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## Ministerial Consent for Release of Nigerian Oil Workers:

# A Fine Line Between Meddlesome Interference and Protectionism

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In an era where securing a job in the supposedly buoyant oil and gas industry is as tough as the biblical camel going through the eye of the needle, it is understandable why the Federal Government of Nigeria (the "**FGN**") will be most protective of the few "fortunate" Nigerians who manage to secure such lucrative jobs. However, the reality is that only a few of such "fortunate" Nigerians are public servants who enjoy security of employment because their contracts of employment have the so-called "statutory flavour". The other majority are in the private sector and their employments are governed by common law contracts which typically vest the employer with power to hire and fire at will. It is this huge loophole that the FGN through the Department of Petroleum Resources ("**DPR**") and other agencies, has been trying to cover for decades through various directives, circulars, guidelines and similar instruments. However, the challenge for the Government has always been drawing the fine line between employee "protectionism" and what the Supreme Court of Nigeria has described as "meddlesome interference" in a simple master and servant relationship.

The protectionist tendencies of the DPR surfaced on 5 March, 2015, when it issued the "***Guidelines and Procedures for the Release of Staff in the Nigerian Oil and Gas Industry"*** (the "**2015 Guidelines**") with the main objective of establishing procedures for obtaining the prior consent of the Minister of Petroleum Resources (the "**Minister**") for the release of Nigerian workers in the oil and gas industry.

This well intentioned measure is not novel as the DPR had issued similar directives in the past. Precisely, on 6 February 1997, the DPR on behalf of the Minister issued ***Circular No. PR5061/B/V.2/181,*** entitled ***"Release of Nigerian workers from Employment in the Petroleum Industry and Utilisation of Expatriate Quota"*** (the "**1997 Circular**"), to oil producing, oil marketing, and oil service companies in Nigeria, directing all such companies to, among other things, apply for the approval of the Minister before releasing any Nigerian staff from their employment.

Perhaps the DPR felt the need to issue the 2015 Guidelines because the 1997 Circular was breached by those to whom it was addressed with impunity and without adverse consequences. Unlike the 1997 Circular which did not prescribe detailed processes to be followed for the release of Nigerian employees and which did not contain any penalties for non-compliance, the 2015 Guidelines has taken the far reaching approach of prescribing more detailed requirements and procedures for obtaining the consent of the Minister before "releasing" a worker and also sets out stiff penalties for non-compliance.

The definition of the term "release" in the 2015 Guidelines and the implications of a release is curious. The 2015 Guidelines defines "release" to include but not limited to, "*the removal of a worker from the employment … in a manner that permanently separates the worker from the company* whether such removal is by "*dismissal; retirement - whether voluntary or forced; termination; redundancy; release on medical grounds; resignation; death or abandonment of duty post*". It is difficult to understand the reasoning behind requiring the consent of the Minister to release an employee who dies in service or voluntarily resigns, retires or abandons his duty post. However, the drafters of the 2015 Guidelines would appear to have considered the impracticability of this approach and decided to stipulate that it would be sufficient to merely notify (as opposed to obtaining the consent of) the Minister of the release where the employee retires voluntarily, resigns, dies or abandons his duty post. In the case of abandonment of duty, the employer can release the employee after two weeks of notifying the DPR.

Penalties stipulated for failure to obtain the Minister's consent prior to the release of a worker or to implement the decision of the DPR in this regard, include, fines ranging between N5,000,000.00 (Five Million Naira) to N10,000,000.00 (Ten Million Naira), recall of the released worker(s) and in some cases, suspension or cancellation of the lease, licence or permit belonging to the employer. The drafting of the 2015 Guidelines makes it difficult to determine, whether the DPR will impose just one or more than one penalty in relation to a single infraction.

Not surprisingly, the 2015 Guidelines has received widespread criticism since its release. The reason for the criticism is not far-fetched. It relates to the apparent disregard of the sanctity of employment contracts by the 2015 Guidelines. The sanctity of employment contracts is upheld all over the world and Nigeria cannot be an exception. An employment contract by its very nature is personal due to the master-servant relationship it creates, and is in principle subject to the general contractual rules of common law (except in relation to those contracts with statutory flavour). Hence, where parties have reduced the terms and conditions of service into an agreement, the conditions set out in that agreement (or the applicable statute) must be observed.

The Supreme Court was clear in the renowned case of *Chukwuma* vs. *Shell Petroleum Development Company*, when it decided that, "*it is a well-established principle of the common law, and of Nigerian law, that ordinarily, a master is entitled to dismiss his servant from employment for good or bad reasons or for no reason at all*". Thus, the right to hire and fire is inherent in all contracts of employment, as a willing employee cannot be forced on an unwilling employer. Indeed, the equitable remedy of specific performance, save in special circumstances (such as where the employment has statutory flavour), is alien to contracts of service. The courts have succinctly expressed this position on several occasions. In fact, the Court of Appeal (subsequently upheld by the Supreme Court) was very specific in the case of *Shell Petroleum Development Company vs. Nwawka & The Director of Petroleum Resources*, when it held, "*that a directive from a stranger or third party to a contract may not be construed to derogate from such contractual relationship and that the DPR cannot issue any directive that could have the effect of affecting that contractual relationship*".

Despite the common law position and the position of the Nigerian courts on the subject, the DPR and other agencies in the oil and gas industry such as the Nigerian Content Development Monitoring Board ("**NCDMB**") continue to flagrantly disregard the law by justifying their interference in the termination of employment of workers in the oil and gas industry on the basis of national interest, claiming that they only seek to protect the oftentimes vulnerable worker in Nigeria by exercising authority claimed to be derived from Section 10 of the Nigerian National Petroleum Corporation ("NNPC") Act, Sections 9(1) (b) and 12(1) of the Petroleum Act and Section 28 of the Nigerian Oil and Gas Industry Content Act, which generally provides that Nigerians shall be given first consideration for employment and training in the oil and gas industry.

In furtherance of the objectives of the Nigerian Oil and Gas Industry Content Development Act, amongst which is to increase indigenous participation in terms of human resources, the NCDMB in its guidelines on the hiring of expatriates also requires that employers seek its prior approval before applying for expatriate quota positions from the Ministry of Interior. It further requires that operators and service companies intending to embark on any form of staff rationalisation notifies the NCDMB of such scheme, providing details of the justification for the exercise and its impact on the Nigerian workforce of such companies.

The NCDMB has indicated that its intention "*is to protect the Nigerian work force by curbing the systemic substitution of experienced Nigerian workers with expatriates*". These intentions though laudable are very intrusive. It cannot be conceivably construed that the intendment of the Nigerian content policy meant for the protection of Nigerian employees will be such as to extend to a regulation of an employer's right to terminate an employee, notwithstanding the reason for such termination.

The DPR and the NCDMB appear not to realise that the matter of termination of an employee can only be subject to the contractual relationship, that is, the contract governing the employment. Thus, in termination cases, the circumstances in which the employment was terminated such as malice, bad faith or other unfavourable circumstance are irrelevant and of no consequence and cannot be taken into consideration so long as the termination was done in accordance with the terms of the contract.

Of greater concern, still, is the validity of the provisions of the 2015 Guidelines which derives its authority from Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations 1988 made pursuant to Sections 9(1) (b) and 12(1) of the Petroleum Act, as well as Section 10 of the NNPC Act, which provides that any regulatory function conferred on the Minister pursuant to the Petroleum Act or any other enactment may be delegated to and discharged by the Director of the DPR. Section 10(2) of the NNPC Act in particular empowers the Minister to delegate such powers as may be conferred on him under the Petroleum Act to the chief executive officer of the DPR. Nothing in these principal statutes empowers the Minister to intervene in employment relations in the oil and gas industry. The DPR therefore has no legal basis for issuing the 2015 Guidelines which provisions are clearly beyond the scope of its regulatory oversight.

While the position of the law is quite clear, it would appear that the DPR has forgotten or rather has decided to be wilfully unmindful of the decision of the apex court in *Chukwuma vs. Shell* and *Shell vs. Nwawka.* Perhaps, what is needed is a fresh judicial pronouncement to juggle the memory of the DPR, hopefully, into withdrawing or at least amending the 2015 Guidelines to suit the realities of the employment relationship. Achieving this feat, would no doubt require a legal challenge of the DPR's authority to issue the 2015 Guidelines or to interfere in master-servant relationships. The problem is that this may not happen in the near future, as more often than not, industry participants who are affected by DPR's directives simply comply with the guidelines and directives of the DPR without challenge, obviously, for fear of running the risk of being perceived as defiant to their primary regulator. What makes such a challenge even more unlikely is the arm-twisting tactics that the DPR employs in getting industry participants to kow-tow to its rules (whether or not validly issued), by either withholding or cancelling the licenses and permits pivotal to their operations or at least threatening to do so.

As it is, the waters are yet to be tested and the extent to which the DPR is ready to go in implementing the 2015 Guidelines is uncertain. More so as implementation ultimately requires the sanction of the Minister and an appointment is yet to be made by the President in this regard. The coming days will tell whether this bark will have any bite.