

REFLECTIONS ON THE NATIONAL INDUSTRIAL COURT OF NIGERIA PRACTICE DIRECTION 2022

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INTRODUCTION

On 31st May 2022, the President of the National Industrial Court of Nigeria (NICN), Honourable Justice Benedict Bakwaph Kanyip, PhD, made the National Industrial Court of Nigeria (Filing of Applications/Motions in Trade Union Matters and Marking of Exhibits) Practice Directions (No. 1) 2022 (“the Practice Direction”), which came into force on 13th June 2022.

In its section 1, the Practice Direction sets out the guidelines to be adopted in (a) filing of applications and motions in trade union matters; and (b) marking of documents/exhibits. Section 4 thereof provides that the Practice Direction shall apply to all causes and matters in the NICN save to the extent as indicated on the Practice Direction or as otherwise directed by the President of the NICN. Section 2 remarkably provides that the Practice Direction is issued with a view to guarantee continued access to justice and expeditious disposal of cases. Whether the subsequent provisions of the Practice Direction align with this goal is a point to be reflected upon.

GENERAL PROVISIONS OF THE PRACTICE DIRECTION

As stated above, the major provisions of the Practice Direction relates to the guidelines/procedure for (a) filing of applications and motions in trade union matters; and (b) marking of documents/exhibits. The provisions of the Practice Direction on these two items are appraised below.

Filing of Applications and Motions in Trade Union Matters

Section 3(1) of the Practice Direction provides as follows:

“From the date of this Practice Direction and notwithstanding any provisions in the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 in this regard, all forms of originating processes including applications and motions, particularly such that seek for order(s) to restrain the holding of delegates’ conference of a trade union or conduct of trade union elections, are to be filed either in Abuja or Lagos Judicial Division of the Court.”

With due respect to the draftsman, it is not clear what is intended on the face of the provision excerpted above. An attempt to interpret the said provision gives room for more than a few of controversies, some of which are highlighted below.

i. Status of the Practice Direction

The opening lines of section 3(1) of the Practice Direction contain the phrase "...notwithstanding any provisions in the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017..." The provision suggests that where there is a conflict between the provisions of the Practice Direction and the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 (the NICN Rules), the provisions of the Practice Direction shall prevail.

To be fair to section 3(1) of the Practice Direction, there are some judicial authorities which equate practice directions with the rules of court. In **Abubakar v. Yar'Adua (2008) 1 SC (Pt. II) 77**, Niki Tobi JSC held that the rules of court include practice directions. See also **Buhari v. INEC & Ors (2008) LPELR-814(SC)**. However, in the much recent decision of the Court of Appeal in **Zabuka (Nig) Ltd v. Ade Alarege & Ors (2022) LPELR-57784(CA)**, the court held that "practice directions of any sort, provide guides on how to comply with existing rules of court". If emphasis is placed on "of any sort," it then means that even the Practice Direction under review here ought to merely provide a guide for compliance with the NICN Rules. The Court of Appeal referred to the case of **Unilag v. Aigoro (1984) 11 SC 152 @ 159**, where the Supreme Court defined practice direction as "a direction given by the appropriate authority stating the way and manner a particular rule of Court should be complied with, observed or obeyed." In **Okereke v. Yar'Adua & Ors (2008) LPELR-2446(SC)**, the Supreme Court was even more emphatic when it held as follows:

"Practice Directions do not, strictly speaking, qualify as Statutes or enactments. They do not even stand on equal footing with Rules of Court. They are ancillary to and therefore subordinate to Rules of Court. Consequently, in the event of a conflict between a Rule of Court and a Practice Direction the rule must prevail."

In view of these decisions, it is clear that the rules of court rank higher than a practice direction. It is therefore awkward to see that section 3(1) of the Practice Direction appears to make the Practice Direction supersede the NICN Rules in case of a conflict regarding filing of the processes referred to the Practice Direction.

ii. The Scope of Section 3(1) of the Practice Direction

Section 3(1) of the Practice Direction further provides that "...**all forms** of originating processes including applications and motions, **particularly** such that seek for order(s) to restrain the holding of delegates' conference of a trade union or conduct of trade union elections, are to be filed either in Abuja or Lagos Judicial Division of the Court."

The use of the phrase "all forms" in the provision suggests that every originating processes (without any exception) shall be filed either in Abuja or Lagos Judicial Division of the NICN. The implication is that the registries of the NICN other than the Abuja and Lagos divisions are rendered redundant as far as filing of originating processes is concerned. Thus, every suit to be

filed at the NICN must be commenced in the Abuja or Lagos division, no matter where the cause of action arose or the domicile of the parties.

Section 3(1) may also be seen to have limited the suits it references to those seeking for order(s) to restrain the holding of delegates' conference of a trade union or conduct of trade union elections. This it appears to do using the adverb "particularly". According to the 2nd edition of the Longman Dictionary of Contemporary English, the adverb, "particularly" means "especially; in a way that is special and different from others". It appears that by using the word "particularly", section 3(1) of the Practice Direction is limited to the processes seeking to restrain the holding of delegates' conference of a trade union or conduct of trade union elections. However, this intention could have been better captured by a phrasal of the section without the words, "all forms" as used at the beginning, to avoid any controversy as to the classes of suit to which the section apply. Section 4 of the Practice Direction is not helpful. Although it stated that the Practice Direction would apply to all causes and matters in the NICN, it adds a rider, "save to the extent as herein indicated or as may otherwise be directed by the Honourable President...". It is not clear whether it is intended that processes seeking to restrain the holding of delegates' conference of a trade union or conduct of trade union elections are the exemptions referred to under section 4.

iii. Effect of Section 3(1) of the Practice Direction on Access to Justice

There is indeed only one NICN created under section 254A of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) ("the 1999 Constitution") and section 1 of the National Industrial Court Act, 2006 ("the NIC Act"). In fact, section 21(1) of the NIC Act provides that the Court shall have and exercise jurisdiction throughout the Federation and for that purpose, the whole area of the Federation shall be divided by the President of the Court into such number of judicial divisions, as the President from time to time, by instrument published in the Federal Gazette decide, and may designate any such judicial division or part thereof by such name as he thinks fit. Subsection (2) provides that the Court may sit in any Judicial Division as the President of the Court may direct.

The provisions referenced above provide the legal justification for the provision of 3(1) of the Practice Direction in limiting the venue for filing of court processes seeking to restrain the holding of delegates' conference of a trade union or conduct of trade union elections to the Abuja and Lagos divisions of the NICN.

It is not clear why the Practice Direction limits the filing of suits seeking to restrain the holding of delegates' conference of a trade union or conduct of trade union elections to the Abuja and Lagos divisions of the NICN. It may be to curb the practice where different factions of trade unions commence multiple suits on the same subject in various divisions of the NICN, which most times result in conflicting decisions from various Judges of the NICN.

Assuming this is the mischief the provision seeks to cure, the approach undertaken in the Practice Direction may not be the best. The implication is that trade unions that are not predominant in either Abuja or Lagos will have to go all the way to Abuja or Lagos to file an action, no matter the urgency. By this approach, where there is a real situation of urgency deserving of the interim preservative/preemptive orders of court, injustice may have resulted even before the parties get to Abuja or Lagos to file the action, rendering any subsequent decision of the court nugatory. The good intentions of the Practice Direction notwithstanding, the procedure it has adopted may constitute an impediment to access to justice.

The Practice Direction could have adopted the procedure under the Federal High Court Rules, 2019 where a claimant is required to depose an affidavit of non-multiplicity of action and include same as part of documents to accompany the writ or originating summons. This way, a person who knows of the existence of a suit but goes ahead to commence another suit and making a false deposition in the affidavit of non-multiplicity of action may be liable for perjury. Another measure would be for the NICN to have a central repository system assessable to and from all Registries in the different divisions. This way the Registry, the President of the NICN and the Administrative Judges can keep tab of all new actions filed in any registry and assign similar actions to the same Judge.

Marking of Documents/Exhibits

Section 3(2) of the Practice Direction contain provisions which bothers on evidence. It provides that all frontloaded documents attached and/or referred to a pleading or witness statement on oath and which are intended to be relied upon at trial should be marked serially in the manner done for originating summons. It is also required that the part of the document (e.g., paragraphs or pages) to be relied upon in the attached document must be concisely referred to and appropriately marked as to be discernable in terms of the fact being proved.

The section further provides that a party who intends to tender a frontloaded document at trial must also indicate if the original will be available/produced for inspection at the hearing of the matter. Also, if the document is such that requires the laying of foundation before it can be admitted into evidence, the necessary foundation must be laid in the pleading and witness statement on oath.

Section 3(2)(g) specifically states that a defendant who intends to object to the admissibility of a document to be tendered by a claimant must indicate so on the statement of defence and witness statement on oath and state the basis of the objection. A similar provision is contained in section 3(2)(k) which requires a claimant to indicate his objection to the defendant's document in his reply to the statement of defence. One problem with section 3(2)(k) is that it assumes that a claimant will in all cases file a reply to the statement of defence. The law is clear on the point that a reply is only necessary to respond to novel issues raised in a statement of defence that was not contemplated in the statement of claim- please see **Aliyu v. Adamu & Ors (2021) LPELR-**

56641(CA). In **Unity Bank v. Bouari (2008) LPELR-3411(SC)**, Niki Tobi, JSC held that “a Reply is necessary where a Statement of Defence raises a fresh issue which was not anticipated by the Statement of Claim. Where a Statement of Defence raises an issue which is already averred to in the Statement of Claim, a Reply is otiose.” The Practice Direction did not consider a situation where a claimant may not have to file a reply but intend to object to documents intended to be tendered by a defendant. This is another shortcoming of the Practice Direction.

EFFECT OF NON-COMPLIANCE

Section 3(3) of the Practice Direction provides that any process that does not comply with any provision of the Practice Direction shall not be accepted in the registry for filing. Where it is accepted, the court shall treat same as incompetent and strike out the entire suit, if it is the claimant’s statement of fact, reply to statement of defence, and/or witness statement on oath, or strike out the process if it belongs to the defendant.

By this provision, the Registries of the various divisions of the NICN have been empowered to filter all processes or at least those relating to actions seeking to restrain the holding of delegates’ conference of a trade union or conduct of trade union elections and refuse same for filing except in the Abuja and Lagos divisions. More worrisome is the fact that such a process, except if it was filed in either the Abuja and Lagos divisions, is deemed incompetent and liable to be struck out.

In the same vein, the Registries of the various divisions of the NICN have been empowered to reject processes presented for filing if they do not comply with the procedure for marking exhibits as provided for in section 3(2) of the Practice Direction. Even where it is accepted for filing, the court is enjoined to treat the process as incompetent and strike it out.

The controversy created by section 3(2) is that it relates to evidence. Evidence is the 23rd item in the Exclusive Legislative List, which confines evidence to the exclusive legislative competence of the National Assembly. Generally, evidence is governed by the Evidence Act, 2011. Any other law on evidence which is inconsistent with the provisions of the Evidence Act is void to the extent of its inconsistency, of course without disregard to the provision of section 3 of the Evidence Act, 2011 which allows for the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.

The thought-provoking questions are, can the Practice Direction validly legislate on evidence? Will the fact that a party failed to raise his objection to the admissibility of a document in his pleading make him unable to raise the objection at a later stage of the proceeding and thereby render an otherwise inadmissible document admissible? Or will the fact that a party failed to lay necessary foundation to the admissibility of a document in his pleading and witness statement on oath prevent him from laying the said foundation at trial and thereby make him unable to tender the document at trial?

There are many judicial authorities on the point that the proper time to raise an objection to the admissibility of documentary evidence is when the document is sought to be tendered- See **Isa Kassim v. The State (2018) 4 NWLR (Pt. 1603) 20 and Arinze v. First Bank (Nig) Ltd (2000) 1 NWLR (Pt. 639) 78**. An analogy may also be drawn from the position of the law that it is desirable for objection on admissibility of a document to be raised during pre-trial conference. Notwithstanding, failure to so raise the objection at the pre-trial conference does not prevent a party from raising it at the trial stage, because this will give room for rendering admissible an otherwise inadmissible document. This is the resultant effect of section 3(3) of the Practice Direction on failure to raise objection to admissibility on pleadings. The Court of Appeal was emphatic when it held in **Ashaka Cement Plc v. Asharatul Mubashshurun Investment Ltd (2016) LPELR-40196(CA)** that the Rules of Court cannot override a substantive legislation. The Evidence Act, 2011 is the substantive legislation on admissibility of documents. Therefore, the Practice Direction ought not to affect its provisions on admissibility.

How about in cases where the document frontloaded is absolutely inadmissible in law? The law is trite that such documents even after it is admitted without objection should be discarded and that a party can raise the objection for the first time on appeal or at the address stage. This position of the law was well espoused on **Okpu v. Trust Bond Mortgage Bank Plc (2021) LPERL-54554(CA)**. However, section 3(3) of the Practice Direction seems to deny a party the right to raise the objection on admissibility at a later stage not minding that the document is, by law, absolutely inadmissible.

It may be argued that the Evidence Act does not apply strictly to the NICN in view of the provision of section 12(2)(b) of the NIC Act which provides that the court shall be bound by the Evidence Act but may depart from it in the interest of justice. But as has been demonstrated above, strict compliance with the Practice Direction in defiance of the Evidence Act may lead to even greater injustice. The problem with section 3(3) of the Practice Direction does not end at the fact that it is likely to render admissible an inadmissible document. It goes ahead to render incompetent the claimant's suit or the defendant's processes. There is a distant relationship between the competence of an action and admissibility of evidence. The fact that a document is not in an admissible form does not render an action incompetent. It is therefore strange that by the Practice Direction, an entire suit is liable to be rendered incompetent because documents are not properly marked as it should be in an originating summons.

CONCLUSION

The goal of the Practice Direction as indicated in section 2 is to promote access to justice and expeditious disposal of cases. This intention is regrettably not aptly manifested in the provisions of the Practice Direction as a result of the controversies that surround the said provisions, some of which have been highlighted above.

In an attempt to guarantee access to justice, the Practice Direction may have created an avenue for the denial of justice by limiting litigants to only the Abuja and Lagos divisions of the NICN. The Practice Direction does not bury the doubt as to whether this limitation only applies to actions seeking to restrain the holding of delegates' conference of a trade union or conduct of trade union elections or to all actions.

The Practice Direction also contains some far-reaching evidential provisions. Fairly, the intention of this provisions is to make for the expeditious dispensation of cases which is very laudable. However, some of the provisions are not in consonance with the rules of evidence as expounded in many judicial decisions, raising the question as to whether the Practice Direction can competently govern evidence and, particularly, the admissibility of documents.

The most worrisome part of the Practice Direction is the sweeping provisions of section 3(3) which renders an action or process incompetent and liable to be struck out for non-compliance with the Practice Direction. The far-reaching provisions of the Practice Direction cast doubt on whether it has accomplished its objective of promoting access to justice and speedy dispensation of disputes.

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