DID THE COURT VALIDLY RESURRECT THE GUIDELINES FOR THE RELEASE OF STAFF IN THE NIGERIA OIL AND GAS INDUSTRY IN *SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA v. MINISTER OF PETROLEUM RESOURCES & 2 ORS?*

Introduction

On 26th February 2021, the National Industrial Court (NIC) per Hon. Justice E. A. Oji, delivered a judgment in **Suit No: NICN/LA/411/2020 - Petroleum and Natural Gas Senior Staff Association of Nigeria** (**PENGASSAN**) **& 3 Ors. V. Chevron Nigeria Limited *(the PENGASSAN case)*** [i] holding that the Guidelines for the Release of Staff in the Nigeria Oil and Gas Industry 2019 (the Guidelines) which required the written approval of the Minister of Petroleum Resources (the Minister) prior to the termination of an employee's employment in the petroleum industry, was invalid. Oji J. came to this conclusion having held that the Minister acted beyond the scope of his powers under Section 9 of the Petroleum Act[ii] in enacting Regulation 15A of the Petroleum (Drilling and Production) Regulations 1969 (as amended) (the Regulations) pursuant to which the Guidelines was made by the Department of Petroleum Resources (DPR), now known as the Nigerian Upstream Petroleum Regulatory Commission (the Commission).

On 28th July 2022, the NIC per Hon. Justice B. B Kanyip, delivered another judgment in **Suit No: NICN/ABJ/178/2022 - Shell Petroleum Development Company of Nigeria v. Minister of Petroleum Resources and 2 Ors. (*the Shell case*)**[iii], holding that the Guidelines are valid and applicable to employment contracts within the petroleum industry. While not faulting the decision of Oji J. in the *PENGASSAN case*, Kanyip J. held that the provisions of the Petroleum Industry Act, 2021 (PIA)[iv] which came into force after judgment was delivered in the *PENGASSAN case* "supplanted" Section 9 of the Petroleum Act, and thus, the Guidelines are not beyond the scope of the powers of the Minister (1st Defendant) and the Commission (the 2nd Defendant in the suit) and relying on his interpretation of the PIA, he held that the Guidelines are valid and applicable.

This article examines the NIC's importation and interpretation of the PIA to validate the Guidelines, against the background of the decision in the *PENGASSAN case.*

The Shell case

By a letter dated 2nd June 2021, the Claimant terminated the employment of one of its employees, Gbenuade Joko Olanitori. Dissatisfied, Olanitori petitioned the DPR on the ground that the Claimant did not comply with the Guidelines by failing to obtain the written approval of the Minister before terminating her employment. Upon being queried by the DPR, the Claimant maintained that its termination of Olanitori's employment was in terms with her contract of employment, and that the Guidelines was inapplicable in this instance. The DPR on its part, maintained that the Guidelines were applicable and by a letter dated 28th January 2022, imposed a fine of US$250,000 on the Claimant for failure to seek and obtain the Minister's approval prior to the termination

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of Olanitori's employment as provided by the Guidelines.

Disgruntled by the fine imposed on it, the Claimant filed a suit at the NIC raising several questions for the determination of the Court amongst which was whether the Defendants are empowered by law to enforce or continue to enforce any provisions of the Guidelines which have been invalidated and rendered null and void by virtue of the decisions of the NIC in the *PENGASSAN case* and the Supreme Court in **Shell Petroleum Development Company of Nigeria Limited & Nwaka**[v]**.** The Claimant also argued that Section 12 of the Petroleum Act forbade the DPR from making the Guidelines on behalf of the Minister, rendering same invalid.

In determining the questions posed by the Claimant, Kanyip J. held that the Claimant's right to come to court culminated only on 28th January 2022, when the fine of US$250,000 was imposed on it. Thus, the Court determined that the PIA, which came into effect on 16th August 2021, was applicable in conjunction with the Petroleum Act. The Court further stated that although the PIA did not repeal the Petroleum Act, it supplanted it in several respects.

On the issue of the validity of the Guidelines the Court found that "***There is a marked difference in the provisions of section 9 of the Petroleum Act and the corresponding provisions of the PIA as to make PENGASSAN & 3 ors. v. Chevron Nigeria Limited distinguishable from (and so not applicable to) the instant case"*** and that by Section 3(1)(a) and (i) of the PIA, "***The exception in section 12 of the Petroleum Act ("except the power to make orders and regulations") has been done away with.",*** thus, the Minister can ***"delegate in writing to the Chief Executive of the Commission or Authority any power conferred on the Minister by or under this Act."***

In distinguishing the *PENGASSAN case*, the Court relied on several provisions of the PIA including section 317(2) of the PIA which provides that all rules, orders, notices or other subsidiary legislation made under the Petroleum Act, the Petroleum Profits Tax Act, and the Deep Offshore and Inland Basin Production Sharing Contract Act shall continue to have effect as if made under the corresponding provisions of this Act; section 3(1)(a) and (i) of the PIA, which provides that the Minister shall formulate, monitor and administer government policy in the petroleum industry and delegate in writing to the Chief Executive of the Commission or Authority any power conferred on the Minister by or under this Act; section 6 of the PIA, which charges the Commission with the responsibility of implementing such policies for and objectives as are consistent with the provisions of the PIA; section 10 of the PIA which grants the Commission the power of enforcing regulations, policies and guidelines formerly administered by the DPR or the Petroleum Inspectorate and section 10(f) specifically grants the Commission the power to issue guidelines in accordance with the provisions of the PIA or any regulation in respect of upstream operations.

The Court also referred to Sections 10 and Section 12A of the Interpretation Act[vi] that: ***"10 (2)*** *An enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it;* ***12(1)*** *Where an Act confers a power to make a subsidiary instrument, proclamation or notification, the power shall include — (c) in the case of a subsidiary instrument, power to prescribe punishments for contraventions of provisions of the instrument, not exceeding as respects a particular contravention — (i) in the case of rules of court imprisonment for a term of three months or a fine of fifty Naira or both, (ii) in any other case,*

imprisonment for a term of six months or a fine of one hundred Naira or both."

Based on the above reproduced laws, the Court held that the powers now vested in the Minister by the PIA, portend that the Guidelines are valid and operable, rendering the decision in the *PENGASSAN case* inapplicable to the *Shell* case.

On the tenability of the judgment in the *Shell case*

The above reasoning of the learned judge is in our opinion untenable.

Our first point of divergence is on the applicability of the PIA to the determination of the validity of the Guidelines in the *Shell case*. The basis of the suit is the interpretation of the Guidelines in relation to the termination of Olanitori's employment and the resulting fine imposed on the Claimant. Also, the grievance which led to the petition to the DPR resulting in the fine imposed on the Claimant is the termination of Olanitori's employment. These events occurred before the enactment of the PIA.

The position of the Court to the effect that the cause of action arose in January 2022 based on its finding that "*but for this fine, the claimant would not have come to this Court as it did in this matter, hence the claimant's cause of action*" is a surprising if not unfounded stretch at justifying the Court's reliance on the PIA in reaching its decision. While the Court is right that the applicable law in deciding a matter is the law as at the time the cause of action arose, the Court failed to appreciate that the reliefs sought by the Claimant were hinged on the propriety or otherwise of the termination of Olanitori's employment as at the time it occurred. The Claimant's relief that the purported imposition of a fine by the Commission via its letter of 28 January 2022 was illegal, was based on the Claimant's contention that the Guidelines were invalid.

The current legal status of the said Guidelines ought to have been considered by the court in determining whether the Claimant was liable for the imposition of the fine. This can only be determined based on the Petroleum Act which gave birth to the Guidelines and not the PIA.

A statute operates prospectively and cannot apply retrospectively unless it is made to do so by clear and express terms, or where it only affects purely procedural matters and does not affect the right of the parties[vii]. The Guidelines requiring the Minister's approval before termination was already declared invalid by the Court and the Claimant was not under any obligation to abide by its provisions. As such, the Claimant cannot be said to be in breach of a law which was not in existence or has been invalidated when it acted and any fine imposed pursuant to same must be held illegal.

The Second point is, can the PIA be interpreted as having validated the Guidelines which was made in exercise of a non-existent power and already pronounced invalid by the Court as at the time the PIA was enacted?

The reasoning of the Court in the *Shell case* was that the Guidelines have been saved by the provisions of the PIA which validates the power of the Minister to make the type of policies contained in Regulation 15A of the Regulations and in turn, the Guidelines. However, Section 317(2) of the PIA which the Court relied on does not detract from the position of the law that once a legislation is pronounced invalid, it ceases to exist[viii] in law. Thus, reference to '*All rules, orders, notices or other subsidiary legislation"* in Section 317(2) of the PIA must be interpreted to exclude legislations which a court of competent jurisdiction has pronounced null and void. Moreso in this case, the Court had in a previous decision before the enactment of the PIA[ix], held that the Guidelines which is a

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subsidiary legislation, was made without express powers provided under its primary enabling law, that is, the Petroleum Act. Applying the *expressio unius est exclusio alterius* rule of interpretation[x], section 9 of the Petroleum Act does not empower the Minister to make regulations pertaining to employment. It is therefore a grave error of interpretation as espoused by the Court, to give effect to the provisions of the Guidelines as it did in the *Shell case*.

Thus, to the extent that Regulation 15A of the Regulations was made without the enablement of the Petroleum Act, the Guidelines made pursuant to the said Regulation must remain invalid and ineffective. The finding of the Court that "**Section 3(1)(a) of the PIA was not part of section 9 of the Petroleum Act and so must be read as a conscious act by the draftsman to validate the *Guidelines*"** is irreconcilable with the status of the Guidelines which is already pronounced dead.

Further, Section 10(f) of the PIA granting the Commission the power to issue guidelines in accordance with the provisions of the PIA or any regulation in respect of upstream operations is a literal interpretation, only applicable to guidelines and regulations that may be issued after the PIA came into force. There is no ambiguity in the said provision to require any other interpretation.

The provisions of the Interpretation Act relied on by the Court in the *Shell case* are not to the effect that an enactment can ratify or revive an invalid law but only regulates how to construe powers conferred by an enactment and any subsidiary legislation. In fact, it would be a great misapplication of the Interpretation Act to assume such an interpretation.

The judgments in the *PENGASSAN case* and *Shell case* were delivered by Judges of coordinate Jurisdiction, both of the NIC. Thus, Kanyip J. was not bound by the judgment delivered by Oji. J. and only an appellate court can set aside either judgment. However, it is our view that the position taken by Kanyip. J is untenable under our jurisprudence irrespective of the construction of the powers now donated to the Minister under the PIA. Our position lies with the decision of Oji J. that the Guidelines which were made without any enabling law are invalid. Thus, the PIA which came into force after the Guidelines were made cannot change the status of the Guidelines which were dead on arrival.

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[i] Suit No: NICN/LA/411/2020 - Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) & 3 Ors -Vs- Chevron Nigeria Limited

[ii] Petroleum Act, Cap P10, Laws of the Federation of Nigeria 2004

[iii] Suit No: NICN/ABJ/178/2022 - The Shell Petroleum Development Company of Nigeria Limited -Vs- The Minister of Petroleum Resources & 2 Ors

[iv] Petroleum Industry Act, 2021

[v] [2003] 6 NWLR (Pt. 815) 184

[vi] Interpretation Act, CAP I23, Laws of the Federation of Nigeria 2004.

[vii] Oshinye v. C.O.P. (1960)2 SCNLR 216

[viii] A.S.H.A v Tijani (2012) 8 NWLR (Pt. 1303) 483 at Page 506 para-E-F

[ix] PENGASSAN v Chevron *(Supra)*

[x] Meaning that *the express mention of one person, thing, act, or consequence, excludes the others.*