

ENFORCEMENT OF THE PENALTY PROVISIONS IN THE DEPARTMENT OF PETROLEUM RESOURCES (DPR) GUIDELINES FOR THE RELEASE OF STAFF IN THE NIGERIAN OIL AND GAS INDUSTRY, 2019

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INTRODUCTION

The oil and gas industry attracts wide range of topical issues ranging from legislation, economic and social concerns to environmental protection. In the heart of the issues bedeviling the oil and gas industry in Nigeria is archaic and outdated legislation which do not address the challenges encountered in the industry in present day Nigeria. The Petroleum Act regulating the oil and gas industry was enacted as far back as 27th November, 1969. There has been clamour for a total overhaul of the legislative framework of the Nigerian oil and gas industry. The Petroleum Industry Bill (PIB) which was first proposed in 2008 to enhance social and economic development whilst meeting the nation's energy needs in an environmentally friendly manner has still not been passed. Though the National Assembly passed a variation of the PIB in the nature of the Petroleum Industry Governance Bill (PIGB) in 2017², the President of the Federal Republic of Nigeria did not give his assent to the Bill. In a view to address some of the problems in the Nigerian oil and gas industry, particularly in respect of developing capacity as well as ensuring job security for Nigerians in the upstream and midstream sectors of the oil and gas industry, legislation³ and guidelines have been passed and issued. The most recent guideline is the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 dated 17th October, 2019. This article seeks to carry out a foray into the Guidelines and to determine whether it addresses employment issues affecting Nigerians in the Nigerian upstream and midstream oil and gas industry.

Overview of the Guidelines

The Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 dated 17th October, 2019 ('Guidelines') were issued pursuant to the provisions of Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations 1988, which are made pursuant to Section 9 of the Petroleum Act.⁴ The DPR had previously introduced similar guidelines entitled the "Release of Nigerian workers from Employment in the Petroleum Industry and Utilisation of Expatriate Quota" (Circular PR5061/B/V2/181 (the

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² The PIGB was revised and again sent to the President of the Federal Republic of Nigeria in 2019 after the President of the Federal Republic of Nigeria refused to give his assent to the initial Bill.

³ See the Nigerian Oil and Gas Industry Content Development Act, 2010 which provides for the development and implementation of Nigerian content in the Nigerian oil and gas industry, Nigeria

⁴ Cap P10 Laws of the Federation of Nigeria (LFN) 2004.

1997 circular)) and the "Release of Staff in the Nigerian Oil and Gas Industry" (Guideline 1/2015).

The Guidelines issued on 17th October, 2019 by the DPR established procedures for releasing Nigerian workers in the oil and gas Industry⁵ as well as stipulating a penalty for non-compliance with the laid down procedures. The Guidelines repealed the Guidelines No. 1 of 2015 for the Release of Staff in the Nigerian oil and gas industry. The Guidelines were issued pursuant to the provisions of Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations, 1988 which was made pursuant to Section 9 of the Petroleum Act. Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations, 1988 provides as follows:

“The holder of an oil mining lease, license or permit issued under the Petroleum Act 1969 or under regulations made thereunder or any other person registered to provide any services in relation thereto, shall not remove any worker from his employment except in accordance with guidelines that may be specified from time to time by the Minister.”

Under the Guidelines, staff release means the removal of a worker in a manner that permanently separates the said worker from the employer⁶ which could be by way of dismissal, retirement, termination, redundancy, release on medical grounds, resignation, death and abandonment of duty post.⁷ The procedures for release of workers under the Guidelines vary and are dependent on the manner of release of the worker. The employer will either apply to, or notify the Minister of Petroleum Resources (“Minister”) before the release of any worker.

Application to the Minister

For release of workers by involuntary retirement, dismissal, termination, redundancy or on medical grounds, an employer shall apply in writing to the Director of Petroleum Resources for the Minister’s approval before releasing the worker.⁸ The application shall state and contain:

- (a) the manner of staff release;
- (b) the reasons for the proposed release;
- (c) the compensation due to the worker;

⁵ See Paragraph 1.3 of the Guidelines which states its purpose as follows: The purpose of the Guidelines is to establish the procedure for obtaining the approval of the Minister of Petroleum Resources through the DPR for the release of any worker employed by the holder of an oil mining lease, licence or permit under the Petroleum Act or under Regulations made thereunder or any person registered to provide any services in relation thereto.

⁶ The Guidelines defines Employer to mean any organization, company, partnership or registered business name which holds an oil mining lease, licence or permit (or an interest therein) issued under the Petroleum Act or under Regulations made thereunder or any person registered to provide any services in relation thereto.

⁷ See Paragraph 3.0 of the Guidelines.

⁸ See Paragraph 4.1 of the Guidelines.

- (d) any proposed replacement for the worker; and
- (e) any document relevant to the worker's employment including the employer's conditions of service as defined by the Guidelines.⁹

Upon receipt of the application, the DPR shall conduct an inquiry into the circumstances of the proposed staff release and make a decision on whether to convey the Minister's approval or otherwise. Pending when the DPR conveys its approval to the employer's application, the employer shall not advertise, publish or make press release in respect of the release of the worker.¹⁰ The decision made by the DPR shall be implemented no later than ten (10) days after it is received by the employer.¹¹ Where the employer fails to submit any required information to the DPR, such application for staff release shall not be eligible for the Minister's approval.¹²

Notification to the Minister

Where the worker is to be released by way of voluntary retirement, resignation, death or abandonment of duty, the employer is required to notify the Minister through the DPR of the release of such worker.¹³ The Guidelines also provide that on or before 31st of March of every year, every employer shall submit to the Director of Petroleum Resources in a manner prescribed by the DPR:

- (a) Name and designation of all its workers;
- (b) The number of workers employed during the period ending 31st March; and
- (c) The number of workers released prior to the period ending 31st March.¹⁴

Breach of the Guidelines:

Unlike the Guidelines and Procedures for the Release of Staff in the Nigerian Oil and Gas Industry issued on 5th March, 2015, the Guidelines provides that any person who fails to comply with the Guidelines shall be liable to: (a) a penalty issued by the Director of Petroleum Resources not exceeding Two Hundred and Fifty Thousand United States Dollars (USD\$250,000.00); and (b) in addition, any permit, licence or lease granted to that employer may be withdrawn or cancelled by the Director of Petroleum Resources.¹⁵

Challenging the validity of the Guidelines

⁹ The Guidelines defines Conditions of Service to mean any document by whatever name which governs the relationship between the employer and the worker. Such documents include Collective Bargaining Agreements, Letters of Employment, Conditions of Service, Employee Handbooks, Corporate Policy and Procedure Guides etc.

¹⁰ See Paragraph 4.4 of the Guidelines.

¹¹ See Paragraph 4.5 of the Guidelines.

¹² See Paragraph 4.2 of the Guidelines.

¹³ See Paragraph 4.3 of the Guidelines.

¹⁴ See Paragraph 5.1 of the Guidelines.

¹⁵ The penalty in the Guidelines is in conformity with the penalty stipulated in Regulation 60B of the Petroleum (Drilling and Production) (Amendment) Regulations, 2019 signed into law on 9th October, 2019 by the President of the Federal Republic of Nigeria and Minister of Petroleum Resources, President Muhammadu Buhari.

In the view of the writer, the Guidelines is not immutable and is fraught with so many irregularities which can be challenged legally. The law is clear that a person who is subject to a law in force in Nigeria has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Constitution and can challenge such law in a competent court.¹⁶

The first ground of challenge can be brought under the sanctity of contract between an employer and an employee. The law is clear that an employment contract by its very nature is personal due to the master-servant relationship it creates, and is in principle subject to the general contractual rules of common law (except in relation to employment with statutory flavor).¹⁷Hence, where the parties have reduced the terms and conditions of service into an agreement, the conditions set out in that agreement must be observed. In our view, the provision of Paragraph 4.1 of the Guidelines which requires the employer to seek the Minister's approval before releasing a worker contravenes the contract of employment existing between an employer and employee in an employment which does not enjoy statutory flavour. This is further strengthened by the principle of privity of contract which is to the effect that only parties to a contract can sue and be sued on it and a third party has no right to intervene in the contract.¹⁸ In the case of *Shell Pet. Dev. v. Nwawka*¹⁹, the Court of Appeal held that where there exists a contractual relationship between two parties, a directive from a stranger or third party to the contract may not be construed to derogate from such contractual relationship and the Director of Petroleum Resources' directive though praise worthy for what it intends to achieve for the society and the nation cannot affect the relationship between the employer and the employee. The rationale of the decision of the Court of Appeal in *Shell Pet. Dev v. Nwawka* is that the matter of termination of appointment of an employee borders on contractual relationship in law, that is the contract governing the appointment. In *Chukwumah v. Shell Petroleum*²⁰, the Supreme Court of Nigeria refused to rely on the policy statement made by the Nigerian National Petroleum Corporation (NNPC) which was not part of the contract of employment between the employer and employee as the basis of the termination of the employment of the employee. Based on the cases of *Shell Pet. Dev. v. Nwawka* and *Chukwumah v. Shell Petroleum*, it is our opinion that the Guidelines which are not part of the employment contract existing between the holder of an oil mining lease, licence or permit and its employees cannot be interpreted into the employment contract. The only instance where the court will apply the provisions of the Guidelines will be when the Guidelines are incorporated into the employment contract.

¹⁶ See *SPDC v Nwawka* (2001) 10 NWLR (Pt. 720) 64 at 83.

¹⁷ In *C.O.E., Ekiadolor v Osayande* (2010) 6 NWLR (Pt. 1191)423 at 450, the Court of Appeal defined an employment with statutory flavor as an employment or contract of service whose terms or tenure is protected either by statute or regulation.

¹⁸ See *Nwuba v Ogbuchi* (2008) 2 NWLR (Pt. 1072) 471 at 473; *Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited* (1915) A.C. 847.

¹⁹ (2001) 10 NWLR (Pt. 720) 64 at 84.

²⁰ (1993) 4 NWLR (Pt. 289) 512 at 517.

Notwithstanding the positions of the Supreme Court and the Court of Appeal in the cases of *Shell Pet. Dev. v. Nwawka* and *Chukwumah v. Shell Petroleum*, it is important to state that the National Industrial Court which is saddled with the exclusive jurisdiction to determine labour, employment, trade unions and industrial relations matters by virtue of Section 254C of the Constitution in 2007 upheld the validity of Circular No. PR5061/B/V.2/181 dated 6th February, 1997 issued by the Minister of Petroleum Resources on the Release of Nigerian workers. In *Petroleum and Natural Gas Senior Staff Association of Nigeria (Pengassan) v. Schlumberger Anadrill Nigeria Limited*²¹, the National Industrial Court upheld Circular No. PR5061/B/V.2/181 dated 6th February, 1997 titled “Release of Nigerian workers from Employment in the Petroleum Industry and Utilisation of Expatriate Quota” which in paragraph (i) provides that all companies operating in the petroleum industry should apply for official approval of the Honourable Minister of Petroleum Resources before releasing any Nigerian staff from their employment. The Court in the case agreed with the submission of Pengassan that the directive of the Minister of Petroleum Resources that employees are not to be laid off without the consent of the Minister of Petroleum Resources is/was valid. Consequently, the Court held that the action of Schlumberger Anadrill Nigeria Limited in terminating the employment of some of its Nigerian employees without recourse to the Minister of Petroleum Resources was done without due process.

The second flaw with the Guidelines is the power of the Minister of Petroleum Resources to issue a regulation or guideline relating to employment and labour. The Guidelines is said to have been made pursuant to Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations, 1988 which was made pursuant to Section 9 of the Petroleum Act. Section 9 of the Petroleum Act empowers the Minister of Petroleum Resources to make regulations on matters listed under the section. Amongst the matters listed in the Petroleum Act, there is nowhere in the Act empowering the Minister of Petroleum Resources to make regulations on employment and labour matters. Though Section 9(1)(a) of the Petroleum Act empowers the Minister to make regulations prescribing anything requiring to be prescribed for the purposes of the Petroleum Act, it is our opinion that, the power can only be exercised in furtherance of the purpose of the Petroleum Act. The purpose of the Petroleum Act can be found in the Long Title of the Act which is to the effect that the Act is to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and offshore revenue from petroleum resources derivable therefrom in the Federal Government, and for all other matters incidental thereto²². The Regulations relating to termination of employees working in upstream oil and gas companies cannot be said to have been made towards ‘prescribing the purpose of the Petroleum Act’. It is the writer’s view that Regulation 15A of the Petroleum (Drilling and Production) (Amendment)

²¹ (2008) 11 N.L.L.R (Pt. 29) 164.

²² In *Osawaru v Ezeiruka* (1978) NSCC 390, the Supreme Court held that the long title can be used as an aid to find the scope and intendment of an enactment.

Regulations, 1988 is *ultra vires* the Minister and as such the power to make the Guidelines couldn't have been derived from Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations, 1988. The law is that a public authority invested with statutory powers must act within the law and must take care not to exceed its power. Where a person, body or authority claims to have acted pursuant to a power granted by statute, such person, body or authority must justify the act by showing that the statute applied in the circumstances and that it was empowered to act under it.²³ In the light of the foregoing, it is the writer's view that the Regulations pursuant to which the Guidelines was made is *ultra vires* the powers of the Minister of Petroleum Resources.

The imposition of the penalty in Paragraph 6.0 of the Guidelines is *ultra vires* the DPR and unconstitutional. Paragraph 6.1 of the Guidelines provides as follows: "As provided in Regulation 60B of the Petroleum (Drilling and Production) (Amendment) Regulations, 2019 any person who fails to comply with these Guidelines is liable to a penalty issued by the Director of Petroleum Resources not exceeding Two Hundred and Fifty Thousand United States Dollars (USD \$250,000), and in addition any permit, licence or lease granted to that person may be withdrawn or cancelled by the Director of Petroleum Resources." A simple reading of the provisions of Paragraph 6.1 would show that the Paragraph 6.1 imbues the Director of Petroleum Resources with the power to impose penalty when there is non-compliance. The power to impose penalties where there is a violation is the sole prerogative of the court of law under Section 6 of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) and no other authority, organization or bodies can usurp that power. In addition, any law, regulation or guideline that would consign to anybody other than the courts the power to award fines and penalties is unconstitutional. In *NOSDRA V ExxonMobil*,²⁴ NOSDRA imposed the sum of N10,000,000.00 as penalty against ExxonMobil for alleged contravention of the National Oil Spill Detection and Response Agency (NOSDRA) Act and its regulations. The Court of Appeal deciding on the power of NOSDRA to issue and impose penalties held that penalties or fines are imposed as punishment for an offence or violation of the law. The power as well as competence to issue penalty belongs to the courts.²⁵

CONCLUSION

The Guidelines though laudable and made with the aim of protecting the Nigerian workers in the Nigeria oil and gas industry which is dominated by expatriates, is unlikely to stand the test of time in view of the flaws enumerated above. There is need for an all-encompassing petroleum legislation to address the issues and problems of the Nigerian oil and gas industry.

²³ See *P.H.M.B v Ejitaga* (2000) 11 NWLR (Pt. 677) 154 at 163, 169.

²⁴ (2018) LPELR-44210 (CA).

²⁵ See also *S.P.D.C.N. Ltd v Ajuwa* (2015) 14 NWLR (Pt. 1480) 403 at 473.