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Settlement of Trade Disputes: Nigeria's Labour Court in Perspectives

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Abstract
The fabric of any society rests on the interaction of people and the denomination of value exemplified in the exchange of goods and services. Prominent in this exchange, is the engagement of labour by the employer, in a relationship broadly identified as involving a contract of service. Typically, unresolved conflicts in divergent interests of employer and employee yield disputes. The National Industrial Court of Nigeria, as a specialized labour court with a chequered history, has been vested with far reaching jurisdiction and powers under the Constitution and statute, with responsibility for justice between parties even at the expense of evidentiary rules and technicalities, consonant with national laws and international standards and best practices. By some default, the court in its present form, serves as both court of first and last resort, making it suspect. The challenge is for the court not to transform into one where the interests of labour, both real and imaginary, must be protected at all cost.

Key Words: Trade Disputes, Industrial Court, Jurisdiction, Dispute Resolution

1. Introduction

The relationship between the employer and his employee is distinguishable from that existing between him and an independent contractor. The employee has a contract of service but the independent contractor has a contract for services with the employer. According to the Supreme Court in Iyere v. Bendel Feed & Flour Mill Ltd.[1] an "employee" is an individual who has entered into or works under, or where the employment has ceased, worked under a contract of employment. A contract of employment connotes a contract of service or apprenticeship, whether express or implied, and if it is express, whether it is oral or in writing.[2] On the other hand, the independent contractor is a self-employed person who has engaged to render some services to the employer as defined by the contract between them.

There is hardly any gainsaying the fact that issues of labour inure in every relationship, arising in one way or the other during marriages, to time of conception, delivery, to maturity and even at death until a deceased is buried. Consequently, disputes on issues relating to labour are a recurring decimal on daily basis; they do arise in both informal and formal sectors of the economy.[3]

The courts are saddled with settlement of these disputes whenever and wherever they occur. Sometimes, a nation has to make the choice whether to establish a specialized court on labour/industrial matters or consign such cases to the regular courts. Nigeria, as did some others,[4] chose the former, recognizing the high impact of decisions on labour matters to the parties, the society, foreign investors and overall development of the nation. Uncertainties in applicable legal regime and/or undue delay in the adjudication process on labour matters are clearly undesirable. These and more, underscore the importance of the National Industrial Court of Nigeria.

The court was conceived to expeditiously resolve employment, labour and industrial relations disputes and other related matters, thereby creating a harmonious industrial environment. It is desirable that the establishment,

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[1] [2008] 12 S.C.M. (Pt. 1) 66
[2] *Ibid*., at p. 80
[3] Adejumo, B. A. "The Relevance of the National Industrial Court of Nigeria in the Scheme of Things in Contemporary Nigeria: What is the Future for Litigation and Advocacy in the Court? Being the text of a Paper presented on the Occasion of the 2013 Retreat Organised by the Nigerian Bar Association, Ilorin Branch, Holden at the ARMTI Campus, Along Ajasse Ipo Road, Near Ilorin, Kwara State, Nigeria from 2nd – 4th April, 2013; available at <http://nicn.gov.ng/speech/relevance_of_nicn_contemporary_nigeria.pdf> (last accessed 30/03/2015).
[4] Some other countries that have established specialized labour or industrial courts are Trinidad and Tobago, Ghana, Tanzania, America, India, Ireland, South Africa, Kenya

status, jurisdiction and other matters concerning the court have now been fairly settled[1] by the Alteration Act[2] which made necessary amendments to the provisions of the 1999 Constitution.[3]

As a point in fact, in Amadi v. NNPC[4] a worker challenged his suspension and a subsequent dismissal from work and it took 13 years to resolve the question of jurisdiction with an order by the Supreme Court that the case be remitted to the High Court and tried all over by another judge. Also, in Osisanya v. Afribank Nigeria Plc,[5] a case of wrongful dismissal, the legal tussle between the parties lasted nearly twenty years before final judgment by the Supreme Court.[6] This protraction is hardly desirable or helpful of the industrial harmony required at the work place. It remains to be seen if and to what extent the National Industrial Court has affected the paradigm in the labour dispute resolution process.

2. Relations Between Employer and Employee

The focus of this paper is the relationship between the employer and the employee, as distinct from the relationship that may exist between the employer and the independent contractor. In the former, the nexus between the parties is the contract of employment otherwise referred to as the contract of service. In the latter, there is a contract for services.[7]

According to the Supreme Court in Shena Security Co. Ltd. v. Afropak (Nig.) Ltd. & Ors.,[8] a contract of employment means any agreement, whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker. In contrast, the independent contractor is essentially his own employer. Generally, he determines what will be done and how it will be done within the confines of the contract between him and the person who has engaged him; the employer may only determine the outcome of the work to be done. The independent contractor, in turn, may have other workers working for him, who have contracts of service with him.

Between the independent contractor and the employer, there is a limited relationship defined by the underlying contract between the parties. It is not an engagement of work or employment; rather, the subject matter is defined in the contract. There is no mutuality of obligations[9] between them, as exists between an employer and an employee.

[1] Prior to the Alteration Act, the National Industrial Court was bedeviled with a lot of controversy surrounding its true status and jurisdiction. There were decisions, including those of the Supreme Court, to the effect that in the absence of constitutional amendments, the court cannot truly be regarded as a superior court of record, neither did it have exclusive jurisdiction over labour, industrial and related matters, notwithstanding provisions of the Trade Disputes Act (Cap, T8, Laws of the Federation of Nigeria 2004) and the National Industrial Court Act (Act No. 1, 2006) which conferred this status on the court. The Court of Appeal held in both *Kalango v. Dokubo* (2003) 15 WRN 32 and *Attorney General, Oyo State v. National Labour Congress* (2003) 8 NWLR 1 that the court was not a superior court of record. Worse still, in *National Union of Electricity Employees & Anor. v. Bureau of Public Enterprises* (2010) 7 NWLR (Pt. 1194) 538, the Supreme Court held that the National Industrial Court was not a superior court of record and that it was a subordinate court to the High Court.

[2] Constitution (Third Alteration) Act, Act No. 3 of 2010, hereinafter referred to as the "Alteration Act". The Alteration Act came into effect on March 4, 2011.

[3] Constitution of the Federal Republic of Nigeria 1999; Cap. C23 Laws of the Federation of Nigeria 2004

[4] (2000) 5 WRN 47

[5] [2007] 6 NWLR (Pt.1031) 565

[6] *Bernard Longe v. First Bank of Nigeria Plc* (2010) 2-3 SC (Pt. III) 67 took eight years between the High Court and the Supreme Court; *University of Nigeria Teaching Hospital Management Board & Anor. v. Nnoli* (1994) 10 SCNJ 71 lasted seven years from the High Court to the Supreme Court.

[7] Some of the tests that have been applied by the courts in distinguishing between an employee and an independent contractor are: control test; integration or organizational test; economic reality or entrepreneurial test; mutuality of obligation test; and the multiple test.

[8] (2008) 9 SCM 169

[9] Mutuality of obligations, in this context, refers to the presence of mutual commitments to keep the employment relationship in existence. The first determination is whether there is an obligation to provide work and an obligation to carry out that work; the second is whether there is a promise of future work, both as to providing it by the employer and the employee being under obligation to do it. The mutual obligations – to provide work and for it to be done and remunerated for – on the part of both parties will continue to exist until the contract of employment is terminated and will provide the basic requisite mutual obligations. Thus, in the face of a contract of employment, both parties are entitled to believe that the work will be available, will be done as required and will be appropriately remunerated. See generally, *Stephenson v. Delphi Diesel Systems Ltd.* [2003] ICR 471; *Carmichael & Anor. v. National Power Plc.* (1999) 1 W.L.R. 2042, (2000) IRLR 43 (HL); Clarke L. "Mutuality of Obligations and the Contract of Employment: Carmichael and Another v National Power Plc" *The Modern Law Review*, Vol. 63, No. 5 (Sep., 2000), pp. 757-763

3. Meaning of Trade Dispute

Generally, the intention of parties in an employment relationship is to have a continuing relationship. However, labour and industrial relations are vulnerable to changing, sometimes divergent interests, which could engender conflicts. Industrial conflicts could arise in the work place, since the interests of management and labour do not always coincide. These conflicts may or may not lead to industrial actions. Failure or inability of the parties to resolve an emerging conflict may eventually result into a trade dispute, which itself could precipitate an industrial action.

Section 54 (1) of the National Industrial Court Act (NICA)[1] defines "trade dispute" to mean "any dispute between employer and employees including dispute between their respective organisations and federations which is connected with:

a. the employment or non-employment of any person,
b. terms of employment and physical conditions of work of any person,
c. the conclusion or variation of a collective agreement, and
d. an alleged dispute".[2]

The effect of this definition is that any controversy between an employer and an employee on terms and conditions of employment is a labour dispute on which the National Industrial Court has jurisdiction.[3]

In National Union of Road Transport Workers v. Ogbodo[4] the Court of Appeal held, inter alia, that the word "dispute" means to make a subject of argument; to contend for; to oppose by argument; or to call in question. It also means an argument, a debate or a quarrel. In that case, the court identified the following ingredients of a trade dispute:

(a) there must be a dispute
(b) the dispute must involve a trade
(c) the dispute must be between:
  (i) employers and workers; or
  (ii) workers and workers;
(d) the dispute must be connected with
  (i) the employment or non-employment, or
  (ii) the terms of employment, or
  (iii) physical conditions of work of any person.

According to the court, in order to come within the Act, the dispute must involve trade as distinct from a political dispute; for example, boycott of goods and services of a foreign country. Furthermore, a trade dispute invokes the "conciliation" and "arbitration" jurisdiction provided in the Trade Disputes Act[5] (TDA). Thus, essentially, in a trade dispute, there must be in existence proper parties and the subject matter must be related to the employment, non-employment or terms of employment or physical condition of work of any person.[6]

4. Mechanism for Resolution of Conflict in Labour Matters

A trade dispute can be in the form of dispute on agreements previously made between the parties, as to its terms or their interpretation, or even a fresh matter on which the parties or one of them has given notice of a dispute or even a breakdown of the process of collective bargaining. In any event, there is a fairly well established procedure laid down by law, which need be observed in the quest for resolution of such a trade dispute. These are: resolution by any internal settlement mechanism – that is, settlement by means of a pre-determined or agreed procedure between the parties; resort to mediation, conciliation, and arbitration before the Industrial

[1] Act No. 1, 2006, published in the Federal Republic of Nigeria Gazette No. 38 Vol. 93 of 16th June 2006. The National Industrial Court Act came into force on the 14th June, 2006.
[2] This definition has enlarged the meaning of the term as contained in section 48 of the *Trade Disputes Act*, Cap, T8, Laws of the Federation of Nigeria 2004, which is an older yet extant legislation. The section defined "trade dispute" as "any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person". The court in *Tidex (Nig.) Ltd. v. Maskew* (1998) 3 N.W.L.R. (Pt. 542) 404 echoed the statutory meaning of "trade dispute" in the *Trade Disputes Act*. See also, *National Union of Road Transport Workers v. Ogbodo* (1998) 2 N.W.L.R. (Pt. 537)189.
[3] This was the ruling of the National Industrial Court of Nigeria in *Shaibu* v. *Noble Drilling (Nigeria) Ltd.* Suit No: NIC/LA/09/2009 delivered July 13, 2009, available at <http://judgment.nicn.gov.ng/pdf.php?case_id=71> (last accessed 30/03/2015)
[4] (1998) 2 N.W.L.R. (Pt. 537) 189
[5] Cap, T8, Laws of the Federation of Nigeria 2004; sections hereinafter refer to the TDA except otherwise indicated.
[6] *New Nigerian Bank Plc.* v. *Osoh* (2001) 13 N.W.L.R. (Pt. 729) 232

Arbitration Panel (IAP); and adjudication by the National Industrial Court (NIC). We shall now proceed to consider these steps in greater details.

4.1 Internal Settlement Mechanism

According to section 4 (1) Trade Disputes Act,[1] parties to a trade dispute are enjoined to seek resolution of the dispute by means of any existent pre-agreed procedure, apart from the provisions of the Act,[2] arising from a collective agreement or any other agreement between the parties. This provision endorses one of the roles of collective bargaining referred to as rule-making; that is, the inclusion in the resultant collective agreement of provisions governing the various employment relationships which obtain in the bargaining unit, including the settlement of disputes, the regulation of relations between the parties and the promotion of workers' participation.[3]

The section itself recognizes the possibility of absence of any such agreement. However, the question that arises is, does this provision have any imperative or compelling force on the parties, in the face of the common law position that collective agreements, in general, cannot be termed as contracts in law as the parties do not intend to be legally bound by it?[4] Such collective agreements have been described as a gentleman's agreement, a manifesto for labour relations, and an extra-legal document devoid of sanctions.[5]

The implication may be three-fold. First, in the absence of any such agreement, the parties would have to resort to the procedure laid out in the Act. Secondly, where there is an agreement, either party or both parties could decide not to comply with the procedure stated in the agreement. Where this happens, the procedure as with the totality of the agreement (more so where it is a collective agreement) may not be legally enforceable against a recalcitrant party. Thirdly, the parties, perceiving themselves free to do so, could have agreed to seek resolution of their disputes by means other than the provisions (and by implication the mechanisms stipulated by) of the Act. This possibility raises a fresh poser: can the parties contract out of statute as by making the provisions of the Act, in this regard, inapplicable to them?

It appears that contracting as such by the parties will not be illegal, neither will it necessarily become the subject of any legal or judicial inquisition, particularly where the parties honour such prescription in their collective agreement. However, in the event that they fail to hallow the provision, at all, or one party is dissatisfied by the implementation of the procedure, the other party cannot successfully shut out the application of the established procedure under the Act, beginning with mediation.

4.2 Mediation

Where there is no existing agreed means of settling disputes, or where the application of that means has failed to resolve the conflict, the parties shall within seven days of the failure (or, if no such means exists, within seven days of the date on which the dispute arises or is first apprehended) meet under a mediator, mutually agreed upon between the parties, with a view to an amicable settlement of the dispute.[6]

If the dispute is not settled within 7 days of the date on which a mediator is appointed, the dispute shall be reported to the Minister[7] in writing, within 3 days of the end of the 7 days.[8] The report shall be in writing, disclosing the points of disagreement, and the steps already taken by the parties to reach a settlement.[9]

Aside, the Minister, suo motu, can apprehend[10] a trade dispute. In such a case, he would in writing inform the parties of this fact (of apprehension) and the steps he proposes to take in resolving the dispute. Such steps may

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[1] *Supra*

[2] Section 4 (1) *Trade Disputes Act* (*supra*) provides: "If there exists agreed means for settlement of the dispute **apart from this Act**, whether by virtue of the provisions of any agreement between organisations representing the interests of employers and organisation of workers or any other agreement, the parties to the dispute shall first attempt to settle it by that means"; emphasis supplied.

[3] Córdova, E. "*Collective Bargaining*", Comparative Labour Law and Industrial Relations in Industrialized Market Economies, Vol. 2, 1990, Blanpain R. ed., Kluwer Law and Taxation Publishers, Deventer, The Netherlands.

[4] *Ford Motor Co. Ltd v. Amalgamated Union Of Engineering And Foundry Workers* (1968) 2 Q.B.303

[5] *Nigeria Arab Bank Ltd* v *Shuaibu* (1999) 4 N.W.L.R. (Pt. 186) 450; *ACB Ltd. v. Nbisike* (1995) 8 N.W.L.R. (Pt. 416) 725 at 741; *Union Bank of Nigeria Ltd. v. Edet* (1993) 4 N.W.L.R. (Pt. 287) 288 at 299

[6] Section 4 (2)

[7] "Minister" means the Minister charged with responsibility for matters relating to the welfare of labour; section 48 (1)

[8] Section 6 (1)

[9] Section 6 (2)

[10] According to the Court in *National Union Of Hotels And Personal Service Workers (NUHPSW)* v. *Whassan Eurest (Nigeria) Ltd.* Suit No: NIC/14/2001 (Ruling of the National Industrial Court of Nigeria delivered January 09, 2004 available at <http://judgment.nicn.gov.ng/pdf.php?case_id=275> (last accessed 30/03/2015)) in the context of the Trade Disputes Act, to apprehend a trade dispute would mean to understand or to recognize the trade dispute. The provision of the Act, which deals with the Minister's power to apprehend a trade dispute, is just one of the processes through which a trade dispute may

include the appointment of a conciliator, or a reference to the Industrial Arbitration Panel, or a reference of the dispute to a board of inquiry under section 33 of the Act.[1]

4.3 Conciliation

The Minister may appoint a conciliator who shall inquire into the causes and circumstances of the dispute and by negotiation with the parties endeavour to bring about a settlement of the dispute.[2] If a settlement of the dispute is reached within 7 days of his appointment the conciliator shall report the fact to the Minister and forward to him a memorandum of the terms of the settlement. If a settlement of the dispute is not reached within 7 days of his appointment, the conciliator shall report same to the Minister.[3]

Quite apart from the foregoing, where the Minister is of the opinion that the provisions of the Act relating to settlement of trade dispute by a previously agreed means or by a mediator have not been complied with substantially, he shall issue to the parties a notice in writing directing steps they should take and the time within which to take such action. Subsequently, at the expiration of the specified period of time or where none was specified, at the expiration of 14 days following the date the notice was issued, if the matter remains unsettled, the Minister may take further steps including conciliation, arbitration, direct reference to the NIC, or reference to a board of inquiry.[4]

The Minister has the power to constitute a board of inquiry under Sections 33 and 34 of the TDA. This is another mechanism for the resolution of trade disputes. Under Section 33 (1), the board is statutorily expected to only inquire into the causes and circumstances of the trade dispute in question and report to the Minister.

4.4 Arbitration before the Industrial Arbitration Panel

By section 9, within 14 days of the receipt by the Minister of the report stating that mediation has failed (including the 7 days provided for conciliation under section 8) he shall refer the matter to the Industrial Arbitration Panel which shall constitute a tribunal of itself. Under section 13, the tribunal shall make its award within 21 days of its being constituted, or such longer period as the Minister may allow in any particular case.

The award shall be communicated to the Minister and nobody else, and he shall send a copy of the award to the parties. If the Minister receives no notice of objection from either party, he shall then publish in the Federal Gazette a notice confirming the award which then becomes binding on the employers and workers to whom it relates as from the date of the award (or such earlier or later date as may be specified in the award).[5] In the event that the Minister receives a valid notice of objection, section 14 directs that he refer the dispute to the National Industrial Court.

It will be noted that where a mediator[6] as well as a conciliator[7] is unable to settle the dispute and the dispute is one to which workers employed in any essential service are a party and the Minister is of the opinion that in the circumstances of the case reference of the dispute to an arbitration tribunal would not be appropriate, section 17 of the Act empowers him to refer the dispute directly to the National Industrial Court within 7 days of his receipt of the report made to him by the conciliator. In such a case, the dispute is brought directly before the National Industrial Court, without it having first being arbitrated upon by the Industrial Arbitration Panel.[8]

4.5 Direct Recourse of the Parties to the National Industrial Court

Without prejudice to the foregoing, the disputants have the right to apply to the National Industrial Court directly (here, the reference to the NIC is not by the Minister but by the parties themselves, or by one of them) by way of appeal as of right against the decisions of an arbitral tribunal in trade dispute matters. This is by virtue of the provisions of section 7 of the National Industrial Court Act. One may therefore ask, does this portray a conflict between the provisions of the Trade Disputes Act and the National Industrial Court Act?

The answer to this can be found in section 53 of the NICA which provides that other provisions of the TDA (those not repealed by the NICA) shall be construed with such modification as may be necessary to bring them

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be settled. When section 4 (now section 5) of the Act gives the Minister the power to apprehend a trade dispute and deal with it through any of the steps listed in that section, the idea is for the Minister to nip the trade dispute in the bud, that is, to stop or arrest it before it gets out of hand. This is why section 4 starts with the words, "Notwithstanding the foregoing provisions of this Act...." By this provision, the Minister need not wait for the settlement process of section 3 of the Act or bother about the provisions of sections 1 and 2, before he can act under section 4.

[1] Section 5 (1) & (2)

[2] Section 8 (1) & (2)

[3] Section 8 (3) & (5)

[4] Section 7; see also sections 8, 9, 17 & 33

[5] Section 13

[6] Section 6 (1)

[7] Section 8 (5)

[8] See *Trade union members of the Joint Health Sector Unions (JOHESU) v. Federal Ministry of Health*, Suit No: NICN/ABJ/238/2012, Judgment delivered 27/07/2013; available at <http://judgment.nicn.gov.ng/pdf.php?case_id=502> (last accessed 30/03/2015)

into conformity with the provisions of the Act. In other words, there is no conflict between the two. All that is ensured is that an aggrieved party is not thereby shut out of the Court by the neglect, refusal or failure of the Minister to refer a matter to the Court, following failure of arbitration.

4.6 Adjudication by the National Industrial Court

4.6.1 Background

The National Industrial Court was established in 1976 pursuant to the Trade Disputes Decree.[1] In 1992, the Trade Disputes Act was amended by the Trade Disputes (Amendment) Decree.[2] By virtue of section 5 (a) of this Amendment Decree, the NIC became a superior court of record. The law has now become the Trade Disputes Act.[3]

Prior to the enactment of the Act in 1976, and in particular, prior to 1968, industrial relations law and practice was modeled on the non-interventionist and voluntary model of the British approach.[4] The statutory machinery for the settlement of trade disputes was found in the Trade Disputes (Arbitration and Inquiry) Act.[5] The Act gave power to the Minister of Labour to intervene by means of conciliation, formal inquiry and arbitration where negotiation had broken down.

Under the Act, the parties had absolute discretion to decide whether or not they would avail themselves of the dispute resolution mechanism spelt out by the Act. The Minister could not compel them to accept his intervention. Rather, he could only appoint a conciliator upon the application of the parties. Also, he needed the consent of both parties to set up an arbitration tribunal. Furthermore, there were no permanent institutions laid down before which the disputing parties could go for the settlement of their labour disputes. Instead, an ad hoc body, an arbitration panel, had to be set up for a particular dispute and once it gave its decision, it became functus officio.[6]

The year 1968 witnessed the beginning of the Civil War in Nigeria. It was expedient, therefore, during the state of emergency, to make transitional provisions for the settlement of trade disputes arising during the period. The Trade Disputes (Emergency Provisions) Act[7] was enacted. It suspended the Trade Disputes (Arbitration and Inquiry) Act and gave to the Minister of Labour compulsory power of intervention in trade disputes while retaining the usual methods of conciliation, formal inquiry and arbitration.

The Act of 1968 also abrogated the requirement for consent of the parties before the Minister could act, so that he could resort to the methods for dispute resolution without the consent of the parties to the dispute. The Act created a timetable from the time that employers and workers became aware that a dispute existed to the time that a dispute was notified to the Minister and, within the discretionary powers conferred on him by the Act, to decide on what sort of action to take.[8]

4.6.2 Objective of Establishment of the National Industrial Court

The objective behind establishing the court is to create a specialized court to handle special matters which are connected with the economic growth, industrial relations development, peaceful co-existence between and among labour and employers of labour as well as labour policy formulator, that is, the government.[9] It is argued that the idea of having a labour and industrial court is not peculiar to Nigeria.

African countries such as Kenya, South Africa, Malawi, Liberia, Botswana, Lesotho and other countries such as Great Britain, Germany, Italy, Belgium, Trinidad and Tobago, have established courts that deal with labour, including trade union and industrial relations matters between employers and employees and their associations. Experience has shown that the establishment of these courts in these jurisdictions has largely been responsible for the industrial growth, peace and tranquility in those countries.[10]

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[1] No. 7 of 1976

[2] No. 47 of 1992

[3] Cap T8, Laws of the Federation of Nigeria 2004. It should be noted, however, that the provisions of the *Trade Disputes Act*[3] relating to the National Industrial Court have been repealed by virtue of section 53 (1) of the National Industrial Court Act.[3]

[4] Justice Adejumo, Babatunde Adeniran "*The Role of National Industrial Court in Economic Development of Nigeria*"; being a paper delivered at the 2nd Emeritus Prof. D. A. Ijalaye (SAN) Annual Lecture at Oduduwa Hall, Obafemi Awolowo University, Ile-Ife; citing Chioma Kanu Agomo "*Nigeria*" in *Labour Law and Industrial Relations in the International Encyclopedia of Law*; Blanpain ed., 2000, pp. 38 – 39; see also, Ogunniyi, O. *Nigerian Labour and Employment Law in Perspectives*, 1st ed., 1991, Folio Publishers Ltd.

[5] Cap. 201, Laws of the Federation of Nigeria and Lagos, 1958; section 3

[6] Section 4 (2) *Trade Disputes (Arbitration and Inquiry) Act*, *op. cit.*

[7] No. 21 of 1968

[8] See sections 2 – 7 thereof ; see generally, Justice Adejumo, Babatunde Adeniran "*The Role of National Industrial Court in Economic Development of Nigeria*"; *op. cit.* for a brief history of the National Industrial Court

[9] "*National Industrial Court of Nigeria*", available at <*http://nic.gov.ng/History.html*>; (last accessed 30/03/2015)

[10] Adejumo, B. A. "*The Impact of National Industrial Court in the Administration of Justice in a Developing Economy like*

4.6.7 Establishment of the National Industrial Court

Section 6 of the Constitution (Third Alteration) Act[1] amends the provisions of the 1999 Constitution by introducing a new Section 254A – F. It provides that there shall be a National Industrial Court of Nigeria[2] consisting of a President and such number of judges of the Court as may be prescribed by an Act of the National Assembly.[3] The relevant Act of the National Assembly as of date is the NICA.

It should be noted that the provisions of the NICA have to be read in conjunction with, but subject to the provisions of the Alteration Act, particularly so as the provisions of the Alteration Act, in some areas, have by implication repealed the provisions of the NICA. The President of the Court shall be appointed by the President of Nigeria on the recommendation of the National Judicial Council, subject to confirmation by the Senate. A judge of the court shall be appointed by the President of Nigeria on the recommendation of the National Judicial Council.[4]

A person to be appointed as President or a judge of the Court must have qualified to practice as a legal practitioner in Nigeria for at least ten years and must have considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria.[5] By this provision, the Alteration Act by implication repeals Section 2 (4) (b) of the NICA which provides that a graduate from a recognized Nigerian university with ten year experience in the law and practice of industrial relations and employment conditions in Nigeria could be appointed a judge of the Court.

Perhaps, the residue of section 2 (4) (b) may be found in section 254E (3) of the Constitution which states that as may be deemed necessary, the Court may call in aid one or more assessors specially qualified to try and hear the cause or matter wholly or partly with the assistance of such assessors. An assessor shall be a person who is qualified and experienced in his field of specialization and who has been so qualified for a period not less than ten years.[6]

4.6.8 Status and Composition of the Court

Section 2 of the Alteration Act amends the provisions of section 6 (5) of the 1999 Constitution by introducing a new section 6 (5) (cc) to the effect that the National Industrial Court becomes one of the superior courts of record in Nigeria and shall have all the powers of a superior court of record. Section 3 of the Alteration Act amended section 84 (4) of the Constitution by inserting therein immediately after the office of Judge of the Federal High Court, the offices of the President and Judge of the National Industrial Court in the list of officers whose remuneration and salaries are made a charge upon the Consolidated Revenue of the Federation. By implication, this equates the status of the judges of the National Industrial Court with that of the Federal High Court.

Furthermore, section 4 of the Alteration Act amended section 240 of the Constitution by inserting in the list of courts over which the Court of Appeal exercises appellate jurisdiction, the National Industrial Court, immediately after the Federal High Court. As well, the amendment thereby equates the National Industrial Court with the Federal High Court.

According to Section 254E (1) of the Constitution[7] the Court may be constituted by a single judge or no more than a panel of three judges, as the President of the Court may direct, in the exercise of both its civil and criminal jurisdiction. By implication, the foregoing provision has repealed section 21 (4) of the NICA which provides that the Court shall be constituted by not less than three judges.

4.6.9 Jurisdiction and Powers of the Court

Section 254C (1) of the Constitution[8] amended the provisions of sections 251, 257 and 272 of the 1999 Constitution (relating to the jurisdiction of the Federal High Court, High Court of the Federal Capital Territory, Abuja and the State High Court, respectively) and conferred on the National Industrial Court exclusive jurisdiction in civil causes and matters –

Nigeria", Journal of Contemporary Legal Issues, Vol. 11, 2007 UniJos LSJ., Chapter One (Justice Adejumo is the current President of the National Industrial Court).

[1] Act No. 3 of 2010, also referred to as the "Alteration Act".

[2] It would seem that this is a brand new court different from the existing *National Industrial Court* under section 1 of NICA 2006

[3] Section 254A (1) & (2) 1999 Constitution (as amended)

[4] Section 254B (1) & (2) 1999 Constitution (as amended)

[5] Section 254B (3) & (4) 1999 Constitution (as amended)

[6] Section 254E (4) 1999 Constitution (as amended)

[7] As amended by section 6 of the Alteration Act

[8] As amended by section 6 of the Alteration Act

a) relating to or connected with any labour, employment, trade unions, industrial relations and matters arising from workplace, the conditions of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith;
b) relating to, connected with or arising from Factories Act, Trade Disputes Act, Trade Unions Act, Labour Act, Employees Compensation Act or any other Act or Law relating to labour, employment, industrial relations, workplace or any other enactment replacing the Acts or laws:
c) relating to or connected with the grant of any order restraining any person or body from taking part in any strike, lock out, or any industrial action or any conduct in contemplation of or in furtherance of a strike, lock- out or any industrial action and matters connected therewith or related thereto;
d) relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of the Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association or any other matter which the Court has jurisdiction to hear and determine;
e) relating to or connected with any dispute arising from national minimum wage for the Federation or any part thereof and matters connected therewith or arising therefrom;
f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relations matters;
g) relating to or connected with any dispute arising from discrimination or sexual harassment in the workplace;
h) relating to, connected with or pertaining to the application or interpretation of international labour standards;
i) connected with or related to child labour, child abuse, human trafficking or any matter connected therewith or related thereto;
j) relating to the determination of any question as to the interpretation and application of any-

(i) collective agreement,
(ii) award or order made by an arbitral tribunal in respect of a trade dispute or a trade union dispute,
(iii) award or judgment of the court,
(iv) terms of settlement of any trade dispute,
(v) trade union dispute or employment dispute as may be recorded in a memorandum of settlement;
(vi) trade union constitution, the constitution of an association of employers or any association relating to employment, labour, industrial relations or workplace;
(vii) dispute relating to or connected with any personnel matter arising from any free trade zone in the Federation or any part thereof;

k) relating to or connected with disputes arising from payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee, worker, political or public office holder, judicial officer or any civil or public servant in any part of the Federation and matters incidental thereto;
l) relating to-

(i) appeals from the decisions of the Registrar of Trade Unions, or matters relating thereto or connected therewith;
(ii) appeals from the decisions or recommendations of any administrative body or commission of enquiry, arising from or connected with employment, labour, trade unions or industrial relations; and
(iii) such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not, as may be conferred upon it by an Act of the National Assembly; and

m) relating to or connected with the registration of collective agreements.

The Court of Appeal affirmed the exclusivity of the jurisdiction of the NIC in N.U.T., Niger State v. COSST, Niger State[1] when it held that ''Section 254C of the 1999 Constitution as amended by the Third Alteration Act, expanded the jurisdiction of the National Industrial Court by vesting it with exclusive jurisdiction over all labour and employment matters…by virtue of the new provision, the trial court's jurisdiction completely migrated to the National Industrial Court, which forthwith has the exclusive jurisdiction in all matters enumerated thereunder.''[2]

4.6.10 Application of International convention, treaty or protocol

Section 254C (2) confers jurisdiction and power on the Court to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol which has been ratified by Nigeria relating to labour, employment, workplace, industrial relations or matters connected to them. It would appear that it is immaterial for this purpose, whether or not the provisions of such international obligation has been domesticated by an Act of the National Assembly as required under section 12 (1) of the Constitution. It suffices that Nigeria has ratified such international obligation.

[1] (2012) 10 NWLR (Pt. 1307) 89
[2] *Ibid.* at 111

In applying international convention, treaty or protocol which has only been ratified by Nigeria, the Court needed to overcome the difficulty of such not having been domesticated as required by section 12 (1) of the Constitution. In solving the perceived problem, the Court advanced two approaches in Aero Contractors Co. of Nigeria Limited v. National Association of Aircrafts Pilots and Engineers (NAAPE) & Ors.[1]

The first is that the Alteration Act 2010, which inserted section 254C (1) (f) & (h) and (2) is the domestication demanded by section 12 of the 1999 Constitution itself. According to the Court, the Alteration Act amended the 1999 Constitution. Before it was passed and assented to by the President, it was sent to all the Houses of Assembly in the Federation and was ratified by majority of the Houses of Assembly. This effectively means that the requirements of section 12 of the 1999 Constitution were and have been met when section 254C (1) (f) and (h) and (2) was enacted through the Alteration) Act.

The second approach is that both subsections (1) and (2) of section 254C of the 1999 Constitution, as amended, commence with the word "Notwithstanding". In subsection (1) it is "Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution…" and in subsection (2), it is "Notwithstanding anything to the contrary in this Constitution…." Section 12 qualifies as both "anything contained in this Constitution" in subsection (1) and "anything to the contrary in this Constitution" of subsection (2). In other words, the provisions of section 254C (1) (f) and (h) and (2) were meant to take effect despite section 12 and any other provision in the Constitution.

The use of the word "notwithstanding" in any statutory instrument has been judicially considered by the Supreme Court. In Peter Obi v. INEC & Ors[2] the Supreme Court cited NDIC v. Okem Ltd and Anor[3] with approval where it held that when the term "notwithstanding" is used in a section of a statute it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself.

According to the NIC, in like manner, the use of the word "notwithstanding" in section 254C (1) (f) and (h) and (2) of the 1999 Constitution, as amended, is meant to exclude the impending effect of section 12 or any other section of the 1999 Constitution. It follows that as used in section 254C (1) (f) and (h) and (2) of the 1999 Constitution, as amended, no provision of the Constitution shall be capable of undermining the said section 254C (1) (f) and (h) and (2). Thus, whichever of the two approaches is adopted (or even if both approaches are adopted), it would still mean that Court has the jurisdiction and power to apply any international convention, treaty or protocol of which Nigeria has ratified, relating to subjects within the jurisdiction of the Court.[4]

The argument of the Court in Aero Contractors Case is quite fascinating and persuasive. Regrettably, the validity of it will not be tested beyond the Court because of the restriction placed on the right of appeal from the judgment of the Court to the Court of Appeal or any other court for that matter. This further underscores the need for a rethink on the provisions bearing on appeal from the decisions of the Court.

4.6.11 Implementation of relevant international labour standards and best practices

Section 254C (1) (f) and (h) empowers the Court to take cognizance of unfair labour practice and apply international best practices and standards in labour, employment and industrial relation matters. By a composite reading of the foregoing with section 7 (6) NICA, what amounts to good or international best practice in labour or industrial relations shall be a question of fact. The implication is that whatever the court determines to be international best practices cannot be made a subject of appeal or evaluation by the appellate court, being a question of fact determinable by the NIC as a court of first instance.

In this regard, the NIC in Petroleum and Natural Gas Senior Staff Association of Nigeria v. Schlumberger Anadrill Nigeria Limited[5] opined that though the employer has the right to terminate the employment of any of its employee for reason or for no reason at all, the point must be made that globally it is no longer fashionable in

[1] [2014] 42 NLLR (Pt. 133) 664 (NIC); available at <http://compendium.itcilo.org/en/compendium-decisions/industrial-court-of-nigeria-aero-contractors-co-of-nigeria-limited-v-the-national-association-of-aircrafts-pilots-and-engineers-the-air-transport-senior-staff-association-of-nigeria-and-the-national-union-of-air-transport-employees-4-february-2014-case-no/at_download/attachedfile> (last accessed 30/03/2015)

[2] [2007] 11 NWLR (Pt. 1046) 565 at 636 – 634 per Aderemi, JSC

[3] [2004] 10 NWLR (Pt. 880) 107 at 182 - 182

[4] See also *Ejieke Maduka v. Microsoft Nigeria Limited & Ors* [2014] 41 NLLR (Pt. 125) 67 (NIC); also available at <http://compendium.itcilo.org/en/compendium-decisions/national-industrial-court-of-nigeria-ejieke-maduka-v-microsoft-19-december-2013-case-no-nicn-la-492-2012/at_download/attachedfile> (last accessed 30/03/2015). In that case, in making out a case for protection against discrimination in employment and occupation and granting an award for sexual harassment in the workplace, the NIC made resort to international law as a guide for interpreting domestic law, making use of ratified treaties and work of international supervisory bodies.

[5] Suit No: NIC/9/2004, Judgment delivered 18/09/2007, available <http://judgment.nicn.gov.ng/pdf.php?case_id=30> (last accessed 30/03/2015)

industrial relations law and practice to terminate an employment relationship without adducing any valid reason for such a termination.

4.6.12 Alternative Dispute Resolution

The Court may establish an Alternative Dispute Resolution (ADR) Centre within its premises on matters within its jurisdiction. However, this is without prejudice to its supervisory and appellate jurisdiction over such bodies and the like, including an arbitral tribunal or commission, administrative body or board of inquiry, on matters within the jurisdiction of the Court.[1] To date, the Court is yet to establish any ADR Centre. One would expect that when established, the role and functioning of the Centre will not derogate from the statutory purview of the resolution process spelt out in the Trade Disputes Act, preceding recourse to the NIC.

4.6.13 Enforceability of Collective Agreements

Section 254C (4) of the Constitution invests the Court with jurisdiction and powers to entertain any application for the enforcement of the award, decision, ruling or order made by any arbitral tribunal or commission, administrative body or board of inquiry relating to, connected with, arising from or pertaining to any matter within the jurisdiction of the Court.

In particular, this provision raises a conjecture whether or not this signals a significant paradigm shift in the status of collective agreements in Nigeria. It would be recalled that section 254C (1) (j) (i) conferred on the Court exclusive jurisdiction in civil causes and matters, inter alia, relating to the determination of any question as to the interpretation and application of any collective agreement.

As pointed out earlier, as a general rule, collective agreements are regarded as legally unenforceable being deemed as a gentleman's agreement, binding in honour only. Can they now be made subject of a legal action, justiciable and generally enforceable in law, particularly before the National Industrial Court? If this were so, what is likely to be the disposition of the Court of Appeal, if it ever has any opportunity to make a pronouncement on such a development? This is left to be seen as the jurisprudence of this aspect of law unfolds in Nigeria.

The NIC has, however, demonstrated its disposition to the foregoing provision in Petroleum and Natural Gas Senior Staff Association of Nigeria v. Schlumberger Anadrill Nigeria Limited.[2] In that case, in interpreting the provisions of section 7 (1) (c) which is in pari materia with section 254C (1) (j) (i), the court held that the court is a court of justice where collective agreements are held to be of binding effect on the parties that sign them; that the court could not have been given the statutory power to interpret collective agreements if the intention was that they were not binding on the parties. It held further that the common law rule as to the non-binding nature of collective agreements cannot override the clear statutory provisions which empower the court to interpret and enforce collective agreements; collective agreements are, therefore, not only binding on the parties that sign them, but are enforceable as such in the court.

4.6.14 Jurisdiction over criminal matters

Section 254C (4)[3] of the Constitution vests in the Court, jurisdiction and powers over criminal causes and matters that arise in any matter or cause within the jurisdiction conferred on the Court by the Constitution, an Act of the National Assembly or any other law.

4.6.15 Exercise of judicial powers by the Court

By section 254D (1) of the Constitution,[4] for the purpose of exercising the jurisdiction conferred upon it by the Constitution or by an Act of the National Assembly, the NIC shall have all the powers of a High Court. The powers of the Court may be further enlarged by an Act of the National Assembly as may appear necessary or desirable to enable the Court be more effective in exercising its jurisdiction.[5]

Thus, before the jurisdiction of the court can be invoked in matters relating to a trade dispute between employers and employees, disputants must have complied with the extant provisions of Part I of the Trade Disputes Act[6]. In Incorporated Trustees of Independent Petroleum Association v. Alhaji Ali AbdulrahmanHimma & 2 Ors.[7] the NIC declined original jurisdiction on the ground that the dispute resolution mechanism set out in Part 1 of the TDA had to be fulfilled before the Court could assume jurisdiction. This position is strengthened by the provisions of section 7 (3) of NICA which state that the National Assembly may by an Act prescribe that any

[1] Section 254C (3) of the Constitution as amended by section 6 of the Alteration Act

[2] Suit No: NIC/9/2004, Judgment delivered 18/09/2007, available <http://judgment.nicn.gov.ng/pdf.php?case_id=30> (last accessed 30/03/2015)

[3] As amended by section 6 of the Alteration Act

[4] *Ibid.*

[5] Section 254D (2) 1999 Constitution as amended by section 6 of the Alteration Act

[6] *Op. cit.*

[7] Unreported Suit No. FHC/ABJ/CS/313/2004; Ruling on it was delivered on January 23rd 2004 by NIC

matter under section 7 (1) of NICA (essentially dealing with jurisdiction of the court) may have to go through the process of conciliation or arbitration before the matter could be heard by the Court.

By this provision, the NICA encourages Alternative Dispute Resolution (ADR)[1] mechanisms in order to avoid the delay that may be occasioned by resort to litigation in the court, thereby ensuring speedy dispensation of justice. To this effect, the NICA also provides in Section 20 that in exercising its jurisdiction over any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.[2]

4.6.17 Appellate Jurisdiction of the Court

According to section 7 (4) NICA, an appeal shall lie from the decisions of an arbitral tribunal to the Court as of right in matters of trade disputes specified in section 7 (1) (a) of the Act. Thus, the Court is vested with the powers to correct if it so decides, legal errors made in an arbitration panel in respect of labour disputes or organizational disputes. Such matters must have passed through the necessary preliminary stages at the arbitral tribunal before being eligible for consideration by the National Industrial Court.[3]

4.6.18 Appeal from National Industrial Court to the Court of Appeal

Section 240 of the Constitution[4]provides that the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the National Industrial Court, in addition to the other courts mentioned in the provision. By section 243 (2) of the Constitution,[5] an appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of the Constitution on matters within the jurisdiction of the Court. In the same vein, section 254C (5) & (6) of the Constitution,[6] provides a right of appeal to the Court of Appeal from decisions of the National Industrial Court in respect of criminal causes and matters which arise from any of the matters over which the National Industrial Court has jurisdiction.

However, according to section 243 (3) of the Constitution, in other civil matters (that is, those that do not have to do with fundamental rights) appeal shall 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; with a proviso that where an Act or Law[7] so prescribes that an appeal shall lie from the decisions of the NIC to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

Section 243 (4) is to the effect that decisions of the Court of Appeal shall be final in the exercise of its appellate jurisdiction on decisions of the National Industrial Court on civil matters. It follows, though, that further appeal may be had to the Supreme Court on decisions of the Court of Appeal on criminal causes and matters that had earlier been taken by the National Industrial Court.

It should be noted that as at now, there is no Act of the National Assembly that prescribes appeal to the Court of Appeal from decisions of the National Industrial Court on civil causes and matters within its jurisdiction. Indeed, the extant National Industrial Court Act 2006 had in its section 9 (1) & (2) limited the right of appeal from decisions of the National Industrial Court to questions of fundamental rights.

The implication of the foregoing is that until there is the enactment of an Act of the National Assembly prescribing otherwise, decisions of the National Industrial Court in civil causes and matters are, in practical terms, final (except in matters of fundamental rights). The argument in favour of this present state of development could be that it is undesirable to have litigation on labour and industrial matters go on for too many years in the course of appeals, before a final decision is reached, as this may have deleterious effects on the national economy and development.

Recently, the Court of Appeal came to a decision on the matter by employing a seemingly curious logic of argument. In Local Government Service Commission Ekiti State & Anor. v. Bamisaye[8] the appeal Court held that there is nothing both in the Act or Constitution that provides that the National Industrial Court shall be a final court in respect of any matter before it. While the law provides that appeal on questions of fundamental

[1] See also Section 254C (3) 1999 Constitution as amended by section 6 of the Alteration Act

[2] Adejumo, B. A. "*The Impact of National Industrial Court in the Administration of Justice in a Developing Economy like Nigeria*", Journal of Contemporary Legal Issues, Vol. 11, 2007 UniJos LSJ., Chapter One (Justice Adejumo is the President of the National Industrial Court of Nigeria)

[3] *Ibid.*

[4] As amended by section 4 of the Alteration Act

[5] Section 5 of the Alteration Act amended section 243 of the Constitution by introducing new sub-sections (2) – (4).

[6] As amended by section 6 of the Alteration Act

[7] The emphasis on "Law" here is mine as we would later see the curious, devising meaning given to it by the Court of Appeal in a fairly recent decision.

[8] (2013) LPELR 20407 (CA); also available at <http://www.lawpavilionpersonal.com/ipad/books/20407.pdf> (last accessed 30/03/2015)

right shall lie as of right to the Court of Appeal, no provision forecloses a right of appeal with leave on other decisions of the National Industrial Court. Since there is no express provision both in the Constitution and the Act, that the National Industrial Court shall be a final court in any matter before it, it follows that under no circumstance shall the National Industrial Court exercise the act of finality in a matter before it. A court of law can only be expressly made a final court by the statute that created it or by any other law where necessary. No court can be a final court by mere implications.

The Court of Appeal relied on section 243 (4) which provides in material part, that the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final. It relied further on the proviso to section 243 (3) which states in material part that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal. In the Court's opinion, while there is no Act of the National Assembly which has so prescribed, the Law has prescribed that appeal in civil matters other than as of right on questions of fundamental rights shall lie to the Court of Appeal. For the Court, the Law in this case, is section 240[1] of the Constitution which vested in the Court of Appeal, the right to hear and determine appeals from the NIC and other courts stated therein.

According to the Court of Appeal, it came to this decision by reading and construing together, rather than disjointedly, the provisions of the Constitution and tilting towards the construction that would serve the intent of the Constitution and best carry out its object while preserving its purpose while avoiding any result that will be anti-constitution or unconstitutional, if any other construction is given to the provision under consideration. It will defeat the ends of the constitution and achieve unconstitutional result to interpret section 243 (2) and (3) to deny a citizen his right of appeal.[2]

With respect to the learned Justices of the Court of Appeal, it appears the Court has overreached itself in its zeal to preserve its appellate jurisdiction over the National Industrial Court, as it exercises over other courts of equal status with the NIC. According to the Court, "since section 243 (3) seeks to oust the jurisdiction of this court, section 243(3) of the constitution must not only be read and interpreted together with other sections of the constitution but strictly interpreted."[3]

The appellate jurisdiction of the Court of Appeal over the NIC (and other courts of equal status) is not in doubt. However, the court can only exercise this jurisdiction where it has properly been conferred on it; in this case by an appropriate provision in a relevant statute. Until then, the Court may only legitimately exercise appellate jurisdiction on the NIC on questions of fundamental rights as it relates to matters upon which the NIC has jurisdiction, but not on other civil causes or matters over which the NIC has jurisdiction.

4.6.19 Matters Pending Before Other Courts

Pursuant to the exclusive jurisdiction granted the National Industrial Court under section 254C (1) of the Constitution, the exercise of jurisdiction by the High Court, be it Federal or State, on such matters ceases forthwith. This should be without prejudice to part-heard matters[4] pending before such courts; such cases needed to be concluded within one year of the commencement of the Alteration Act.[5]

It is tempting to argue that with the exclusive jurisdiction in those matters now vesting in the NIC, such cases pending before other courts, whether part-heard or not, have ipso facto, become incompetent and should be struck out before those courts, for want of jurisdiction. This was akin to the argument of the respondent in Echelunkwo & 90 Ors. v. Igbo-Etti Local Govt. Area.[6] However, in that case, the Court of Appeal upholding the appellants' contention held that the clear import of the provisions of section 24 (3) of NICA was that no such pending matter before those other courts shall[7] be struck out. Furthermore, that such a court has a compelling duty, rather than discretion to transfer the matter to the appropriate court, that is, the National Industrial Court.[1]

[1] As amended by section 4 of the Alteration Act

[2] See *Attorney General Federation v. Abubakar & Anor* (2009) All F.W.L.R. (pt.449) 401 at 432

[3] *Local Government Service Commission Ekiti State & Anor. v. Bamisaye*; *supra*, *per* Onyemenam, J.C.A. at p.19, paras. C-F

[4] In *Isaac Obiuwevbi v. Central Bank of Nigeria* (2011) 7 NWLR (Pt. 1247) 465, the Supreme Court defined "part-heard" as commencement of trial and taking of evidence as against mere filing of claims or inchoate proceedings in a matter. Thus, other courts must have commenced trial, for proceedings to continue in such matters. In the same vein, the Court of Appeal in *Maigana v. Industrial Training Fund & Anor*. (2014) LPELR 24172 held that part heard matter as the name implies, is a case whereby hearing had commenced, while pending matters are all cases pending before the court irrespective of whether hearing had commenced or not. Hence all part heard matters are pending cases, but not all pending cases are part heard.

[5] This amounts to an adaptation of the provisions of section 11 (1) & (2) National Industrial Court Act 2006, which had provided that consequent on the exclusive jurisdiction granted the NIC on labour, industrial and related matters, all other courts cease to have jurisdiction in such causes and matters. It provided further that part heard matters before other courts which are not concluded within one year of the commencement of the Act, shall abate thereafter.

[6] (2013) 7 NWLR (pt. 1352) 1 (CA)

[7] According to the court, whenever "shall" is used in an enactment, it connotes imperativeness and mandatoriness, leaving no

The appeal court pointed out that the foregoing provision must have been made to preserve such suits and ensure their transfer to the National Industrial Court for proper adjudication. If such suits are struck out and there is the need to file them afresh, some of them may be caught by the statute of limitation (as was the case in Echelunkwo & 90 Ors. v. Igbo-Etti Local Govt. Area) and the plaintiffs in such situations, without any fault of theirs, would suffer grave injustice.

4.6.20 Matters of Practice and Procedure of the National Industrial Court

Section 254F of the Constitution[2] reinforces the prerogative of the President of the National Industrial Court to make rules regulating practice and procedure of the Court.[3] In the exercise of its jurisdiction over criminal causes and matters, the Court is enjoined to observe provisions of the Criminal Code, Penal Code, Criminal Procedure Act, Criminal Procedure Code and the Evidence Act. The power to make rules of procedure has been exercised by the President of the Court in the making of the National Industrial Court Rules 2007.[4]

The provisions of section 254F have not derogated from the import of section 12 of the NICA to the effect that the Court shall observe the provisions of the Act or such rules and orders of Court made under the Act, with reference to practice and procedure. These shall regulate proceedings before the Court, as well as the provisions of the Evidence Act.[5] However, it is within the Court's prerogative to determine the application of any rules of procedure to its proceedings. Indeed, the Court is placed at liberty to depart from the provisions of the Evidence Act, in the interest of justice.[6]

In the dispensation of justice, the Court shall administer law and equity concurrently.[7] However, in the event of conflict between the rules of equity and the rules of common law, the former shall prevail.[8] Invariably, these provisions have set the tone for the Court in the administration of justice. It is intended that the Court shall endeavour to accomplish substantial justice and expeditiously, too.[9] It shall not consider itself constrained by any rules of procedure in attaining justice and fairness; neither shall it pay undue attention to technicalities at the expense of the merits of the case. Ultimately, the Court is enjoined to be flexible in matters of practice and procedure.

The Court ventilated this flexibility in the dispensation of justice in Kurt Severinsen (suing through his lawful attorney Charles Edeki) v. Emerging Markets Telecommunication Services Limited.[10] In that case, the Court relying on the decision of the Supreme Court of India in NTF Mills Ltd v. The 2nd Punjab Tribunal,[11] opined that "Industrial Courts are to adjudicate on the disputes between employers and their workmen, etc. and in the course of such adjudication they 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. The process does not cease to be judicial by reason of that elasticity or by reason of the application of the principles of justice, equity and good conscience."

5. Conclusion

From every indication, the National Industrial Court has thrived within the enabling environment provided it by the Alteration Act. The jurisdiction of the court is quite clear cut, exclusive and expansive. Apparently, cases are treated with dispatch with the eye of the court trained on achieving substantial justice unfettered by undue technicalities and inconvenient procedural fixations. Recourse is had in appropriate cases, to international best

room for discretion at all; *Ejilemele v. Opara* (1988) 9 N.W.L.R. (Pt. 567) 587 at 619; *Achineku v. Ishagha* (1988) 4 N.W.L.R. (Pt. 89) 411

[1] The court posited further that the language of the provision directing that the court *may* transfer the matter to the appropriate court is not merely facultative but mandatory and this is notwithstanding anything to the contrary in any enactment or law. It relied on the Supreme Court decision in *Adesola v. Abidoye* (1999) 14 N.W.L.R. (Pt. 637) 28 at 56 that when the exercise of power is coupled with a duty on the person to whom it is given to exercise it, then it is imperative.

[2] As amended by section 6 of the Alteration Act

[3] See also section 36 (1) National Industrial Court Act 2006

[4] National Industrial Court Rules 2007, Statutory Instrument No. 35, contained in Federal Republic of Nigeria Official Gazette Vol. 94

[5] Evidence Act 2011

[6] Section 12 National Industrial Court Act 2006

[7] Section 13 thereof

[8] Section 15 thereof

[9] Order 1, rule 1 (3) National Industrial Court Rules 2007, *op. cit.*

[10] [2012] 27 NLLR (Pt. 78) 374 (NIC); also available at <http://judgment.nicn.gov.ng/pdf.php?case_id=388> (last accessed 30/03/2015)

[11] AIR 1957 SC 329

practices and standards, capable of setting the tone for a paradigm shift in labour law and practice in Nigeria. It is interesting to note, too, that the court is empowered to implement in deserving cases, the provisions of international conventions, treaties or protocols which have been ratified by Nigeria, notwithstanding that such is yet to be domesticated, in a direct sense, by an Act of the National Assembly.

Of little moment, is the exclusive jurisdiction vested in the court by the Alteration Act, in terms virtually the same as provided under section 7 of the extant National Industrial Court Act. It may be argued that the scope of the jurisdiction of the court is far reaching and revolutionary; perhaps spanning other areas directly beyond employment, labour or industrial matters but only indirectly connected because they are situated in the workplace. Examples include jurisdiction over matters relating to or connected with any dispute arising from discrimination or sexual harassment at the workplace;[1] child abuse, human trafficking or any matter connected therewith or related thereto.[2]

More disturbing is the provision of the Alteration Act on appeals from the decision of the NIC to the Court of Appeal. The Alteration Act provided for appeal as of right from decisions of the NIC to the Court of Appeal in criminal matters as well as in civil matters, but limited to matters of fundamental rights. In other civil matters, prescription and delimitation of right of appeal by leave of the Court of Appeal is left to be determined by statutory provisions, rather than made a constitutional matter in the Alteration Act. This could be in recognition of the rigidity of making amendments to constitutional provisions as against statutory provisions.

Curiously, as at the time of passing the Alteration Act, extant NICA did not provide for right of appeal in other civil matters; indeed, its provisions seemed to negate this. The lawmakers did not concurrently with the Alteration Act pass any law on the matter; neither was there any bill before them in the process of passage. By this default, the NIC have inadvertently (or was it deliberately) been constituted into a court both first and last resort, contrary to the letter and spirit of sections 240 and 243 (4) of the Constitution.

Parties have direct access to the court without having gone through the arbitral process under provisions of the Trade Disputes Act and the National Industrial Court Act. To this extent, the NIC becomes a court of first instance. Except in matters of fundamental rights, there is at present no right of appeal from the judgment of the NIC. This makes the court a court of last resort.

It follows then, that the right thing to do is for the Legislature to amend the provisions of section 9 of NICA to the intent that there would be a right of appeal in all matters within the jurisdiction of the NIC to the Court of Appeal. The existing gap in the law in this regard, is to all intents and purposes, undesirable and misconceived. Notably, the court may now be constituted by a judge sitting over a matter, unlike before when there would be no less than a panel of three under the provisions of NICA. In any event, whether constituted by a panel of one or three, it is desirable that at least one window of appeal is preserved, in the interest of justice which the court was set up to serve. It may amount to an immorally heavy burden placed on the parties, to realize that loss in a suit before the NIC is tantamount to total and final loss.

It can only be imagined the consternation of the employer in Patrick Obiora Modilim v. United Bank for Africa Plc,[3] realizing that there is no appealing the judgment of the court ordering it to pay in excess of ₦76.5 million to

[1] Section 254C (1) (g) 1999 Constitution as amended

[2] Section 254C (1) (i) 1999 Constitution as amended. In *Folarin Oreka Maiya v. The Incorporated Trustees of Clinton Health Acesss Initiative, Nigeria & Ors.* [2012] 27 NLLR (Pt. 76) 110 (NIC); also available at <http://judgment.nicn.gov.ng/pdf.php?case_id=346> (last accessed 30/03/2015) the Court held that the claimant's contract of employment was terminated on the ground of pregnancy (she became pregnant during probationary period); that this amounted to discrimination on the ground of sex; that she has been discriminated against by reason of her being a woman and therefore subjected to disability; that this amounted to inhuman, malicious, oppressive and degrading treatment contrary to sections 34(1)(a) and 42 of the 1999 Constitution, Articles 2, 5, 15 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004 and the ILO's Convention No. 111 of 1958 on Discrimination. The court awarded the claimant one year of her full gross pay which is ₦5, 576,670 (Five Million Five Hundred and Seventy-Six Thousand Six Hundred and Seventy Naira only) being general and aggravated damages for wrongful termination. Also, in the later case of *Ejieke Maduka v. Microsoft Nigeria Limited & Ors.* Unreported Suit N. NICN/ABJ/123/2011; Judgment delivered on December 16, 2013; available at <http://compendium.itcilo.org/en/compendium-decisions/national-industrial-court-of-nigeria-ejieke-maduka-v-microsoft-19-december-2013-case-no-nicn-la-492-2012/at_download/attachedfile> (last accessed 30/03/2015) the NIC (in the first successful award of its kind) held that the applicant's appointment was terminated by the respondents as a result of her refusal to succumb to sexual harassment which is a retaliatory action; that this was a breach of her fundamental rights of freedom from discrimination and degrading treatment guaranteed in Sections 42 and 34 of the 1999 Constitution of the Federal Republic of Nigeria and Articles 15 and 19 of the African Charter on Human and people's Rights (Ratification and Enforcement) Act, Cap.A9, Laws of the Federation of Nigeria, 2004. The court awarded the sum of ₦13,225,000.00 (Thirteen Million, Two Hundred and Twenty Five Thousand Naira) being her annual basic pay as general damages, against each of the three respondents (the fourth respondent was struck out of the suit).

[3] Unreported Suit No. NICN/LA/353/2012; Judgment delivered on June 19, 2014.

the claimant in the case. In that case, the NIC held that United Bank for Africa "constructively and wrongly" terminated the claimant's employment and thereby ordered that the defendant shall pay to the claimant the sum of ₦75,535,128.00 only being the total sum the claimant ought to have been paid as his emolument for 20 months had the defendant reviewed his level to General Manager on confirmation. In addition, the defendant shall pay to the claimant the sum of ₦1,120,221.60 as damages for the wrongful termination of the claimant's contract of employment in terms of his constructive dismissal by the defendant.

On the whole, among other spinoffs, it is expected that the court's exclusive jurisdiction over matters ceded to it will conduce to a further decongestion of the regular courts which have been relieved of jurisdiction in those matters. The NIC can now concentrate on those matters, adjudicating over them with appropriate dispatch. There is also the opportunity to have appointed to the court, judges with specialization in labour, industrial and related matters, which itself could enhance the quality of adjudication over those matters.

The court is mandated to adopt a trade dispute resolution system that is more arbitral than adversarial and adjudicatory with a view to promoting good labour relations and industrial harmony. No doubt, achieving this mandate demands a dispassionate, unswaying balancing of the contending interests of the parties. The court must never allow itself to become branded as the workers' court, where there is a predisposition to protection of the workers' rights, both real and imaginary, at all cost.

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