



SHELL PETROLEUM DEVELOPMENT CO. LTD. v. MINISTER OF PETROLEUM: A NEW LEGAL REGIME ON THE RELEASE OF NIGERIAN EMPLOYEES IN THE PETROLEUM INDUSTRY BECKONS

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1. INTRODUCTION

The National Industrial Court of Nigeria (“**NICN**”) has disrupted the old and long-established labour jurisprudence on the power of the Minister of Petroleum Resources (“**Minister**”) to regulate private contracts of employment between operators in the petroleum industry and their employees.

While the power of the Minister to regulate operations and operators in the petroleum industry was never in doubt, a school of thought, which appeared to enjoy an overwhelming majority, was of the opinion that the Minister’s wide and seemingly overbearing regulatory powers did not extend to private contracts of employment between operators in the petroleum industry and their employees.

This line of thought would appear to have been dealt a mortal blow by the recent ground breaking decision of the NICN in (the “**Decision**”)¹. The implication of the Decision is that the Minister has regulatory powers over contracts of employment between operators in the petroleum industry and their employees. The wider implication of the Decision is that the Minister now appears to have total control over the operations and operators in the petroleum industry.

Given the significant impact of the Decision on the old and long-established labour jurisprudence, Templars thought leadership will publish a series of articles that will review and critique the Decision. This article, which is the first in the series, will highlight the key takeaways from the Decision.

2. THE GUIDELINES

Against the backdrop of the Nigerian content policy of the Government of Nigeria which seeks, among other things, to provide security of employment for Nigerians, the Minister has to date issued two Guidelines in 2015 and 2019 for the Release of Staff in the Nigerian Oil & Gas Industry (the “**Guidelines**”)

¹ *Suit No. NICN/LA/178/2022 – Shell Petroleum Development Company Limited (“SPDC”) v. Minister of Petroleum Resources & 2 Others* (unreported) delivered by the President of the National Industrial Court of Nigeria, His Lordship, Honourable Justice B.B. Kanyip, Ph.D., PNICN on 28 July 2022.

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with a view to regulating and monitoring the spate of employments and terminations in the petroleum industry. Though the 2019 Guidelines replaced the 2015 Guidelines, both Guidelines were made pursuant to Regulation 15A of the Petroleum (Drilling and Production) Regulations 1969 (as amended in 1988) which itself was made pursuant to Section 9 of the Petroleum Act Cap P10 LFN, 2004.

The 2019 Guidelines as well as the 2015 Guidelines require an employer who is the holder of an oil mining lease, license, or permit issued under the Petroleum Act or Regulations, or who is registered to provide any service in the Nigerian Oil and Gas Industry to obtain Ministerial Approval² through the Director of the Department of Petroleum Resources for the release of any of its Nigerian employee.

While the 2015 Guidelines did not provide for penalties for non-compliance, under the 2019 Guidelines, any person who fails to comply with its provisions is liable to various degree of penalties for various categories of offences, including fines, suspension or cancellation of the operator’s licence or permit, etc.

3. THE OLD LABOUR JURISPRUDENCE

In several decisions handed down by the Nigerian courts, the 2015 and 2019 Guidelines as well as Regulation 15A of the Petroleum (Drilling and Production) Regulations, pursuant to which the Guidelines were made, have separately been held to be *ultra vires* the powers of the Minister.³

The kernel of the old labour jurisprudence was that the employer is not obligated to obtain the written approval of the Minister before disengaging an employee in the petroleum industry. The reasoning was that there is nothing in the relevant laws (Petroleum Act and Regulations made thereunder) that vest the Minister with power to regulate private contracts of employment, or to introduce terms into a contract of employment that the Minister is not a party to.

This was the state of the law before the Decision in Shell case. It is pertinent to make the point that the earlier judgments on the Guidelines did not deal with or indeed strike down the power of the Minister to sanction erring operators under the Guidelines. The thrust of the earlier judgments was that where the termination of an employee is in compliance with the contract of employment, such termination will not be liable to be declared wrongful or set aside by the court for non-compliance with the Guidelines. By extension of logic, reinstatement of the employee was not grantable by the courts for failure to obtain Ministerial consent under the Guidelines.

4. THE SHELL CASE

The facts of the Shell case in brief is that Shell had employed Mrs. Gbenuade Joko Olanitori (the “**Employee**”) in 2008 and terminated her employment on 2 June 2021. The Employee petitioned the then DPR (now replaced by the Nigerian Upstream Petroleum Regulatory Commission (“**NUPRC**”)) contending that her employment was terminated without due process i.e. that Shell did not follow the provisions of the Guidelines to obtain the prior consent of the Minister.

² That is the Minister of Petroleum Resources.

³ The authorities relied on by the claimant include: *Chukwumah v. Shell Petroleum Development Company of Nigeria* [1993] 4 NWLR (Pt.289) 512 SC, *Shell Petroleum Development Company of Nigeria Limited & ors v. Nwawka* [2003] 6 NWLR (Pt. 815) 184 SC; [2003] LPELR-3206(SC), *Mr Raphael Obasogie v. Addax Petroleum Development (Nig.) Ltd & anor* unreported Suit No. NICN/LA/257/2013, the judgment of which was delivered by Hon. Justice J. D. Peters on 12 April 2018, *Mr Michael Smith Atoe v. Petrofac Energy Services Nig. Ltd* unreported Suit No: NICN/LA/506/2015, the judgment of which was delivered by Hon. Justice J. D. Peters on 6 June 2019 and *PENGASSAN & ors v. Chevron Nigeria Ltd* unreported Suit No: NICN/LA/411/2020 the judgment of which was delivered on 26 February 2021 by Hon Justice E. A. Oji, PhD.

By letter dated 16 August 2021, the DPR informed Shell of the receipt of the petition from the Employee and directed Shell to recall and reinstate the Employee and pay all entitlements from the date of her release. There were several exchanges between Shell and the DPR/NUPRC, in which Shell maintained that it terminated the employment of the Employee in accordance with her contract of employment (and so it was proper) and extant court decisions invalidating the Guidelines and the NUPRC, on its part maintained that Shell violated the *Guidelines* in not seeking and obtaining the consent of the Minister to terminate.

By its letter dated 28 January 2022 the NUPRC ruled that Shell’s termination of the Employee’s employment (i) constituted a disregard and breach of the Guidelines; and (ii) was inconsistent with an earlier decision of the NICN in Suit No: NICN/LA/257/2013: *Raphael Obasogie v. Addax Petroleum Development (Nig.) Ltd & anor.*,⁴ which recognised the powers of the Minister to make regulations and issue guidelines on the release of staff in the Nigerian Oil & Gas industry. Consequently, the NUPRC, in addition to directing the reinstatement of the Employee, imposed a fine of \$250,000.00 (Two Hundred and Fifty Thousand United States Dollars) on Shell for allegedly flouting the extant laws, procedures, and guidelines. Aggrieved, Shell approached the NICN by way of originating summons to determine the validity of the NUPRC’s decision.

5. INTRODUCTION OF THE PETROLEUM INDUSTRY ACT, 2021

The Petroleum Industry Act (the “**PIA**”), 2021 was signed into Law on 16 August 2021 and substantially repeals the Petroleum Act of 1969 (save for some provisions that have been held to be saved). In relation to the Guidelines, the PIA gives the Minister the 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 on the Minister by or under this Act⁵ — the Commission being the NUPRC in the instant case. Furthermore, the NUPRC is, by virtue of the PIA, charged with the responsibility of implementing government policies for upstream petroleum operations including ‘such other policies and objectives as are consistent with the provisions of the PIA⁶. Additionally, the PIA grants the NUPRC the power to enforce regulations, policies and guidelines formerly administered by the DPR or the Petroleum Inspectorate⁷. Specifically, the NUPRC has the power to issue guidelines in accordance with the provisions of the PIA or any regulation in respect of upstream operations⁸.

It should be noted that the PIA had not been signed into law as of the date of termination of the Employee on 2 June 2021. Indeed, no reference was made to the PIA in all the exchanges between Shell and DPR/NUPRC and the NUPRC did not purport to act pursuant to the PIA. Also, none of the parties to the Shell case made reference to the PIA or the Interpretation Act which formed the bases of the decision in the Shell case. The PIA was actually raised by the court *suo motu*.

The court acknowledged in the judgment that Shell argued its case without any reference whatsoever to the PIA Shell did not avert its mind to the fact that the applicable law is the PIA, not just the Petroleum Act that Shell copiously referred to.... This means that Shell’s case, cannot be decided

⁴ unreported judgment delivered by Hon. Justice J. D. Peters on **4 December, 2018** where the NICN held that the statutory provisions under the Guideline did not elevate the employment status of a Nigerian staff into one of statutory flavour. Therefore, failure of the defendant company to comply with the requirement to obtain the approval of the Minister before disengaging its Nigerian staff only amounts to a crime within the meaning of Section 60B (1), Petroleum (Drilling and Production) (Amendment) Regulations 1988.

⁵ Section 3 of the PIA

⁶ Section 6 of the PIA

⁷ Section 10 of the PIA

⁸ Section 10(f) of the PIA

without reference to the PIA.... Reference to the Petroleum Act alone as Shell did in its submissions is not sufficient to resolve its case.

6. KEY NOTES FROM THE DECISION

Following an inexhaustive review of the Decision, the following key highlights (that will most likely have a fundamental impact in the labour and employment space within Nigeria) are set out seriatim:

i. If the Guidelines ultra vires the powers of the Minister

In the Decision, the court highlighted the differences between the provision of the Petroleum Act, 1969⁹ and the corresponding provision(s) of the PIA – and further distinguished the cases of **PENGASSAN & 3 ors. vs. Chevron Nigeria Limited**¹⁰; **Chukwumah v. Shell Petroleum Development Company of Nigeria**¹¹, **Shell Petroleum Development Company of Nigeria Limited & Ors v. Nwawka**¹², **Mr Michael Smith Atoe v. Petrofac Energy Services Nig. Ltd**¹³ relied on by Shell, from the instant case. In addition, the court held that the provisions of the PIA (as referenced above), particularly the power to 'formulate, monitor and administer government policy in the petroleum industry', (which can now be delegated by the Minister, under the PIA) are wide enough to accommodate the Guidelines. Accordingly, the court held that the Guidelines are not ultra vires the powers of the Minister.

ii. Validity of the Guidelines issued by the DPR/NUPRC on behalf of the Minister

The erstwhile provisions of the Petroleum Act 1969¹⁴ restricted the powers of the DPR to issue the Guidelines on behalf of the Minister. For ease of reference, the relevant provision of the Petroleum Act states as follows: 'The Minister may by writing under his hand delegate to another person any power conferred on him by or under this Act **except the power to make orders and regulations**'. The court noted that this provision of the Petroleum Act has been overtaken by the advent of the PIA which now empowers the Minister to formulate, monitor and administer government policy in the petroleum industry and delegate, in writing to the Chief Executive of the NUPRC, any power conferred on the Minister by or under the PIA¹⁵. As such, the exception in the Petroleum Act 1969¹⁶ that restricted the power of the DPR to issue orders and regulations have been omitted under the PIA.

iii. Application of the Guidelines to employments in the Oil and Gas Industry

The court noted that the judicial decisions supporting the non-applicability of the Guidelines in private employment relationships within the Oil and Gas Industry predates the PIA and as such, did not consider the applicability of the relevant provisions of the PIA to the issues that gave rise to those decisions. The court was also of the opinion that the issues in the referenced cases were distinguishable from the issues raised by SPDC, in the instant case.

⁹ Section 9 of the PA

¹⁰ NICN/LA/411/2020: *PENGASSAN & ors v. Chevron Nigeria Limited* unreported judgment delivered on 26 February 2021 by Hon Justice E. A. Oji, PhD

¹¹ [1993] 4 NWLR (Pt.289) 512 SC

¹² [2003] 6 NWLR (Pt. 815) 184 SC; [2003] LPELR-3206(SC)

¹³ unreported Suit No: NICN/LA/506/2015, the judgment of which was delivered by Hon. Justice J. D. Peters on 6 June 2019

¹⁴ Section 12 of the PA

¹⁵ Section 3(1)(a) and (i)

¹⁶ Section 12

In view of the above, the court held that the Guidelines can validly govern the employment relationship between Shell and the Employee, even when the Guidelines were not incorporated into the contract of employment, for reason that the Guidelines have legislative backing in the provisions of the PIA and the Interpretations Act.

iv. Imposition of the prescribed fine for failure to obtain the consent of the Minister prior to the release of an employee

With regard to the issue that the NUPRC is not a judicial body and cannot impose fine, the court relying on the relevant provision of the Interpretation Act¹⁷, observed that the Guidelines is a subsidiary instrument made pursuant to the PIA and the Minister derives his powers from the Guidelines – such powers which include the power to prescribe punishments for contraventions of provisions of the instrument. The court also included that prior to the decision in *NOSDRA v. Mobil Prod. (Nig.) Unltd*, a number of Court of Appeal decisions recognised the power of regulators to impose civil penalties without recourse to the Courts¹⁸. Furthermore, the court added that, by virtue of the Interpretation Act¹⁹ and the 1999 Constitution (as amended)²⁰, ‘enactment’ means ‘any provision of an Act or subsidiary instrument’. The implication of these provisions is that the imposition of penalties, even under a subsidiary legislation or instrument is valid and legal. The court therefore held that NUPRC could validly impose penalties on SPDC.

It is on this basis that the court upheld the fine of **US\$250,000 (two hundred and fifty thousand united states dollars)** imposed against Shell and same was not unconstitutional, illegal or void, and not *ultra vires* the powers of the Minister and by extension the NUPRC.

v. Reinstating/recalling terminated employees for non-compliance with the provisions of the Guidelines.

On this, the court reiterated its holding on the validity and legality of the Guidelines as representing a government policy, especially where the interest of an employee is in issue. The court stated that the Supreme Court has acknowledged that the categories of special circumstances in which specific performance of a contract of employment can be ordered are not closed. One of the special circumstances under which specific performance can be granted is where a wrongly released employee, can be recalled in pursuance of a government policy. To this end, the court held that the NUPRC can validly direct Shell to recall and reinstate the Employee, for non-compliance with the Guidelines.

7. CLOSING THOUGHTS

There are no prizes for guessing that Shell will exercise its constitutional right of appeal to appeal the Decision and there appears to be substantial grounds of appeal that can be argued at the appellate court. However, the Decision stands as the current position of the law, pending when and/or if it is overturned by the Court of Appeal.

For the avoidance of doubt, the position of the law for the time being as affirmed by the Decision is that the Guidelines require an employer who is the holder of an oil mining lease, license, or permit issued under the Petroleum Act, PIA or Regulations, or who is registered to provide any services in the Nigerian

¹⁷ Section 12(1)(c)

¹⁸ *Ogunniyi v. Hon. Minister of FCT & anor* [2014] LPELR–23164(CA), *Ebong v. Securities and Exchange Commission* [2017] LPELR-43547(CA). *CAC v. Seven-up Bottling Co.* [2017] 5 NWLR (Pt.1558) at 258 & 259

¹⁹ Section 37

²⁰ Section 318(1)

Oil and Gas Industry to obtain Ministerial Approval through the NUPRC prior to the release of any of its Nigerian employees. The Guidelines define 'staff release' to mean the removal of a worker from the employment of an employer company as defined in the Guidelines in the form of dismissal, retirement (whether voluntary or forced), termination, redundancy, release on medical grounds, resignation, death or abandonment of duty post. However, in the case where the worker is retired at his instance, resigns, dies, or abandons his duty post, a mere notification to the NUPRC will suffice without a formal application for staff release and the employer may release the worker two weeks after notifying the DPR.