TEMPLARS

THE UNCERTAIN FUTURE

OF LABOUR OUTSOURCING & CONTRACT STAFFING IN NIGERIA

INTRODUCTION

Alternative work arrangements have been on the rise and will continue to rise globally because of the potential of such work arrangements to create the new workforce ecosystem that meets the aspirations of the old generation traditional workers as well as the millennials and Generation Z.[1]

While alternative work arrangements practiced in the form of contract staffing and labour outsourcing have been trending in Nigeria[2], sadly, the practice is one that has been generally abused[3] and the reason for this is not far-fetched. So far, the only specific and special purpose regulation on contract staffing, casualization and labour outsourcing in Nigeria has come from the oil and gas industry in the form of "Guidelines on Contract Staffing/Outsourcing"[4]. However, enforcement of the provisions of the Guidelines has been rather weak and the many legal issues relating to workers' rights and unfair labour practices have remained unaddressed.

The National Industrial Court of Nigeria (NICN) through its recent judgments and jurisprudence appears to be carrying out "*a quiet revolution*" and "*judicial intervention*" in the current labour outsourcing regime ostensibly, to protect the "*rights*" of this category of workers[5] which portends the end days of contract staffing and labour outsourcing in Nigeria.

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[1] See Deloitte's 2018 Global Human Capital Trends survey sourced at: https://www2.deloitte.com. See also The McKinsey Global Institute (MGI) 2018 report titled, Skill Shift: Automation and the Future Workforce sourced at: https://www.mckinsey.com

[2] Workers in this category fall within the broader category of the labour force that generally exists in a kind of economic and legal limbo… although employed, these workers often remain in the margin of the typical employer's workforce without job security, benefits or legal protection… However they come, they are characterized by their intermittent, temporary nature where they lack job security of the core employees and are generally without access to the job ladders, training, fringe benefits and legal protections possessed by core employment…" See Richard Miller, "The Impact of Contingent Employment on Workers Rights: A Comparative Analysis" in R. Blanpain (ed) – Employee Rights and Industrial Justice, Bulletin of Comparative Labour Relations 28 – 1994 (Kluwer Law and Taxation Publishers: Deventer, Boston) 47.

[3] See article of Messrs. John Omogeafe Ohiorenoya, PhD and Omorogieva Sylvester Uwadiae, M.Sc. titled "Contract Staffing and Employee Engagement in the Oil and Gas Industry in Nigeria (A Case Study of Shell Petroleum Development Company (SPDC) West, Nigeria)" International Journal of Business and Social Science Vol. 7, No. 10; October 2016. See also ***Mr. Olabode Ogunyale & 64 Others v. Globacom Nigeria Ltd*** [2013] 30 NLLR (Pt. 85) 49 (NIC) at 85 where the NICN held that the practice of the Defendant engaging the Claimants as casual workers for the permanent position of driver constituted casualization.

4 The Minister of Labour, in exercise of his powers under section 88 (1)(e) and (g) of the Labour Act, in May 2011 issued the Guidelines on Contract Staffing/Outsourcing in the Oil and Gas Industry. The Guidelines is in the nature of a subsidiary legislation and has the same force and effect as the principal legislation. See ***Trade Bank Ltd v. LILGC*** (2003) 2 NWLR (Pt. 806) 11.

[5] Hon. Justice Benedict Bakwaph KANYIP, PhD in a discussion paper titled "*The Changing Face of Nigerian Labour Law Jurisprudence and What Employers Need to Know*".

The employment relationships under outsourcing and contract staffing arrangements

Contract staffing and labour outsourcing typically presents itself in the NICN when the court is invited to determine the scope of the employment relationship among the employee, the intermediary and the end user. The NICN typically determines the scope of the employment relationship by applying the co-employer principle and the triangular employment principle.

The co-employer principle

The "co-employer" principle is a coinage of the NICN from the following decision of the Court of Appeal in *Donatus Onumalobi v. Nigerian National Petroleum Corporation:*[6]

> "…I need to state once more that the 2nd Cross-Appellant is a subsidiary of the 1st Cross-Appellant. Parties are *ad idem* on that point. It is clear … that the 2nd Cross-Appellant is totally integrated into and under the control of the 1st Cross-Appellant. In *Union Beverages Ltd v. Pepsi Cola International Ltd* (supra) at pages 180-181, the Supreme Court held as follows:- "*If the companies are to all intent and purposes one, their corporate veil could be pierced and each could be held liable for the action of the other. If one company can be said to be the agent or employee, or tool or simulacrum of another, the two companies would be treated as one.*"

In the course of its application of the co-employer principle, the NICN has departed from established judicial precedents and changed the character and face of labour jurisprudence in Nigeria dramatically.[7]

The triangular employment principle

An employment relationship normally involves two parties: the employer and the employee. The International Labour Organisation (ILO) has acknowledged that there are, however, more complex situations in which one or more third parties are involved, in what might be termed a "triangular" employment relationship or a *disguised* or *objectively ambiguous* "triangular" employment relationships. "Triangular" employment relationships occur when employees of an enterprise (the "provider") perform work for a third party (the "user enterprise") to whom their employer provides labour or services. A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form in which the worker enjoys less protection. Disguised employment

[6] (1999) 12 NWLR (Pt. 632) 628 (CA) 639F-640D; [2004] 1 NLLR (Pt 2) 304

[7] See ***Oyewumi Oyetayo v. Zenith Bank Plc*** [2012] 29 NLLR (Pt. 84) 370 (NIC); ***Ejieke Maduka v. Microsoft Nigeria Ltd*** Suit No. NICN/LA/492/2012 unreported judgment of Hon. Justice O. A. OBASEKI-OSAGHAE, J., delivered on December 19, 2013; ***Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor*** Suit No: NICN/LA/453/2012: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered December 13, 2016-12-13; ***Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd & Anor.*** [2015] 57 NLLR (Part 195) 268 (NIC).

relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the worker.[8]

Circumscription of outsourcing and contract staffing through the co-employer and triangular employment principles

The co-employer principle and triangular employment principle have become two sides of the same coin in the hand of the NICN and they have been applied together by the NICN when dealing with outsourcing and contract staffing cases to great effects, some good and others not so good. Some of the notable effects are discussed below.

Circumscription of the separate legal personality principle

The common law has always treated a company to be independent and separate legal personality distinct from its members, affiliates, parent company and subsidiaries[9] and except in the rare cases where the veil of incorporation is lifted, no company should be liable for the acts and liabilities of another regardless of the relationship.[10] The Supreme Court in *Union Beverages Ltd v Pepsi Cola International Ltd*[11] reaffirmed the following age long common law principles, *to wit:* only parties to a contract can enforce it. A person who is not a party to a contract cannot enforce it even if the contract was made for his benefit and purports to give the right to sue on it;[12] and a subsidiary company has its own separate legal personality. Consequently, the act of a subsidiary company cannot be imputed to the parent company nor can the act of the parent company be imputed to the subsidiary company. This general rule is only departed from and the veil of incorporation lifted in cases of fraud, or where the subsidiary is a sham or is so totally integrated and under the control of the parent company that the subsidiary is for all intents and purposes *the agent or employee, or tool* of the parent company.

In *Oyewumi Oyetayo v. Zenith Bank Plc*[13] the NICN held that both Zenith Bank and its subsidiary, Zenith Securities Limited were co-employers of the Claimant based on the co-employer principle. The court rejected the argument of Zenith Bank that the transfer of the Claimant to its subsidiary, Zenith Securities Ltd and the confirmation of the Claimant's appointment as staff of Zenith Securities Ltd presupposes that the

[8] See The ILO Report titled, ***"The Scope of the Employment"*** (ILO Office: Geneva), 2003 at pages 25, 37-39 sourced at http://www.ilo.org/. See also ***Stephen Ayaogo & 16 Others v. Mobil Producing Nigeria Unlimited & Another*** [2013] 30 NLLR (Pt. 85) 95; ***Diamond Bank Plc v. National Union of Banks, Insurance and Financial Institutions Employees*** (NUBIFIE) SUIT NO. NICN/ABJ/130/2013: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered February 6, 2019

[8] [2013] 32 NLLR (Pt. 92) 243 (NIC) 322B – 328F.

[9] The doctrine of separate legal personality was settled in the old English case of ***Salomon v. Salomon*** (1897) AC 22 at 51 affirmed by the Nigerian Supreme Court in several cases including ***Marina Nominees Ld. v. F.B.I.R.*** (1986) 2 NWLR (Pt. 20) 40. See also ***Union Bank (Nig.) Ltd v. Penny Mart*** (1992) 5 NWLR (Pt. 240) 228 at 237; ***Musa v. Ehidiamem*** (1994) 3 NWLR (Pt. 334) 544; ***M.O. Kanu & Sons & Co. v. FBN Plc*** (1998) 11 NWLR (Pt. 572) 116; ***Aso Motel Kaduna v. D*** (2006) 7 NWLR (Pt. 978) 93; ***Chartered Brains Ltd. v. Intercity Bank Plc.*** [2009] 15 NWLR (Pt. 1165) 445.

[10] See ***Union Beverages Ltd v Pepsi Cola International Ltd*** [1994] 3 NWLR (Pt 330) 1; ***Nigerite Ltd v. Danlami (Nigeria) Ltd*** (1992) 7 NWLR (Pt. 253) 288 at 304; ***Musa v. Ehidiamem*** (1994) 3 NWLR (Pt. 334) 544; ***M.O. Kanu & Sons & Co. v. F.B.N Plc*** (1998) 11 NWLR (Pt. 572) 116.

[11] [1994] 3 NWLR (Pt 330) 1 (SC) at 16B-E.

[12] See ***Ikpeazu v. African Continental Bank*** (1965) NMLR 374; ***Lagos State Development and Property Corporation & Ors. v. Nigerian Land and Sea Food Ltd*** (1992) 5 NWLR (Pt.244) 653;

[13] [2012] 29 NLLR (Pt. 84) 370 (NIC)

Claimant is no longer the employee of Zenith Bank but that of Zenith Securities Ltd, the new employer.

In *Ejieke Maduka v. Microsoft Nigeria Ltd*[14] the NICN found that the 1st Respondent (Microsoft Nigeria Ltd) who actually employed the Claimant was the agent of its parent company, the 2nd Respondent (Microsoft Corporation) for the purpose of employment of the Claimant and therefore both were co-employers of the Claimant. The basis of the decision was even though the Claimant was an employee of Microsoft Nigeria Ltd her employment was subject to and governed by the worldwide policies of Microsoft Corporation which affects all employees, subsidiaries and affiliates of Microsoft worldwide. Furthermore, the evidence before the court was that the Release Agreement which the Claimant was made to execute stated that "*the company is entering into this Agreement both for itself and as agent for its holding company, subsidiaries, shareholders, directors, officers and employees*".

Circumscription of sanctity and privity of contract principles

The doctrine of privity of contracts is all about the sanctity of contract between the parties to it.[15] By the doctrine of privity, a contract cannot confer rights or impose obligations on any person who is not a party to the contract.[16] In effect, parties are not bound to respect, observe and perform a contract they did not enter into.[17] An action brought by a party to a contract against a person who is not a party or privy to that contract is incompetent for want of privity.[18]

The NICN in a number of cases however took a different view about the doctrine of privity of contract when there is a co-employment or triangular employment relationship. In *Anthony Agum v. United Cement Company Ltd.* (UNICEM) Anor[19] the 1st Defendant entered into a service contract with MS Outsourcing Services (2nd Defendant) as an independent contractor for the provision and management of drivers, cooks and stewards. Pursuant to the service contract the 2nd Defendant employed the Claimant and assigned him to the 1st Defendant. There was clearly no contract of employment between the Claimant and the 1st Defendant and the payment of the Claimant's salary was the sole responsibility of the 2nd Defendant. Nevertheless, the NIC found that the parties had a co employment or triangular employment relationship because the Claimant was employed by the 1st Defendant and posted to work with the 2nd Defendant.

Similarly, in *Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd*[20] the 1st Defendant, Integrated Corporate Services Ltd (ICSL) employed the Claimant and seconded him to the 2nd Defendant, Ecobank Nigeria Plc. to work as

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[14] Suit No. NICN/LA/492/2012 unreported judgment of Hon. Justice O. A. OBASEKI-OSAGHAE, J., delivered on December 19, 2013

[15] ***United Bank for Africa Plc v. Alhaji Babangida Dargaba*** (2007) 43 WRN 1 (SC) at 19

[16] See ***Reichie v. Nigerian Bank for Commerce and Industry*** [2016] 8 NWLR (Pt. 1514) 294 (SC) 314C-D, 315A-B, 316B-H; ***Technip v. AIC Ltd*** [2016] 2 NWLR (Pt. 1497) 421 (CA) 464G-465F; ***B.M. Ltd v. Woermann-Line*** [2009] 13 NWLR (Part 1157) 149; and ***National Union of Hotels and Personal Service Workers (NUHPSW) v. Whassan Eurest (Nigeria) Ltd*** (2005) 2 NLLR (Pt. 4) 145 (NIC) at 154E-H.

[17] See ***Lewis v. United Bank for Africa Plc*** [2016] 6 NWLR (Pt. 1508) 329 (CA) at 345A-F; ***Mortgages PHB Ltd. v. Sovereign Trust Insurance Co. Plc.*** [2016] 6 NWLR (Pt. 1509) 465 (CA) 491G-H.

[18] See ***Ilesa L.P.A. v. Olayide*** [1994] 5 NWLR (Pt. 342) 91 at 104, paras. D – G; ***U.B.A. Plc v. Jargaba*** [2007] 11 NWLR (Pt. 1045) 247 at 266 – 267; ***Chemical and Allied Product Plc v. Vital Investments Ltd*** [2006] 6 NWLR (pt.976) 220; ***Nwuba v. Ogbuchi*** [2008] 2 NWLR (Pt. 1072) 471 at 473 and ***Owodunni v. Registered Trustees of CCC*** [2000] 10 NWLR (Pt. 675) 315.

[19] Suit No: NICN/CA/71/2013 unreported judgment of Hon. Justice E. N. Agbakoba, J., delivered on March 3, 2017.

[20] [2015] 57 NLLR (Pt. 195) 268 (NIC)

transaction officer/posting teller. Notwithstanding that there was no contract of employment between the Claimant and the bank, the court relying on ICSL's letter of offer of employment which specifically stated that the Claimant "*will be employed as a Transaction Officer and seconded to Oceanic International Bank Plc*" held that ICSL was an agent or tool of the bank for the purpose of employing the Claimant for itself. On this basis the NICN held that the bank and ISCL were co-employers.

Sanctity of contract also means the court's duty is to construe and enforce the contract between the parties to give effect to the wishes of the parties as expressed in the contract document and not to re-write the contract.[21] The NICN has however rejected the notion of sanctity of contract, or the sacrosanct nature of the contract of service[22] and extended this to triangular employment and co-employment relationships. In line with this thinking, the NICN in *Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor*[23] gave little weight to letters of offer of employment and fixed term employment contracts issued to the Claimants by third parties. The rational for the decision was that Airtel initially employed the Claimants, confirmed them and even reviewed their salaries before it orchestrated their movement from one employer to another, all for its benefit but these movements were not meant to bring to an end the employer-employee relationship between Airtel and the Claimants.

Circumscription of the principle that a contract of employment is the bedrock of an employer employee relationship

The co-employer principle is a departure from the principle that the contract of employment is the bedrock of an employer employee relationship[24] and that where there is a contract of employment the terms and conditions of employment expressed in the contract governs the employer employee relationship.[25] In *Diamond Bank Plc v. National Union of Banks, Insurance and Financial Institutions Employees*[26] the bank's policy and practice was not to employ certain cadre of workers, but to outsource the provision of such services under a Labour Service Agreement to contractors who send their employees to the bank to perform the services. The contractor is responsible for the employment, conditions of service, remuneration, discipline, welfare, promotion and disengagement of such workers sent to the bank. The bank entered into a Labour Service Agreement with C & M Exchange Limited (the Contractor) and the employees of the Contractor who were members of the Defendant union worked in the bank. In determining whether the workers must have a contract of employment with the bank before they can picket the bank, the court held that the Labour Service Agreement effectively created a triangular employment relationship between the bank, C & M Exchange Ltd and the workers or a disguised employment relationship. In cases of triangular or disguised employment relationships, the ILO enjoins on courts to observe the principle of primacy of

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[21] *Adetoun Oladeji (Nig) Ltd v. Nigerian Breweries Plc* (2007) 15 WRN 1 at 15 Lines 40-45

[22] See ***James Adekunle Owulade v. Nigeria Agip Oil Company Limited*** **(unreported)** *judgment of Hon. Justice Benedict Bakwaph KANYIP, PhD in* ***Suit No. NICN/LA/41/2012*** *delivered on 12th July 2016* and ***Ineh Monday Mgbeti v. Unity Bank Plc*** **(unreported)** judgment of Hon. Justice Benedict Bakwaph KANYIP, PhD in Suit No. NICN/LA/98/2014 delivered on 21st February 2017.

[23] Suit No: NICN/LA/453/2012: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered December 13, 2016-12-13

[24] See ***Osoh v. C.B.N.*** (2013) 35 NLLR (Pt. 103) 1 (CA); ***Rector, Kwara State Polytechnic v. Adefila*** [2007] 15 NWLR (Pt. 1056) 42.

[25] ***NITEL v. Jattau*** [1996] 1 NWLR (Pt. 425) 392 (CA); ***Anaja v. UBA Plc*** [2011] All FWR (Pt.600) 1289 (CA) at 1300; ***Okobi v. Sterling Bank Plc*** (2013) 30 NLLR (Pt 86) 245; ***National Revenue Mobilisation Allocation and Fiscal Commission v. Ajibola Johnson*** (2007) 49 WRN 123 at 150-151

[26] Suit No. NICN/ABJ/130/2013: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered February 6, 2019

facts i.e. to emphasize the substance over the form of the relationship. The Court found that the substance of the relationship between the parties is one of a triangular employment relationship for which the bank is at worse a co-employer of the workers.

It is interesting to note that the facts and circumstances of the case of *Diamond Bank Plc v. National Union of Banks, Insurance and Financial Institutions Employees* is materially similar to that of *PENGASSAN v. Mobil Producing Nigeria Unlimited* and yet there were different outcomes in both cases.

NICN decisions affecting the rule that the Court cannot read terms into a contract or create a contract for the parties

The co-employer principle is a derogation from the rule that where the parties have embodied the terms of their agreement in a written document, extrinsic or external evidence is not admissible to add to, vary, or subtract from or contradict the terms of the written document. This rule serves to bar the Court from reading terms into a contract or creating a contract for the parties.[27]

Perhaps, to quell any doubts, the NICN went to great length in *Diamond Bank Plc v. National Union of Banks, Insurance and Financial Institutions Employees*[28] to explain how the new realities in the jurisprudence of the court makes it imperative for the court to depart from this long established rule. The following were given as the rationale for this disposition of the NIC:

a. in an employer-employee or master-servant relationship, in addition to the express terms of the contract, the law imposes certain implied terms into the contract. These implied terms may either be founded on statute, by custom, by practice, public policy so as to ensure that the master does not subjugate the servant to a condition of servitude or slavery or like terms...;[29]

b. the Industrial Courts in the course of adjudication of disputes between employers and their workmen must determine the 'rights' and 'wrong' of the claim made, and in so doing they are undoubtedly free to apply the principles of justice, equity and good conscience, keeping in view the further principle that their jurisdiction is invoked not for the enforcement of mere contractual rights but for preventing labour practices regarded as unfair and for restoring industrial peace on the basis of collective bargaining...;[30]

c. agreements can be disregarded by the courts especially if they are a false portrayal of the relationship between the parties and Employment judges and tribunals must be 'realistic and worldly wise' and... should take a 'sensible and robust view of these matters in order to prevent form undermining substance'...;[31]

d. the goal of labour law is to ensure that no employer can be allowed to impose – and no worker can be allowed to accept – conditions of work which fall below what is understood to be a 'decent work'.[32]

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[27] ***Lewis v. United Bank for Africa Plc*** [2016] 6 NWLR (Pt. 1508) 329 (CA) at 352G-353B.

[28] SUIT No. NICN/ABJ/130/2013: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered February 6, 2019

[29] ***Afrab Chem Ltd v. Pharmacist Owoduenyi*** [2014] LPELR-23613(CA)

[30] This was the instructive and incisive decision of the Supreme Court of India in ***NTF Mills Ltd v. The 2nd Punjab Tribunal*, AIR** 1957 SC 329 The NIC applied this principle in ***Mr. Kurt Severinsen v. Emerging Markets Telecommunication Services Limited*** [2012] 27 NLLR (Pt. 78) 374 (NIC).

[31] See ***Uber B.V. (UBV) & Ors. v. Yaseen Aslam & Ors.*** [2018] EWCA Civ 2748 (19 December 2018) and ***Autoclenz Ltd v. Belcher*** [2011] UKSC 41; [2011] ICR 1157,

[32] See ***Clement Abayomi Onitiju v. Lekki Concession Company Limited*** unreported Suit No. NICN/LA/130/2011, the judgment of which was delivered on 11th December 2018, quoting with approval Arturo Bronstein *International and Comparative*

What does the future hold?

Considering the NICN's current jurisprudence on outsourcing and contract staffing, the pertinent question is whether there is any future for outsourcing and contract staffing in Nigeria. On closer review, there may very well be a tiny silver lining in the sky.

ILO did not outlaw outsourcing and contract staffing

The ILO report on The Scope of the Employment Relationship[33] considered extensively the validity of triangular employment, disguised or objectively ambiguous employment and understandably did not outlaw outsourcing or contract staffing. The NICN has acknowledged that the ILO did not outlaw triangular employment relationships nor brand the practice of outsourcing or contracting out as unfair labour practice. All the ILO enjoins is that the respective laws of member States on the issue should be respected and applied.[34]

The principle of "primacy of fact" is the yardstick for determining who the employer is in a triangular employment

In *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) v. Mobil Producing Nigeria Unlimited* (MPNU)[35] the NICN discussed extensively the triangular employment principle and laid down the criteria for determining the employer in a triangular employment relationship. The reasoning of the NICN are contained in the following excerpts from the judgment:

"...In the instant case, the disguised employment relationship of the parties comes in the form of a triangular employment relationship ...The triangular employment relationship comes in a variety of forms the best known of which (and which relates to the instant appeal) is the use of contractors and private employment agencies. See *The Scope of the Employment* (ILO Office: Geneva), 2003 at pages 37-39. To the ILO – … *The determination of the existence of an employment relationship should be guided by the facts of what was actually agreed and performed by the parties, and not by the name they have given the contract. ... This is known in law as the principle of the primacy of fact, which is explicitly enshrined in some national legal systems. This principle might also be applied by judges in the absence of an express rule…".*

Labour Law: Current Challenges (Palgrave Macmillan), 2009 at pp. 1 – 2.

[33] *Op. cit.* at pages 22-23.

[34] ***Stephen Ayaogo v. M.P.N. Unltd.*** [2013] 30 NLLR (Pt. 85) 95 (NIC); ***PENGASSAN v. M.P.N. Unltd.*** [2013] 32 NLR (Pt. 92) 243 (NIC) at 327C – D

[35] [2013] 32 NLLR (Pt. 92) 243 (NIC) 322B – 328F.

The decision in *Natural Gas Senior Staff Association of Nigeria v. Mobil Producing Nigeria Unlimited* relied on decisions of the English courts in *Daca v. Brook Street Bureau (UK) Ltd*[36] and *James v. London Borough of Greenwich*[37], where it was held that a contract of service cannot be implied between an agency worker and an end user except where the agency relationship itself can be regarded as a sham, or where there has been direct negotiations of the terms and conditions of service between the end user and the agency worker. The implication is that in England, as should be in Nigeria, only a few agency workers can maintain unfair dismissal/termination claims against the end user unless parliament legislates otherwise.[38]

It is in this context that one can understand some of the decisions of the NICN like *Petroleum and Natural Gas Senior Staff Association of Nigeria v. Mobil Producing Nigeria Unlimited,*[39] *James Francis Etim v. Ikeja Electricity Distribution Plc,*[40] *Engineer Ignatius Ugwoke v. Aeromaritime (Nigeria) Limited*[41] and *Vam Onne Nigeria Ltd v. Petroleum and Natural Gas Senior Staff Association of Nigeria & 4 Others*[42] where the court declined to imply the existence of a contract of service with an end user in an apparent triangular employment setting. The takeaway from these cases when compared to cases like *Oyewumi Oyetayo v. Zenith Bank Plc, Ejieke Maduka v. Microsoft Nigeria Ltd, Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor, Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd & Anor. etc.,* is that the court will not imply the existence of a contract of employment with an end user in an outsourcing or contract staffing arrangement when the facts of the case do not reveal the existence of any except where the agency relationship itself can be regarded as a sham, or where there has been direct negotiations of the terms and conditions of service between the end user and the agency worker, or the intermediary is the agent or employee, or tool or simulacrum of the end user.

The burden of proving claims remains with the employee

A finding by the NICN that an end user is a co-employer of the employee does not reduce or remove the burden on the employee to prove his claims by credible evidence. The NICN has not changed the rule that he who asserts must prove; and in employment law, the onus is on the claimant who asserts that his termination is wrongful to show how it is wrongful. To do this, the Claimant must place before the Court the terms of the contract of employment and then prove in what manner the said terms were breached.[43] Furthermore, an employee claiming damages in an employment or labour case has the burden of proving his entitlement to the monetary claim.[44] In *Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd*[45] the NIC had held that the 1st

[36] [2004] IRLR 358
[37] [2008] IRLR 301
[38] See Muschett v. HM Prison Services [2010] IRLR 451
[39] [2013] 32 NLLR (Pt. 92) 243 (NIC) 322B – 328F.
[40] Suit No. NICN/LA/12/2017: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered October 9, 2018
[41] Suit No. NICN/LA/482/2013 unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered on November 30, 2016
[42] Suit No. NICN/CA/06/2012 unreported judgment of Hon. Justice J. T. Agbadu - Fishim, J delivered on March 18, 2016
[43] ***Ekeagwu v. The Nigerian Army*** [2010] LPELR-1076(SC); [2010] 16 NWLR 419 per His Lordship Onnoghen, CJN; ***Baba v. N.C.A.T.C.*** (1991) 5 NWLR (Pt 192) 388 (SC) at 413; ***Osoh v. C.B.N.*** (2013) 35 NLLR (Pt. 103) 1 (CA) at 29D-30A; ***Aji v. Chad Basin Development Authority & Anor.*** [2015] LPELR-24562(SC) and ***Ademola Bolarinde v. APM Terminals Apapa Ltd*** (Unreported) judgment of Hon. Justice B.B. Kanyip, PHD in Suit No. NICN/LA/268/2012 delivered on February 25, 2016; ***Tosamwumi v. Golf Agency and Shipping Nig. Ltd.*** (2011) 25 NLLR (Pt 71) 200; ***Ziddeh v. Rivers State Civil Service Commission*** (2011) 24 NLLR (Pt. 67) 113 at 119.
[44] See ***Mr. Charles Ughele v. Access Bank Plc*** (unreported) Judgment in Suit No. NICN/LA/287/2014 delivered on 10 February 2017.
[45] [2015] 57 NLLR (Pt. 195) 268 (NIC)

Defendant (Integrated Corporate Services Ltd (ICSL) who employed the Claimant and the 2nd Defendant (Ecobank Nigeria Plc.) to whom the Claimant was seconded were co-employers of the Claimant. However, the court declined the claim for arrears of salaries and allowances as they were not proved to the satisfaction of the Court.

Similarly, in *Oyewumi Oyetayo v. Zenith Bank Plc*[46] the NIC held that Zenith Bank and its subsidiary, Zenith Securities Ltd were co-employers of the Claimant but dismissed the Claimant's claims for salaries, allowances and other emoluments for lack of proof. The reasoning of the court was that salaries, allowances and other emoluments are special damages which must be specifically pleaded and proved if they are to be claimed. The Claimant failed this litmus test.

Also, in *Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor.,*[47] Airtel Nigeria and Tech Mahindra Nigeria Limited (an outsourcing company) were held to be the co-employers of the Claimants. Having held them to be co-employers, the key issues before the Court were whether the Claimants were actually promoted and then denied their due emoluments arising from such a promotion, for which the Claimants are making the claims for bonuses, airtime allowances and pension fund payments. The Court dismissed the claims of the Claimants for the simple reason that the Claimants did not prove that they were promoted.

The appellate court and not the NICN will have the last word

If there was no general right of appeal from the decisions of the NICN to the Court of Appeal the decisions of the NICN applying the co-employer and triangular employment principles to outsourcing and contract staffing would probably have remained unimpeachable.[48] However, the Supreme Court has now settled any argument over the right of appeal from judgments of the NICN to the Court of Appeal when it held that all decisions of the NICN are appealable to the Court of Appeal: as of right in criminal matters and fundamental rights cases) and with leave of the Court of Appeal in all other civil matters where the NICN has exercised its jurisdiction.[49]

The implication is that the Court of Appeal will now have an opportunity to review the decisions of the NICN relating to labour outsourcing and contract staffing. Clearly, in the exercise of its appellate jurisdiction, the appeal court will not be bound by the decisions and opinion of the

[46] [2012] 29 NLLR (Pt. 84) 370 (NIC)

[47] Suit No: NICN/LA/453/2012: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered December 13, 2016

[48] Section 9(1) & (2) of the NIC Act and Section 243(2) and (3) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 provides that appeals "*shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights*". Further that, "*an Appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly*" For a brief spell of time these provisions were construed to mean that the NICN was the final and ultimate court in all causes or matters upon which it has jurisdiction except in decisions relating to questions of fundamental rights under Chapter IV of the Constitution or in criminal causes or any other matter prescribed by an Act of the National Assembly which shall be with the leave of the Court of Appeal. See ***Lagos Sheraton Hotel and Towers v. Hotel and Personal Services Senior Staff Association*** [2014] LPELR-23340(CA); ***Coca-Cola Nigeria Limited & ors v. Mrs. Titilayo Akisanya*** [2013] 18 NWLR (Pt. 1386) 255 (CA); [2013] 36 NLLR (Pt. 109) 338 (CA); ***Local Government Service Commission, Ekiti State & anor v. Mr. M. A. Jegede*** Unreported judgment of the Court of Appeal in Appeal No. CA/EK/07/M/2013 delivered on 15th February 2013; ***The Management of Nestle Nig. Plc Ilupeju, Lagos v. NUFBTE*** [2013] 1 ACELR 1; ***Engr. G. F. C. Ezeani v. Nigerian Railway Corporation*** Unreported judgment of the Court of Appeal in Appeal No. CA/L/344/2011 delivered on 29th November 2013; ***Mr. Tunde Folarin & anor v. Comrade Sam A. Idowu & Ors.*** Unreported judgment of the Court of Appeal in Appeal No. CA/L/426/2012 delivered on 29th November 2013. See also the paper titled "*The Finality of the Jurisdiction of the National Industrial Court*" presented by Hon. Justice Benedict Bakwaph KANYIP, PhD, Presiding Judge, National Industrial Court, Lagos Division at the 2014 Nigerian Bar Association (NBA) Conference held in Owerri in August 2014.

[49] ***Skye Bank Plc. v. Iwu*** (2017) LPELR-42595(SC)

NICN. [50] It is hoped the Appellate courts will use the opportunity provided by the anticipated deluge of appeals to determine if the NICN could, and if it could, under what circumstances it could depart from the principles laid down by the Supreme Court and even the Court of Appeal relating to separate legal personality, sanctity and privity of contracts, implying terms into contracts and basically re-writing the contracts of the parties.

Compliance with extant laws relating to outsourcing and contract staffing

It bears reiterating that the ILO does not brand as invalid or unlawful or as wrong the triangular employment relationship; neither had it even branded the practice of outsourcing or contracting out as unfair labour practice. All the ILO enjoins is that the respective laws of member States on the issue should be respected and applied.[51] If this injunction is obeyed in structuring outsourcing and contract staffing contracts there is a high probability that the end user will not be held to be a co-employer and in the unlikely event that the end user is held to be a co-employer, the claims of the employee will have little chance of success on the merits.

The only law that regulates outsourcing and contract staffing in Nigeria presently is the Guidelines on Outsourcing and Contract Labour in the Oil and Gas Industry. The ILO enjoins that the Guidelines should be respected and applied but none of the decisions of the NICN considered and applied the Guidelines. A close review of the Guidelines shows an attempt to protect the rights of workers.

The Guidelines require that outsourcing shall be restricted to non-core business of an oil and gas company or for proven short term projects.[52] All jobs in a company's organogram (organizational chart) must be occupied by permanent employees of the company[53] and in the event that such regular jobs are not occupied by permanent employees, such jobs should be re-sourced to permanent employment in accordance with the recruitment standards of the concerned company. The *Guidelines* prescribe priority consideration for contract staff who meet the recruitment standards of the company before such jobs can be advertised.[54] The Guidelines also guarantees the right of every worker to be unionized and bargain collectively. No employer, whether third party contractor or the principal company shall hinder overtly or covertly the unionization of workers.[55]

It is pertinent to highlight the fact that the Guidelines stipulates that relevant Government Agencies and Principal Oil Companies shall monitor compliance of their Contractors with National labour laws and ILO core standards, in the relationship between Contractors and Contractors' employees.[56]
The Constitution of the Federal Republic of Nigeria 1999 (as amended) leads the pack among these laws. The Guidelines

[50] This is bearing in mind that the doctrine of judicial precedent makes the decisions of appellate courts binding on all courts below it. This applies even if the decision is wrongly reached, as long as it has not been set aside by a court of competent jurisdiction. However, a decision is an authority for what it actually decided based on the facts and applicable law. Where the facts and the point decided are not the same or similar, a decision in one case cannot bind the court adjudicating on another case. See ***Obasi v. Mikson Establishment Industries Ltd.*** [2016] 16 NWLR (Pt. 1539) 335 (SC) 365B-D; ***NEPA v. Onah*** (1997) 1 NWLR (Pt. 484) 680.

[51] ***Stephen Ayaogo v. M.P.N. Unltd.*** [2013] 30 NLLR (Pt. 85) 95. ***PENGASSAN v. M.P.N. Unltd.*** [2013] 32 NLR (Pt. 92) 243 (NIC) at 327C – D.

[52] Paragraph 1.4 of the Contract Staffing/Outsourcing Guidelines

[53] Paragraph 1.1 of the Contract Staffing/Outsourcing Guidelines

[54] Paragraph 2.1 of the Contract Staffing/Outsourcing Guidelines

[55] Paragraph 3.1 of the Contract Staffing/Outsourcing Guidelines

[56] Paragraph 6.5 of the Contract Staffing/Outsourcing Guidelines

requires intermediaries/contractors to observe their workers' rights protected under the Constitution. Notable among these rights are, the right to fair hearing (applied in disciplinary proceedings),[57] the right to peaceful assembly (by workers either as members of organized union or as individual workers for a common purpose), freedom of association (incorporating the right to organize, form and belong to a union of the employee's choice);[58] freedom from any form of discrimination in the work place.[59]

The Guidelines further require intermediaries/contractors to observe their workers' rights protected under the Labour Act which sadly is outdated, makes no specific mention of contract staffing and labour outsourcing and has limited application to blue collar workers.[60] Nevertheless, the Labour Act contains certain basic rights that protects workers, which intermediaries/contractors are obligated under the Guidelines to observe, including: the obligation of the employer to give to the worker within three months of the engagement, a written contract of employment setting out the basic terms of employment;[61] annual leave with full pay of at least six working days after 12 months of continuous service;[62] free transportation or payment of transport allowance in lieu; nursing mothers must be allowed 30 minutes twice a day during her working hours for nursing her child;[63] prohibition of discrimination against pregnant women;[64] right of pregnant women to maternity leave of 12 weeks (six weeks prior to childbirth and six weeks after childbirth);[65] right to overtime payment, etc.[66]

There are other rights and benefits that are mandatorily applicable to workers under the National Housing Fund Act,[67] Pension Reform Act 2014[68] and Employees' Compensation Act (ECA) 2010[69] which the Guidelines require intermediaries/contractors to observe.

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[57] ***The Board of Management, Federal Medical Centre & Anor. v. Mr. David Terhemba Abakume*** [2016] 10 NWLR (Pt. 1521) 536 (CA)

[58] Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This is reinforced by the provision of Article 11 of the African Charter on Human and Peoples Rights, which is applicable in Nigeria.

[59] In ***Mrs. Folarin Oreka Maiya v. Incorporated Trustees of Clinton Health Access Initiative Nigeria*** (unreported) NIC/ABJ/13/2011 the NICN awarded damages in favor of an employee whose employment was terminated whilst she was pregnant for breach of the employee's rights to human dignity and freedom from discrimination.

[60] The Labour Act is not applicable to persons exercising administrative, executive, technical or professional functions or to any person employed on a vessel or on an aircraft to which the laws regulating merchant shipping or civil aviation already apply. See Section 91(1) the Labour Act; ***Mbilitem v. Unity Kapital Assurance Plc*** (2013) 32 NLLR (Pt. 92) 204; ***Evans Bros. (Nig) Pub. Ltd. v. Falaiye*** (2003) 13 NWLR (Pt. 838) 564 at 584G-H, 587H-588E.

[61] Section 7 of the Labour Act.

[62] Section 18 of the Labour Act.

[63] Section 54(1)(d) of the Labour Act.

[64] Section 53 of the Labour Act.

[65] Section 54 of the Labour Act

[66] Section 13(2) of the Labour Act.

[67] The National Housing Fund Act requires an employer of an employee who earns over NGN 3,000 per annum to contribute 2.5% of the employee's monthly salary to the housing fund to facilitate the mobilization of the fund for the provision of houses at affordable rates to employees.

[68] Pension Reform Act 2014 Cap P4 LFN, 2004. The 2014 PRA repealed the Pension Reform Act 2004 and introduced a contributory pension scheme for the benefit of employees who are in the employment of an organization in which there are three or more employees. The Act prescribes a minimum contribution of 18% of the basic salary of the employee (a minimum of 10% by the employer and 8% by the employee).

[69] The Employees' Compensation Act 2010 established the Employees' Compensation Fund managed by the Nigerian Social Insurance Trust Fund Management Board. Employers are required to pay 1% of the total payroll of the company into the Fund for payment of compensation to employees for death, disability, mental stress, occupational diseases and hearing impediments that may occur in connection with the employment.

LAST WORDS

If the Industrial Court's decisions on labour outsourcing and contract staffing is anything to go by, then it is safe to say that the landscape of Nigerian employment law has changed dramatically, and the old boundaries set by the common law are being challenged and, in most cases, upturned. Pending a review of the NICN decisions by the appellate court or a statutory intervention to provide better regulation, it is imperative for corporate organizations who engage in outsourcing of labour and contract staffing to seek legal guidance in order to successfully navigate this minefield.

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