



COMMERCIAL DISPUTES AND ACCESS TO COURT: TILL COVID-19 “DO US PASS”?

As a sequel to our recent Thought Leadership publication on the management of commercial transactions amid the lockdown in Nigeria arising from COVID-19, this publication addresses questions relating to access to court and claims management.

On 23 March 2020, the Chief Justice of Nigeria (“CJN”) issued a circular which directed all Heads of Court to “suspend Court sittings for an initial period of two weeks at the first instance, except in matters that are urgent, essential or time-bound,” followed by another on 06 April 2020 which suspended court proceedings until further notice. Barely a week after the CJN’s initial circular, the President, on 30 March 2020, directed a 14-day lockdown of Abuja, Nigeria’s capital, along with Lagos State, the commercial hub, and Ogun State (together, “**Lockdown States**”). The President extended the lockdown in the Lockdown States by another 14 days on Monday, 13 April 2020, and several state governments have since introduced similar measures in their respective states.

Even though the President’s COVID-19 Regulations that followed the lockdown directives contain exemptions for services that are deemed “essential” during the lockdown, this does not include

judicial services generally. Rather, the Regulations retain the narrow and vague carve-out in the CJN’s circular for court matters “*that are urgent, essential or time-bound.*” As a factual reality however, the lack of specific exemption for judicial services generally has resulted in judiciary workers being caught by the lockdown. Consequently, courts of record have practically shut down in the Lockdown States and several other States.

This unusual situation has rattled many potential litigants and raised some key legal and practical questions which we now proceed to address below.

Could new claims be filed and pending matters proceed virtually during the lockdown?

Unlikely.

Because judicial services are affected by the lockdown, the chances of filing any new claims in the Lockdown States whilst the lockdown subsists is virtually zero.¹

The Nigerian judiciary, unfortunately, has yet to acquire the necessary technology for virtual filing of court processes and lacks the facilities for virtual proceedings.² Therefore, for now, prospective lawsuits, along with pending proceedings, would likely have to await the reopening of courts when the lockdown is lifted.

It is gratifying, however, to note that the Attorney-General of the Federation (“AGF”) issued a press release on 20 April 2020 which identified with the challenges that the lockdown has created in the justice sector and highlighted the thoughts and plans on how to mitigate these challenges in the short and long term. Measures contemplated in the AGF’s statement include some form of virtual filing of court papers, remote (presumably non-evidential) hearing by judges in chambers and lawyers via teleconference, publication of court decisions on publicly-accessible court websites, and, at worst, strictly controlled

¹ For criminal matters, there is comparatively some room for manoeuvre because the prosecutorial authority is vested in the government at federal and state levels which can make necessary arrangements to secure the attendance of both judiciary workers and officers as and when the need arises.

² Interestingly, in 2012, the Judiciary adopted a Judiciary Information Technology Policy which was meant to guide courts’ use of ICT, but no significant traction has been made in that regard to date. A couple of

physical access to courts that would conform to the necessary precautions impelled by the COVID-19 pandemic.

Separately, the Lagos State Judiciary is reportedly working on draft practice directions that would facilitate virtual filing and hearing of court cases. Although the practice directions have yet to be finalised and issued, we understand that some of the matters being considered include permitting filing of new actions by sending scanned or PDF copies of the relevant court papers by email, using electronic transfers to pay the court registry for filing, service of the filed papers on the opponent by email, and conducting a hearing using digital audio and video-conferencing platforms.

The hope is that the relatively easy-to-deploy aspects of the measures mooted in the AGF’s press release and the draft practice directions of the Lagos State Judiciary will begin to be implemented sooner rather than later, to ensure that courts do not stay shut for much longer if the lockdown period lingers.

Without amendment to current laws, could courts legally transit to filing and hearing of matters via digital platforms during the lockdown period?

Debatable, but potentially doable.

Whilst a quick transition to virtual filing and conduct of judicial proceedings in the wake of the lockdown is highly desirable, the legal impediment to implementing such measures cannot be overlooked.

years ago, the immediate past Chief Justice of the Federation also introduced the Legal Mail, which was essentially an electronic mail system for Nigerian lawyers, with the objective that court papers and communications with the Supreme Court Registry would progressively be served via that platform. Legal Mail, it was hoped by many practitioners, would be the first step in a measured transition to a fully digitized court system that can support virtual filing of court processes. That hope has not been met just yet.

As a constitutional matter, court proceedings are generally required to be held in public.³ Any proceedings conducted on virtual platforms would be faced with the challenge of satisfying this public access requirement. Hence, beyond the technical issue of finding workable technology for entertaining cases on digital platforms lies the legal question of the constitutionality of conducting cases in that manner.

Ideally, amendment to the law to accommodate virtual hearings would be most appropriate, as hinted in the AGF's press release of 20 April 2020, but this is not a feasible option during the lockdown both in terms of timing and process. Given this limitation, some have expressed the view that courts should rely on a so-called "doctrine of necessity" (the necessity arising from the extraordinary lockdown impelled by COVID-19) as a basis for departing from the constitutional requirement of public hearing. The challenge with a necessity argument, of course, is that its exact jurisprudence remains uncertain and there is no judicial guidance on where, why and how it could legitimately be relied upon to defeat express constitutional and/or statutory requirements.

An alternative argument is that the Constitution imposes the requirement for public hearings as part of the fundamental right to a fair hearing conferred on each party before a court, and that such a right is personal and waivable; therefore, if parties agree to a virtual hearing of their civil matter because of the challenges with physical hearing occasioned by the lockdown, their consent should suffice as a legal basis for departing with the public hearing requirement. This viewpoint, at a minimum, appears plausible to us and seems to be reflected somewhat in a provision proposed for inclusion in the draft practice directions of the Lagos State Judiciary which contemplates parties' indication of voluntary participation in remote hearings. The obvious challenge is

that a party which seeks to delay proceedings could easily tie a court's hands by withholding consent to a virtual hearing.

There may be no need, however, to seek to excuse the public hearing requirement of the Constitution. It is our view that courts could substantially meet that requirement even in a virtual setting by using technology which allows the public real-time virtual access on the one hand and ensures equal and balanced participation of parties and their counsel on the other hand. In a nutshell, courts could: (a) stream their virtual sessions on digital platforms that permit any interested member of the public with a digital device and internet service to observe and listen to proceedings in real time; (b) use appropriate audio-visual meeting software to conduct each session with counsel and parties, with appropriate competence available to address any technical hitches that the court, counsel or party may encounter; (c) allow filing and service of court papers via emails, and then upload these documents to the court's own dedicated website for public access; and (d) make its judgments and rulings accessible to the public by uploading them to the court's dedicated website.

Considering that the Constitution provides only for public hearings—and not necessarily physical public hearings—and reckoning with the new reality created by the COVID-19-induced lockdown, it appears that virtual proceedings which sufficiently observe the above protocols would be treated as legally valid. Indeed, some courts in the United Kingdom with similar public hearing requirements as Nigeria have since gone on to successfully conduct virtual hearings. It is not inconceivable that Nigerian courts could follow suit soon, especially if they hear persuasive arguments on the legal defensibility of doing so.

³ See Constitution of the Federal Republic of Nigeria, 1999, section 36(1) and (3).

Could cases be commenced or continued using alternative dispute resolution during the lockdown period?

Yes, with appropriate arrangements.

In contrast to the courts, there are opportunities for settling disputes through alternative dispute resolution (ADR) means such as arbitration and mediation during the lockdown period.

In recent weeks, several alternative dispute resolution (ADR) institutions have issued notes and guidelines to facilitate continuing efficiency in, and reliability of, proceedings despite the COVID-19 disruption. As a result, arbitration and mediation hearings and meetings are being conducted, and documents examined, via digital platforms that create as close to a physical reality as virtual technology can permit.

Hence, parties to contracts which contain ADR mechanism can, with adequate legal and technological support, proceed to resolve their disputes amid the lockdown using those mechanism.

For time-sensitive claims which arise during the lockdown, would time-count for purposes of limitation of action be deferred?

Probably.

Amid the lockdown, certain time-sensitive causes of action could arise for which prompt access to court would normally be imperative. For example, under the Public Officers Protection Act (“POPA”), actions against public officers for acts “done in pursuance or 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” must be commenced within 3 months from the date of the offending conduct of the public officer.

Were such a claim as contemplated by POPA to arise and it turns out that the lockdown will

linger for up to three 3 months, a legitimate question as to whether the claim would nonetheless become time-barred will necessarily arise.

We project that in cases of this nature, courts are likely to postpone the date of accrual of the action to the earlier of the date on which the lockdown is lifted or judicial services resume.

Even though there appears to be no direct precedent on the point (because the lockdown measures precipitated by COVID-19 are themselves unprecedented), the Limitation Act and various State Limitation Laws contain exceptions to computation of time for the purposes of limitation of action. In a nutshell, these exceptions defer the counting of time in cases of disability, fraud, confinement, concealment and mistake (together, “impairments”) from the date that all the facts necessary to initiate the claim accrued to the date when the impairments ceased / were discovered.

The obligation to stay at home during the lockdown, in our view, practically falls within the general rubric of an official confinement. And where confinement is a recognised impairment for which the running of time under the relevant limitation statutes is to be deferred, it is difficult to see any reason why the lockdown would not prompt such a deferment in respect of causes of action that accrue during its subsistence.

Would time be extended for prospective claims that become time-barred during the lockdown?

Hard to tell – but there is a potential solution.

A different scenario from the one considered above could also arise where a cause of action has since accrued but the prospective claimant finds itself unable to file an action within the time prescribed under the limitation statutes because the lockdown began before the court papers were ready for

filing and remained in force until the deadline for filing passed.

To illustrate, a prospective claimant in a debt-recovery action in Lagos State which must file its claim within 6 years from 27 April 2014 when the debt became due would effectively be unable to meet the 26 April 2020 deadline for filing the claim because of the lockdown, even if the court papers were ready for filing since close of business on 30 March 2020. In such a scenario, the question arises as to whether the duration of the lockdown must be included or discounted from the computation of the 6-year limitation timeframe. In other words, will courts interpret limitation statutes purposively in order to treat limitation periods as having been tolled for the period of the lockdown?

Again, there is no direct Nigerian case law guidance on this point because of the unprecedented nature of the lockdown occasioned by COVID-19. An argument could be made in favour of tolling from the point of view that limitation statutes could not have contemplated that commencement of action would effectively be curtailed by court closures occasioned by an official lockdown.⁴ Yet, a counter-argument against tolling could also be made from the point of view that limitation periods generally span several years and are construed strictly, so that a prospective claimant which chooses to delay filing until very close to the limitation deadline must bear the risk if some intervening event ultimately renders filing impossible.

Given the uncertainty around how the courts will decide on tolling of limitation periods during the lockdown, the safest option, if virtual filing remains unavailable throughout

the lockdown period, may well be for prospective claimants whose claims have or will become time-barred during the lockdown period to have their relevant court papers prepared and ready for filing on the very next business day after the lockdown is lifted.

We say so because the Interpretation Act provides inter alia that a reference by a statute to a period of days shall, where the last day of that period is a holiday, shall be construed as “continuing until the end of the next following day which is not a holiday.”⁵ “Holiday” for the purpose of the Interpretation Act means a day which is a Sunday or a public holiday,⁶ and under the Public Holidays Act, a “public holiday” includes “any day declared as a work-free day.”⁷ The lockdown period, in our view, is clearly intended to be work-free days – at least for the non-essential public service.⁸ It follows, therefore, that if the deadline for filing a claim under relevant limitation statutes falls within the lockdown period, then that claim may nonetheless be validly filed on the next business day after the lockdown period.

This limited window invariably makes it imperative for affected companies to take proactive steps during this lockdown period. Now, rather than later, is the time to engage counsel, seek advice and merits review of the prospective claims, prepare and vet the necessary court papers, and ensure that counsel has the capacity and resources to file the claims by no later than the next business day from the day the lockdown is lifted.

⁴ This argument, in a sense, would effectively be urging the court that the application of the earlier-considered *impairment* exemptions (i.e. disability, fraud, confinement, mistake etc.) should not only defer the *beginning of time-count* for limitation purposes, but also defer the *termination of time-count* for a limitation period that is already running. In other words, even though the *impairment* exemptions strictly relate to the day that a relevant limitation period should start to count, the court would be urged to apply the same analysis to hold that whilst the lockdown—which is in the nature of a confinement—subsists, a limitation period which has already begun to count would be frozen and only resume running when the lockdown is lifted.

⁵ Interpretation Act, section 15(2)(b).

⁶ *Ibid.*, section 15(5).

⁷ Public Holidays Act, section 2(3).

⁸ We say so in light of Paragraph 1(3) of the COVID-19 Regulation which provides as follows: “**All citizens in [the Lockdown States] are to stay in their homes. Travel to or from other states should be postponed. All businesses and offices within these locations should be fully closed during this period.**” (Our emphasis). Even though the provision does not specifically use the phrase “work-free”, the intent, in our opinion, is clear from the foregrounded provisions.

Are there steps which prospective disputants can take in anticipation of the lifting of the lockdown and resumption of judicial services?

Definitely!

There are practical steps that can be taken during the lockdown period, in preparation for when judicial services return or virtual filing and conduct of cases become available.

For starters, some rules of court and other statutes impose certain pre-action procedure which intending claimants must comply with before filing a claim. To commence a valid action against some government agencies and State-owned corporations, a prospective claimant must first serve a one-month pre-action notice on the relevant agency or corporation; to commence a civil claim at the Lagos State High Court, a prospective claimant must first serve a memorandum of claim on the prospective defendant (and a reminder if the defendant fails to respond to the initial memorandum of claim); and to challenge a tax decision / assessment at the Tax Appeal Tribunal (“TAT”), a potential taxpayer must have first served an objection on the Revenue, to mention a few examples. Whilst awaiting the resumption of judicial services, prospective claimants should take steps, to the extent possible, to comply with such pre-action procedural requirements. This could be achieved in many cases via electronic means of communication such as emails.

Further, prospective litigants can also use the lockdown period to prepare their relevant court papers for filing as soon as the lockdown is lifted. This would be particularly helpful for intending claimants whose claims will have become time-barred by the end of the lockdown period, as discussed earlier. Moreover, there is a likelihood that civil and commercial cases in court will be conducted on an accelerated basis when judicial services resume, if the views expressed in the AGF’s

press release on 20 April 2020 is acted upon by the courts. Courts could make orders abridging the time for taking certain procedural steps as a way of making up for lost time. Considering this, it may be prudent for prospective disputants to ensure that they prepare adequately for their cases and have effective case management measures in place during the lockdown, in order to launch seamlessly when judicial services return.

As a corollary to the above point, prospective litigants could also serve advance soft copies of their yet-to-be-filed court papers on their opponents, to minimise any potential delaying tactics. Likewise, if the official email address—where one is available—of the relevant court/tribunal registry where an action is sought to be filed is known, it may be helpful to send advance soft copies of the court papers to that registry’s email address, with a cover email notifying the court that the lockdown has rendered physical filing at the registry impracticable but that this would follow as soon as the lockdown is lifted.⁹ This practical step, in our view, could significantly bolster the persuasiveness of any future arguments for the relevant court papers to be deemed to have been filed on time.

Finally, for claims arising out of contracts which contain arbitration agreements or provide for other forms of alternative dispute resolution, the feasibility of proceeding with the arbitration or other mode of dispute settlement via digital platforms means that those proceedings need not await the lifting of the lockdown period. For arbitration especially, it makes sense to start now rather than later because the arbitral process—from commencement, through the issuance of an award, to submission of the award to court for recognition and enforcement—must be concluded within the same general limitation period that would apply if parties had chosen litigation.

⁹ For tax appeals at the Lagos Zone of the TAT, for instance, there seems to be an opportunity to send courtesy copies of the proposed originating court papers to the TAT now, and then file the papers properly when the TAT Registry reopens. Whilst any document sent to the TAT via email will not be regarded as filed until it is eventually presented physically at the

TAT Registry, the showing (through the transmission of the email) that the document was ready for filing at the time it was emailed to the TAT is likely to provide a compelling basis for the TAT to extend time for filing the tax appeal when the TAT Registry reopens.

Conclusion

In the final analysis, COVID-19 and the lockdown which it has necessitated in Nigeria have undoubtedly disrupted the judicial system and may seem at first blush to have placed prospective and pending disputes in the cooler until courts are open again. Yet, a lot can be achieved amid the lockdown with the right tools and legal assistance, especially for businesses looking to gain considerable traction on their disputes, whether in court, arbitration, mediation or other forms of ADR.

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QUALIFICATION

This publication contains general information only and Templars is not by this publication providing professional legal advice or services. The answers to the FAQs are not exhaustive, but are intended to provide some guidance on managing disputes and access to judicial services in the wake of the COVID-19-induced lockdown. If you require further details or clarification or would like us to provide legal advice on the subject, please contact any or all of the above listed persons or reach out to us at info@templars-law.com.