whether the Guidelines applied to the case, having not been incorporated into Mrs Olanitori's employment contract, Kanyip J. distinguished all the decisions relied on by the claimant, including *Nwawka* and the PENGASSAN case, by stating that the said cases predated the PIA and did not consider the applicability of section 3(1)(a) and (i) as well as other provisions of the PIA or even the applicability of the Interpretation Act, CAP I23, LFN 2004 ("Interpretation Act") to the issues canvassed before the respective courts. He went further to hold that in light of the above provision, the incorporation of the Guidelines into Mrs Olanitori's employment contract was unnecessary. Kanyip J also held that the privity argument canvassed by the Claimant on this point was inapplicable as the privity rule is amenable to legislative control, in this case, the Guidelines.

On whether the Guidelines can empower the Commission to compel the Claimant to recall and reinstate an ex-employee, Kanyip J held that the rule against foisting a willing employee on an unwilling employer is a common law rule and that the Guidelines, being subsidiary legislation as defined by the Interpretation Act and the 1999 Constitution, must take precedence. Consequently, Kanyip J held that by failing to obtain the approval of the Minister before terminating Mrs Olanitori's employment, the Claimant could be compelled by the Commission to reinstate her for contravening the Guidelines.

On the whole, Kanyip J resolved all the questions for determination against the Claimant, refused all the reliefs sought and held that the Claimant is bound to comply with the directive to recall and reinstate Mrs Olanitori, and also pay the fine of USD250,000 imposed on it by the Defendants.

Commentary

While the NIC was right to consider the PIA to have a holistic assessment of the case, it is our opinion that the PIA was inapplicable to the SPDC case, as to rely on the same would amount to a statute having a retroactive effect, which can only occur in certain circumstances. In *Ojokolobo v. Alamu*,[6] the Supreme Court per Bello, CJN held that "[i]t is a cardinal principle of our law that a statute operates prospectively and cannot apply retrospectively unless it is made to do so by clear and express terms or it only affects purely procedural matters and does not affect the rights of the parties." See also *Miscellaneous offences Tribunal v. Okoroafor*,[7] where the Supreme Court pointed out that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication.

Section 317(1) of the PIA provides that anything done or to take effect prior to the PIA but pursuant to the Petroleum Act, *and* having a continuing effect with respect to the taxation of company profits or any matter connected thereto, shall have effect as if done under the corresponding provisions of the PIA. While section 317(2) provides that all rules, notices and other subsidiary legislation made under the Petroleum Act shall have effect as if done under the corresponding provisions of the PIA. Furthermore, section 317(3) of the PIA provides that all references to the Petroleum Act shall be construed as references to the corresponding provisions of the PIA.

The foregoing provisions would apply to all existing subsidiary legislation as of the date the PIA came into force, which was on 16 August 2021. While Oji J had held that the Guidelines could not operate to obligate the defendant to obtain the Minister's consent before embarking on a redundancy exercise in the PENGASSAN case, the learned trial judge did not declare the Guidelines void as this was not a question for determination nor a relief claimed before the NIC. In that case, the Claimant only requested two declaratory reliefs as follows:

(1) A Declaration that the Defendant is bound by the provisions of the Guidelines for the Release of Staff in the Nigeria Oil and Gas Industry 2019 dated 17 October 2019.

(2) A Declaration that the refusal of the Defendant to obtain the necessary approvals of the Minister of Petroleum Resources before embarking on any staff reduction or redundancy exercise affecting members of the Claimants in its employ is manifestly illegal, unjust and wrongful.

[6] (1987) 3 NWLR (Pt. 61) 377 at 396-397 paras. H-A

[7] (2001) FWLR (Pt. 81) 1730 at 1756

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Therefore, the Guidelines continued to subsist after the PENGASSAN case. Nonetheless, it is our opinion that Kanyip J erroneously applied the provisions of the PIA to the SPDC case considering that the fine against the Claimant was issued based on Mrs Olanitori's termination which had already occurred on 2 June 2021 before the coming into force of the PIA on 16 August 2021. As stated earlier, statutes ought to be given prospective effect. Therefore, the provisions of the Guidelines as read in line with the PIA, could only affect contraventions that occurred after the PIA came into force.

One other point to consider is the implication of 317(2) and 3(1)(a) and (i) of the PIA on the SPDC case. Can the aforesaid provisions be read in such a way that obviates the need for the Minister to delegate his powers to make regulations to the Commission in writing? In the absence of such written delegation as required under the PIA, it would appear that the Guidelines are still open to challenges.

Conclusion

From the foregoing analysis, it is doubtful whether the NIC's position, that the PIA applies to the SPDC case, is the correct interpretation of the law. It is also doubtful that the PIA can ratify the Guidelines in the absence of a written delegation by the Minister to the Commission to make such regulations. We hope that the several knotty issues raised in this case would be resolved if this matter proceeds on appeal.

However, until any intervention by the appellate courts, companies operating in the oil and gas sector would be expected to notify the Minister and obtain approval before disengaging staff to avoid penalties and other unpleasant consequences.

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