2019 DPR Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry: TO DARE OR TO BEAR IN THE WAKE OF COVID-19?

In the twilight of 2019, the Department of Petroleum Resources ("**DPR**") issued the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 ("**2019 Guidelines**") to replace similar Guidelines issued in 2015[1] ("**2015 Guidelines**"). The 2019 Guidelines, just like the 2015 Guidelines, require employers in the oil and gas industry to obtain prior approval from the Minister of Petroleum Resources ("**Minister**") through the DPR before they can disengage any Nigerian employee.[2]

A tumultuous 2020 economy and the hard choices at stake

In reaction to tumbling crude oil prices, the COVID-19 pandemic and an uncertain economic outlook in 2020, the Federal Government of Nigeria ("**FGN**") reviewed its budget benchmark for crude oil prices from the estimated $57/barrel to $30 and intends to further revise the benchmark to $20/ barrel.

[1] The 2019 Guidelines repealed and replaced the *Guidelines and Procedures for the Release of Staff in the Nigerian Oil and Gas Industry* issued in 2015 which itself had replaced the much earlier Circular No. PR5061/B/V.2/181 titled "*Release of Nigerian Workers from Employment in the Petroleum Industry and Utilisation of Expatriate Quota*" ("**1997 Circular**").

[2] Some of the key changes in the 2019 Guidelines include: (1) the approval of the Minister is not required for workers who abandon their duty posts; (2) the introduction of an additional obligation on every employer to submit to the Director of Petroleum Resources, on or before 31 March of every year: (i) the names and designation of all its workers; (ii) the number of workers employed during the period ending on 31 March; and (iii) the number of workers released prior to the period ending 31 March; (2) increment of the monetary penalty for non-compliance to two hundred and fifty thousand United States dollars.

If crude oil continues to sell at these low prices and with the path to recovery seemingly a long way out, industry operators will be confronted in one form or another with a serious, if not existential, need to cut costs sooner rather than later. One of the ways to remain competitive is to cut overhead expenditure, including by reducing the workforce. Yet, as many employers in the industry would probably have realised, the obligation to obtain Minister's approval for release of employees under the 2019 Guidelines undeniably impairs employers' ability to reorganise their workforce proactively in response to present economic realities.

In a global economy that has been battered by the novel coronavirus pandemic, any "law" which tends to stymie strategic business decisions is deserving of a re-assessment, especially when its defensibility is anything but plausible. Operators in the Nigerian petroleum industry have to make the difficult choice of: (a) complying with the Guidelines; (b) engaging the FGN and DPR to suspend or relax the requirements of the Guidelines; or (c) dare to challenge the validity of the Guidelines.

Challenging industry regulators in Nigeria or indeed the FGN comes with huge economic risks but this has not deterred a few who believe in the rule of law over regulatory arbitrariness and the merits of their case.[3] This brings to the fore the question of whether the 2019 Guidelines, like its predecessors, are legally defensible. In the event that industry operators are now willing to dare the *status quo, there are more than sufficient grounds to successfully challenge the Guidelines.*

The fine art of placing something on nothing

We expressed the view in our 2015 Thought Leadership commentary on the 2015 Guidelines that "*the DPR … has no legal basis for issuing the 2015 Guidelines which provisions are clearly beyond the scope of its regulatory oversight.*"[4] As the brief analysis that follows below shows, that view has not changed with respect to the 2019 Guidelines.

The 2019 Guidelines are said to have been issued pursuant to powers derived from the Petroleum (Drilling and Production) Regulations, 1969 (as amended) ("**PDPR**") and the Petroleum Act[5] ("PA") itself. In fact, there is a specific reference to "Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations 1988" which provides that "*the holder of an oil mining lease, licence or permit issued under the Petroleum Act, 1969 or under regulations made thereunder or any person registered to provide services in relation thereto, shall not remove any worker from his employment except in accordance with guidelines that may be specified from time to time by the Minister*."

Other provisions of the PA such as paragraph 38 of its First Schedule and Regulation 26 in the original PDPR of 1969 respectively obligate oil and gas employers to ensure a certain ratio of Nigerian citizens in their employment at any given time and to submit training programmes for their employees for the Minister's approval. Because of these provisions, some schools of thought seem to rationalise provisions such as the one in the 2019 Guidelines which requires Minister's approval before a Nigerian employee in the industry is released as being incidental to the Minister's power to ensure compliance with the requisite ratio and training of Nigerian employees in the industry.

The above view, however, seems inconsistent with settled principles of interpretation of statutes. First, an attempt to broaden the matters specifically mentioned in the PA to include questions of disengagement of

[3] *Nigerian National Petroleum Corporation (NNPC) V. FAMFA Oil Ltd* (2012) 17 NWLR (Pt. 1328) 148; *Federal Government of Nigeria v. Zebra Energy Ltd* (2002) 18 NWLR (Pt. 798) 162

[4] *See* Ijeoma Uju, *Ministerial Consent for Release of Nigerian Oil Workers: A Fine Line between Meddlesome Interference and Protectionism*, Templars Thought Leadership, September 2015 (available at https://www.templars-law.com/wp-content/uploads/2015/09/Ministerial-Consent-for-Release-of-Nigerian-Oil-Workers_A-Fine-Line-Between-Meddlesome-Interference-And-Protectionism.pdf)

[5] Cap P10, Laws of the Federation of Nigeria, 2004.

employees is the exact thing which the rule that subsidiary legislation cannot *extend* the scope of a substantive enactment forbids. Second, such an attempt would arguably produce absurd outcomes, as the Minister could creatively rationalise virtually all conceivable measures, however draconian, as being in (vague) furtherance of at least one provision in the PA.

As such, the issuance of Regulation 15A of the PDPR apparently constitutes an impermissible expansion of the Minister's power to make regulations beyond what was contemplated under the PA. Such a Regulation is unlikely to survive judicial scrutiny and any Guidelines which purport to be founded on it, including the 2019 Guidelines, would scarcely fare any better.

Moreover, as we mentioned in our Thought Leadership commentary on the 2015 Guidelines, previous appellate court decisions refused to reckon with the predecessor 1997 Guidelines in determining the terms that govern petroleum industry employees' employment.[6] Separately, the National Industrial Court has also had occasion in 2019 to refuse to read the 2015 Guidelines into a disengaged worker's terms of employment.[7] Accordingly, it is likely that the 2019 Guidelines, like its predecessors, may not appeal to the graces of the courts if their validity were to be tested.

The constitutional scrutiny

The provision of any law that is inconsistent with the provisions of the Nigerian Constitution is null and void and liable to be struck down.[8]

As mentioned earlier, the 2019 Guidelines are a subsidiary legislation issued with the authority of the Minister pursuant to powers donated by the National Assembly under Section 9 of the PA. It is the PA as the principal law that provides the subsidiary legislation the source of its existence and the subsidiary legislation cannot exceed the powers conferred by the principal law. The 2019 Guidelines regulates contracts of employment and establishes the procedure for obtaining the approval of the Minister for the release of any Worker employed by an operator in the oil and gas industry. The PA does not vest the Minister with the power to legislate on contracts of employment. This is a matter reserved for the National Assembly.[9] Therefore, the 2019 Guidelines arguably usurp the powers of the National Assembly and thus breach the principle of separation of powers in the Constitution.

Overall, that the 2019 Guidelines' have seamlessly replaced the 2015 Guidelines and are continuing to be implemented in the industry despite appearing, fundamentally, to be resting on nothing, never ceases to intrigue.

To be reactive or proactive?

Against the above background, businesses may soon find themselves in positions where they must confront the 2019 Guidelines head-on. It may well serve their interest now to assess upfront whether that confrontation should be reactive or proactive.

Consider, for example, Participant A in the industry which, being in serious need to release some workers, applies for approval from the Minister as mandated in the 2019 Guidelines but the application is refused. Participant A may proceed to release the workers nonetheless in order to stay in business, but it must then

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[6] *Chukwuma v SPDC* (1993) 4 NWLR (Pt. 289) 512; *SPDC v Nwaka & Ors.* (2002) 10 NWLR (Pt. 720) 64.

[7] In *Michael Smith Atoe v Petrofac Energy Services Nig. Ltd.* (Unreported) Suit No. NICN/LA/506/2015, judgment delivered on 06 June 2019 (J. D. Peters, J.), in which Templars acted for the Defendant, the Court held as follows: "*The* [2015 Guidelines] *was tendered, admitted and marked Exh. SA3. Learned Counsel to the Claimant had submitted that ignorance of the law is not an excuse and that parties in this case ought to be mindful of the governing laws, rules and regulations governing their contract… The case of the Claimant was founded on a weak foundation. That foundation is the applicability of Exh. SA3. That exhibit being extraneous to Exh. SA6 the contract of employment cannot under any guise be imported to confer any benefit on the Claimant.*"

[8] Section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999; *Attorney General of Lagos State v. Attorney General of the Federation* (2003) 12 NWLR (Pt. 833) 1 (SC).

[9] See Item 33 in the Exclusive Legislative List in Part I of the Second Schedule of the Constitution.

prepare for potential DPR sanctions ranging from a US$250,000 (two hundred and fifty thousand dollars) "fine" to withdrawal of Participant A's lease, licence or award. Should Participant A commence an action to challenge the 2019 Guidelines after the sanctions have been imposed, it would be doing so reactively, with some contingent liability potentially hanging over its operations until the case is determined.

In contrast, a proactive Participant B may deem it pointless to "*wait and see*" and thus seek a pre-emptive determination of the validity of those provisions in the 2019 Guidelines which curtail employers' right to release employees at will. If Participant B does so, it would arguably have plausible justification for non-compliance with the challenged provisions from the outset and could potentially secure injunctive orders to restrain the DPR from imposing any purported sanctions until the case is determined. On balance, therefore, it appears to us that being proactive holds more benefits than being reactive.

Nevertheless, the call of whether, in the grand scheme of things, the benefit of accommodating the Guidelines in order not to upset the regulator outstrips the burden of challenging the *status quo* in order to restore employers' full right to disengage workers remains with the employers to whom the 2019 Guidelines apply. In the end, it would be no surprise if the economic realities of 2020 lead to frequent run-ins between these employers' cost-cutting business decisions and the 2019 Guidelines' arm-twisting restrictions on release of employees in the industry.

Conclusion

As the business outlook of the petroleum industry continues looking hazy at best, one wonders how much longer the 2019 Guidelines will continue to enjoy its seemingly grand reign. One thing appears clear enough to us: if oil and gas employers allow themselves to remain sandwiched between the 2019 Guidelines as a rock and the 2020 economic realities as a hard place, then they may find that "*letting sleeping dogs lie*" for so long has its own drawbacks if / when the need for substantial cost-cutting measures arise.

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