1 February 2023

TEMPLARS Successfully Defends TotalEnergies in a Multi-Million Dollar Labour Outsourcing Claim

Introduction

The Court of Appeal (the "**Appeal Court**") has handed down a landmark judgment which would have the effect of dislodging recent decisions of the National Industrial Court of Nigeria (NICN) that treated outsourcing as a "triangular employment" in which the end user is the employer or co-employer of the employee.

The judgment which was delivered on 20 December, 2022 allowed an appeal filed by TotalEnergies E&P Nigeria Ltd (TotalEnergies) and set aside the judgment of the NICN which reclassified the employment relationship between TotalEnergies, several outsourcing companies (the "**Service Contractors**") and 258 personnel of the Service Contractors (the "**Contract Personnel**") as a triangular or co-employment relationship, and on that basis made an award running into multi-billion Naira for wrongful termination of employment against TotalEnergies.

The Background to the Dispute

TotalEnergies, an oil and gas exploration and production company, outsourced its non-core operations to several Service Contractors under their respective service contracts (the "**Service Contracts**").

In furtherance of the Service Contracts, the Service Contractors deployed the Contract Personnel to render services to TotalEnergies. The Service Contractors acted as employers of the Contract Personnel for all purposes and in their capacity as employer, negotiated their employment contracts, issued letters of employments, paid salaries and allowances, remitted pension payments to pension fund administrators, supervised, and disciplined the Contract Personnel.

Key contacts

Inam Wilson, SAN
Partner and Head,
Labour, Employment and Transportation
inam.wilson@templars-law.com

Izuchukwu Ohajinwa
Senior Associate,
Dispute Resolution
izuchukwu.ohajinwa@templars-law.com

Munachiso Michael
Senior Associate,
Dispute Resolution
munachi.michael@templars-law.com

Francis Jarigo
Associate,
Corporate and Commercial
francis.jarigo@templars-law.com

The Service Contractors terminated the employment of a TotalEnergies of 258 Contract Personnel who felt aggrieved and initiated a representative action at the NICN against TotalEnergies and 5 Service Contractors, claiming that they are employees of TotalEnergies and are entitled to a TotalEnergies award of N114,284,037,652 (One Hundred and Fourteen Billion, Two Hundred and Eighty Four Million, Thirty Seven Thousand, Six Hundred and Fifty Two Naira) (approximately US$252,282,644 (Two Hundred and Fifty-two Million, Two Hundred and Eighty-two Thousand, Six Hundred and Forty-Four United States Dollars) for unpaid remuneration and allowances, terminal benefits and damages for wrongful/unlawful termination.

At the conclusion of the trial, the NICN entered judgment in favour of the Contract Personnel. Part of the reliefs granted by the NICN included a declaration that TotalEnergies is the employer of the Contract Personnel and an order directing TotalEnergies and the Service Contractors to pay to the 258 Contract Personnel 18 months gross remuneration as terminal benefits and 2 years gross remuneration as damages for wrongful/unlawful termination of the Contract Personnel's employment. If computed, the monetary claims would have run into billions of Naira or millions of Dollars.

Dissatisfied with the decision of the NICN, TotalEnergies and one of the Service Contractors appealed to the Court of Appeal.[1]

The key issues in the case

Privity of contract

The kernel of the defence put up by TEMPLARS on behalf of TotalEnergies included that there is no privity of contract (a common law doctrine established in a famous old English case[2] and applied in a long line of Nigerian authorities[3]) between TotalEnergies and the Contract Personnel in the form of employment letters. Rather, from the documentary evidence furnished by the Service Contractors, it was clear that the Contract Personnel were employed by the Service Contractors who issued employment letters to them, which represented the contract between them, to the exclusion of TotalEnergies. Consequently, the suit is liable to be struck out.

Though the NICN found that TotalEnergies did not issue letters of employment to the Contract Personnel, it refused to be persuaded that there was no employment relationship between them as the employment relationship may be formed by oral contract. The NICN relied heavily on the oral testimony of the Contract Personnel's witnesses that they worked for TotalEnergies under the supervision of the Service Contractors.

The NICN appeared to be unduly swayed by the averments in their Statement of Facts to the effect that the Contract Personnel were interviewed, employed and trained by TotalEnergies before they were handed over and/or rolled over to the Service Contractors. However, the NICN did not avert its mind to the fact that these were mere

1 Appeal No. CA/ABJ/CV/563/2020: Total E&P Nigeria Ltd v. Mr. Felix Adarikwu (Suing for himself and 257 disengaged service contract personnel of Total E&P Nig. Limited) & 5 Others judgment delivered on 20 December, 2022 and Appeal No. CA/ABJ/CV/1061/2020: Luck Guard Ltd v. Mr. Felix Adarikwu (Suing for himself and 257 disengaged service contract personnel of Total E&P Nig. Limited) & 5 Others judgment delivered on 15 December, 2022.

2 **DUNLOP PNEUMATIC TYRE CO. LTD v. SELFRIDGES & CO. LTD** (1915) A.C. 847

3 **IKPEAZU v. A.C.B. LTD.** (1965) NMLR 374 AT 379

averments and that averment of a fact in pleadings no matter how nicely crafted does not equate to evidence.[4]

The law is clear that parties are bound by their contract.[5] 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.[6] Having found that TotalEnergies did not issue letters of employment to the Contract Personnel and that the various letters of employment tendered in evidence by both parties were issued by the Service Contractors, the NICN ought not to have admitted and accepted the oral evidence to add to, vary, or subtract from or contradict the terms of the written document.

The Court of Appeal appeared to have taken the same view when it held that in the absence of a letter of employment issued to the Contract Personnel by TotalEnergies, the findings of the NICN that the Contract Personnel were employed by TotalEnergies had no foundation in facts and therefore, perverse. According to the Court of Appeal, in labour law, the letter of employment is the bedrock on which the Contract Personnel can lay claim to being employees of TotalEnergies. However, the evidence before the court was that the contract of employment was between the Contract Personnel and the Service Contractors.

Reclassification of the employment relationship as a triangular or co-employment relationship

The NICN underpinned its decision that the Contract Personnel were employees of TotalEnergies on the currently evolved and modern employment structure known as triangular or co-employment relationship, as well as Section 91 of the Labour Act, which, according to the NICN, is the legal basis for outsourcing in Nigeria.

The NICN took the view that TotalEnergies (as an outsourcing company) and the Service Contractors (as labour contractors) were co-employers of, or in some triangular employment relationship with, the Contract Personnel within the meaning and contemplation of the Labour Act. According to the NICN, it is in line with international best practice[7] to treat outsourcing as a tripartite arrangement termed "triangular employment" by the ILO.[8] Consequently, the NICN have treated the end user in several cases as the employer or co-employer of the employee.[9] By implication, the NICN was

---

4 In ***Nsionu v. Nsionu*** (2011) 16 NWLR (Pt.1274) 536 @ 547, E – G it was held: "… *It is also settled law that* ***an averment of a fact in any pleadings is no evidence and can never be so construed. It has to be proved by evidence****, subject to admission by the other party, and* ***any pleaded fact that is not proved or supported by evidence is deemed abandoned.***" (emphasis supplied)

5 ***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.

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

7 Section 254C(1)(f)(h), and (2) of the 1999 Constitution (as amended by the Third Alteration Act 2010) **permits** the National Industrial Court of Nigeria to apply international best practices in labour, employment and industrial relation as well as international labour standards. Section 7(6) of the National Industrial Court of Nigeria Act 2006 further empowers the NICN to have due regard to good or international best practice in labour or industrial relations.

8 The International Labour Organisation (ILO) has acknowledged that there are complex situations in which one or more third parties are involved, in what might be termed a "triangular" employment relationship. "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. *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/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf. ***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 (NICN)
The NICN successfully invoked the co-employer principle in the following cases ***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).

able to reclassify the employment relationship in an outsourcing arrangement regardless of the intention of the parties as expressed in their contracts.

The Court of Appeal rightly rejected this line of reasoning of the NICN and held essentially that the operation of the doctrine of privity of contract excludes the application of the triangular or co-employment principle. Applying the doctrine of privity of contract, the Court of Appeal held that a contract cannot confer or impose obligations on any person except the parties. In other words, only the parties to a contract can sue or be sued on the contract, and a stranger to a contract cannot sue or be sued on the contract. According to the Appeal Court, the doctrine of privity of contract is all about the sanctity of contract between the parties. It does not extend to others from outside. The doctrine will not apply to a non-party to the contract who may have unwittingly been dragged into the contract with a view to becoming a shield or scape goat against the non-performance of the parties.

The Court of Appeal concluded from the foregoing, that there is no iota of evidence to indicate that the arrangement and agreement of the parties could admit of any triangular employment relationship.

Conclusion

The decision of the Court of Appeal has established the following:

1. That Section 91 of the Labour Act is not the legal basis of outsourcing in Nigeria;
2. That the common law doctrine of privity of contract, which the NICN disregarded in order to invoke a triangular or co-employment relationship in an outsourcing arrangement, has been restored. Flowing from this, the NICN decisions treating the end user in an outsourcing arrangement as a co-employer may no longer be good law;
3. That the courts will now uphold the sanctity of contract as earlier enjoined by the Court of Appeal in ***Oak Pensions Ltd v. Olayinka Olayinka*** [2017] LEPLR-43207(CA) where the NICN was admonished that unfair labour practice or international best practices may arise in the course of employment or in a trade dispute or industrial relations, but cannot rightly and properly be imported into the terms and conditions of a contract of service freely entered into.