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Nigeria

Private Companies incorporated before the Enactment of the Companies and Allied Matters Act, 2020 can reduce their membership to one

Re: Primetech Design and Engineering Nigeria Limited & Anor v. Corporate Affairs Commission (Unreported) Suit No.: FHC/ABJ/CS/665/2023

On 30 July 2024, the Federal High Court (FHC) decided that Section 18(2) of the Companies and Allied Matters Act, 2020 ("**CAMA 2020**"), which allows one person to form and incorporate a private company, applies to companies formed before the enactment of CAMA.

The facts of the case are that Primetech Design and Engineering Nigeria Limited ("**Primetech**"), a company with two shareholders, reduced the number of its shareholders to one. Thereafter, Primetech applied to the Corporate Affairs Commission (the "CAC") to approve the new shareholding structure. The CAC, however, queried the application, noting that Primetech (a company existing before the CAMA 2020) cannot reduce its membership to less than two and that such was not allowed under the CAMA 2020.

In its judgment, the FHC held that, given the rationale behind the introduction and recognition of single shareholder companies under the CAMA 2020, it would be illogical for the legislature to permit companies incorporated after the commencement of the CAMA 2020 to have a single member while denying the same opportunity to companies incorporated before CAMA. To do so was, in the FHC's view, discriminatory and inconsistent with the reforms introduced by the CAMA 2020. Consequently, the CAC was ordered to approve and accept Primetech's change of shareholding structure to single membership.

This decision not only clarifies a grey area in the CAMA 2020 but also helps to give life to the intentions of the legislature in enacting the CAMA and the reforms it introduces. With this development, therefore, companies registered before the CAMA 2020 and companies registered after the CAMA 2020 are allowed to have a single shareholder.

The Federal Government can pay Constitutional Allocation directly to Local Government Councils, says the Supreme Court

Re: Attorney General of the Federation v. Attorney General of Abia State & 35 Others (Unreported) Suit No.: SC/CV/343/2024

The Federal Government of Nigeria (FGN) instituted this case to invite the Nigerian Supreme Court to, among other things, interpret and apply the provisions of Section 162 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "CFRN") on the payment of constitutional allocations to Local Government Councils from the Federation Account. As borne out of the underlying facts, the FGN was impelled to file this case due to the alleged non-remittance of funds meant for Local Government Councils by the State Governments.

Ultimately, one of the questions that the Nigerian Supreme Court was called upon to decide was whether the FGN can pay Local Government Councils' funds directly to them in view of the express provision of Section 162 (5), (6), (7) of the CFRN which prescribes that the said funds shall be paid into State Joint Local Government Account from which it would be disbursed to Local Government Councils by State Governments.

In resolving the above issue, the Nigerian Supreme Court departed from literally interpreting and applying the provisions of Section 162 (5), (6), (7) of the CFRN in favour of a purposeful interpretation. According to the Nigerian Supreme Court, the FGN can pay the allocations of Local Government Councils directly or pay to them though the State Governments. In arriving at this decision, the Nigerian Supreme Court was largely influenced by the failure of States to remit the funds to Local Government Councils. In the pronouncement of the Apex Court, since paying the funds through States has not worked, the justice of the case demands that allocations for Local Government Councils can be paid directly to the Local Government Councils by the Federal Government.

The power of the FGN to directly pay allocations to Local Government Councils, given the failure of States to remit the allocation to them, has been a recurring constitutional law issue in Nigeria. By this decision, the Nigerian Supreme Court has certainly resolved this issue, while giving effect to the CFRN as a living document.

Opening a Domiciliary Bank Account by a Bank without the Customer's Consent Constitutes Breach of the Customer's Right to Privacy

RE: Miss Folashade Molehin v. United Bank for Africa Plc (Unreported) Suit No.: FHC/L/CS/2625/2023

Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the **CFRN**) guarantees the right to privacy. To strengthen the efficacy of the right to privacy, the Nigerian Data Protection Regulations 2019 (the "**Regulations**") were issued by the National Information Technology Development Agency (NITDA). In this case, the Federal High Court (FHC) applied the Regulations in upholding Ms. Molehin's right to privacy as it concerned the processing of her personal data by UBA Plc ("UBA").

In this case, UBA opened a domiciliary bank account for Ms. Molehin, who was a regular account holder with the bank, for the purpose of receiving her salary which was paid in United States Dollars (USD) by her foreign employer, without her consent. Despite Ms. Molehin's requests, UBA failed to close the said domiciliary account. As a result, Ms. Molehin brought an action for the enforcement of her right to privacy. In response, UBA argued that it acted in utmost good faith and in line with its duties as a banker by channelling Ms. Molehin's USD payments automatically to a domiciliary account and that this did not amount to a breach of her right to privacy.

In its judgment, the FHC held that the scope of Section 37 of the CFRN encompassed the personal data of Nigerians. The FHC went further to apply the Regulations, holding that under Paragraph 2.2 of the Regulations, UBA unlawfully processed the personal data of Ms. Molehin in breach of her right to privacy and this was further aggravated by UBA's refusal to close the account despite repeated requests by Ms. Molehin.

This decision, when considered with a similar decision of the court in *Nworah v UBA (Unrep. Suit No. FHC/L/CS/1484/2021)*, is monumental as it shows the willingness of Nigerian courts to expand the frontiers of data privacy jurisprudence in Nigeria.

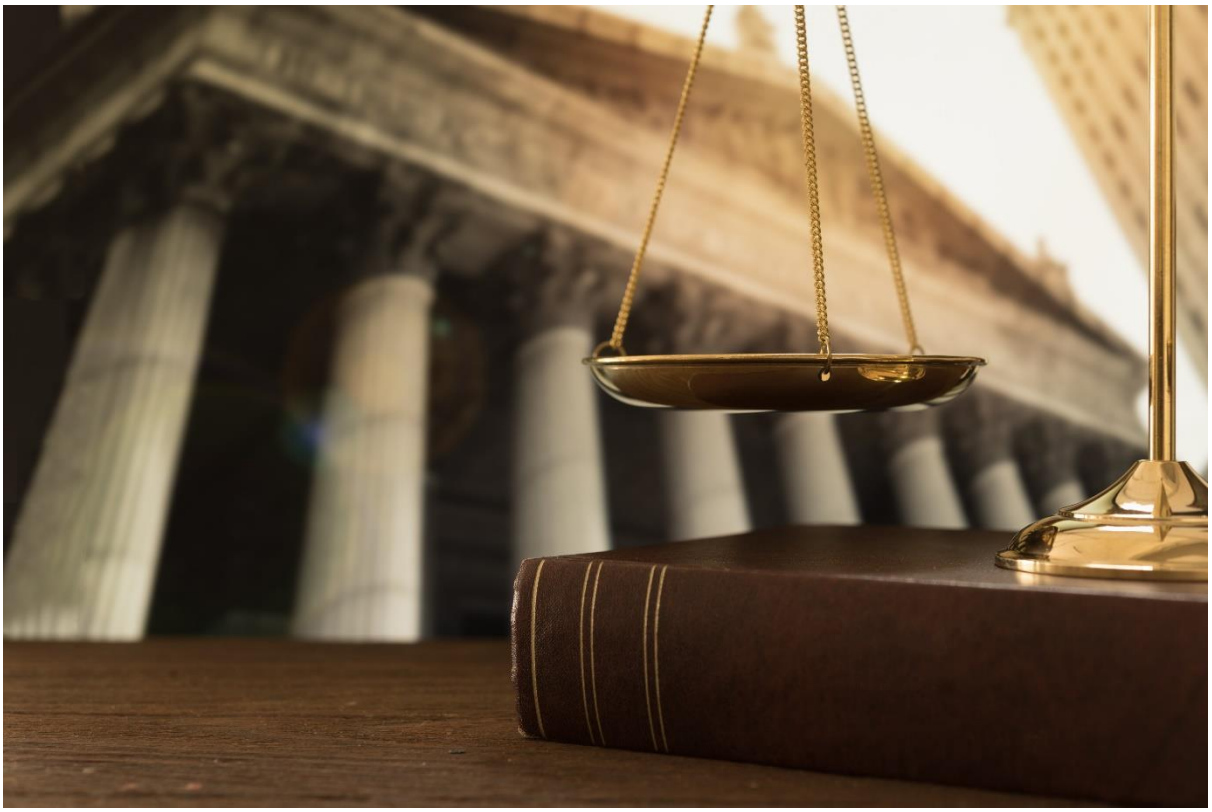
The Federal High Court (Practice Direction on E-Affidavit), 2024: Presenting a New Alternative for Affidavit Swearing

On 7 June 2024, the Honourable Chief Judge of the Federal High Court of Nigeria, Justice John Terhemba Tsoho, issued the Federal High Court (Practice Direction on E-Affidavit), 2024 (the "**Practice Direction**"), which became effective on 1 July 2024.

Before now, the Federal High Court (Civil Procedure Rules), 2019 only permitted deponents to depose to affidavits by physically presenting themselves before the Commissioner of Oaths. This process, while largely effective, posed problems for litigants outside the jurisdiction where a Federal High Court is located. Thus, the Practice Direction now contains provisions permitting deponents to depose to electronic affidavits. It was issued to: (a) ensure efficient, transparent and prompt issuance of E-Affidavits in compliance with global best practices; (b) protect the interest of litigants and other users desiring E-Affidavits; and (c) regulate the standard of issuance of E-Affidavit upon payment of prescribed fees.

The E-Affidavit system introduced by the Practice Direction is consistent with Section 5 of the Evidence (Amendment) Act, 2023 (the "Amendment Act"), which allowed for electronic deposition to affidavits[1]. The E-affidavit system is to be handled by a new E-filling unit of the Federal High Court. To use the E-affidavit system, deponents are required to apply through the Federal High Court's official website[2].

While this development has the potential to simplify the affidavit-swearing process, it is not a replacement for manually sworn affidavits. It only creates an alternative avenue to depose to affidavits electronically. Although, the E-affidavit system has the potential to raise cybersecurity and data protection concerns, it will be interesting to see how the new dispensation unfolds and the changes it makes to the affidavit-swearing process going forward.



[1] Section 5 of the Evidence (Amendment) Act, 2023
[2] Order III of the Practice Directions

Ghana

The Supreme Court of Ghana affirms the common law right of an employer to terminate an employment contract without providing reasons

RE: General Transport, Petroleum & Chemical Workers' Union of Trades Union Congress v. Halliburton International Incorporated Ghana Branch (Civil Appeal No. J4/19/2023) (delivered on 27 March 2024)

The Supreme Court of Ghana has affirmed the common law position that an employer has the right to terminate an employment contract without giving reasons for termination. However, the Court emphasized that in exercising this right, employers must ensure that they do not breach any express terms of the employment contract or the Labour Act[3]. This decision provides much-needed clarity on the question of whether the Labour Act had altered the common law right of an employer to terminate an employee's employment without giving a reason for the termination.

Halliburton International Incorporated (**Halliburton**) terminated the contract of Margaret Jacqueline Adjimah with immediate effect and without providing reasons for the termination. Halliburton paid Ms. Adjimah one (1) month's salary in lieu of notice, and all outstanding remuneration and benefits she was entitled to under the employment contract and the Collective Bargaining Agreement (**CBA**). In response, Ms. Adjimah's union, the General Transport, Petroleum & Chemical Workers' Union of Trades Union Congress (**Union**), wrote a letter to Halliburton demanding the reasons for terminating her employment. Halliburton refused to provide reasons.

The Union filed a complaint before the National Labour Commission (**NLC**) on behalf of Ms. Adjimah against Halliburton, alleging that the termination of Ms. Adjimah's employment without reasons was unfair because it deprived her of the gradual escalation provisions in the CBA. It is important to note that the CBA also provided for the right of Halliburton to terminate the employment with one month's notice or to pay one month's salary in lieu of notice. In interpreting the provisions of the CBA, the NLC held that an employer must provide reasons before terminating an employee's contract. Thus, the NLC held that Halliburton's termination of Ms. Adjimah's contract without reasons was unfair within the meaning of the Labour Act.

[3] Labour Act, 2003 (Act 651).

Halliburton appealed against the decision of the NLC to the Court of Appeal. However, the Court of Appeal affirmed the decision of the NLC. The Court of Appeal considered that Halliburton's contractual right to terminate the contract with one month's notice or payment in lieu of notice was mirrored in section 17 of the Labour Act and that by section 19 of the Labour Act, section 17 does not apply if a CBA contains more beneficial termination provisions. Thus, the Court of Appeal held that Halliburton should have followed the gradual escalation provisions (which are more beneficial to an employee) instead of terminating the contract by paying one month's salary in lieu of notice.

Halliburton further appealed to the Supreme Court. On 27 March 2024, the Supreme Court allowed the appeal and set aside the decision of the Court of Appeal. The majority of the Supreme Court took the view that section 17 of the Labour Act preserves the common law right of an employer to terminate the employment of an employee without giving a reason. However, the Supreme Court clarified that parties may opt out of the application of this common law right of termination by adopting more favourable procedures in their contract for the termination of employment.

In this case, the Supreme Court found that the CBA did not remove Halliburton's common law right of termination. The Supreme Court found that under the CBA, the gradual escalation provisions were limited to circumstances of employee misconduct, and that the right to terminate with one month's notice or payment in lieu of notice was a "contractual affirmation of the parties' rights under law and contract to voluntarily bring the employment relationship to an end by giving relevant notice or payment in lieu of such notice".

The Supreme Court then held that Halliburton's right to provide notice or pay in lieu of notice was not fettered by an obligation of "assigning reasons, blame or ascribing fault on the part of the employee".

The decision of the apex Court provides much-needed clarity on the scope of employers' right to terminate employment contracts. In many instances, the NLC has taken the view that an employer would be liable for unfair termination under the Labour Act if the employer terminated the employment contract without providing reasons. The NLC had adopted an interpretation of the Labour Act which effectively altered the common law right of the employer to terminate an employment contract without providing reasons. Thus, the Supreme Court's decision upheld the existing common law right of an employer which has not been altered either expressly or by implication by the Labour Act. In the circumstances, the decision of the Supreme Court in this case is very welcome clarity on a significant question of employment law.

The shareholding of the Government of Ghana in a company does not constitute that company a public institution subject to disclosure obligations under the Right to Information Act, 2019 (Act 989)

RE: Republic v. Right to Information Commission, Centre for Democratic Empowerment; Ex Parte: Ghana Commercial Bank

In this case, the High Court quashed the decision of the Right to Information Commission (**RTIC**) that ordered the Managing Director of Ghana Commercial Bank PLC (**GCB**) to release to the Centre for Democratic Empowerment (**CDE**) details of contracts awarded by GCB between 1 January 2022 and 31 December 2022. The Court held – contrary to the decision of the RTIC – that GCB is not a public institution under the Right to Information Act, 2019 (Act 989) despite the Government of Ghana (**GOG**)'s 21.3% shareholding in GCB and the commercial services GCB renders to the public.

On 19 May 2023, the CDE requested under Act 989 that GCB disclose details of contracts that GCB awarded between 1 January 2022, and 31 December 2022. GCB refused, stating it was not obligated to disclose information under Act 989 for two reasons: first, GCB is neither a public institution nor a relevant

private body under Act 989; and second, the information the CDE requested related to confidential contractual relationships with third parties. Dissatisfied with the decision of GCB, the CDE petitioned the RTIC to compel GCB to disclose the requested information.

On 2 November 2023, the RTIC decided that GCB was a public institution under Act 989 required to disclose the requested information. Under section 84 of Act 989, a public institution includes "a private institution or a private organization that receives public resources or provides a public function". Thus, the RTIC found that the Government of Ghana's 21.3% shareholding in GCB was a public resource received by GCB. Additionally, the RTIC also found that GCB's provision of banking services to the public constitutes a public function. Thus, the RTIC concluded that since the requested information is not exempt from disclosure under Act 989, GCB must release the information to CDE.

Being dissatisfied with this decision, GCB filed a judicial review application in the High Court for an order to quash the decision of the RTIC. On 12 June 2024, the High Court granted GCB's application for judicial review and quashed the RTIC's decision. The Court reasoned that, first, the Government of Ghana's one-time investment in GCB does not make it a public institution. To qualify as a public institution under the Act, GCB must continuously receive public resources from the Government of Ghana. Second, the Government of Ghana does not hold a resource in GCB. According to the Companies Act, 2019, "shares" are defined as an interest in a company, which differs from the dictionary definition of "public resources."

Therefore, shares cannot be considered a public resource. Third, GCB does not provide a public function. Offering commercial services to the public is different from providing a public function or service.

This decision is a reassuring indication to the business community that the Courts will confine the boundaries of the public right to information to public institutions. For several private companies with government shareholdings (for instance, mining companies), this decision provides the needed assurance that private information will not become the subject of a right-to-information application. While it is a High Court judgment, this decision establishes a precedent for determining the nature of institutions that may be compelled to disclose information under the Right to Information Act, 2019 (Act 989). It is important to note that the RTIC has appealed this decision to the Court of Appeal.

Amendment to the Practice Direction on Virtual Court Sessions, 2023 (PD/CC/RCH/01/2023)

In 2023, the Chief Justice of Ghana issued directions to provide rules for virtual court hearings, particularly during the courts' legal vacation.

Direction C of the Practice Direction provides protocols for lawyers when joining a virtual court session. Previously, Direction C6 limited virtual court sessions to the geographical jurisdiction of Ghana. Thus, the courts would not grant audience to a lawyer joining the session from outside Ghana. A lawyer violating this direction could be sanctioned, and the proceedings nullified.

The Ghana Bar Association on Monday, 12 August 2024 issued a circular announcing the amendment of the Practice Direction on Virtual Court Sessions. It announced that the Chief Justice, upon further consultation with the Technical & Virtual Court Committee, has decided that Direction C6 be deleted effective 7 August 2024. This amendment paves the way for lawyers to participate in virtual hearings from anywhere in the world thereby enhancing the efficiency of virtual court proceedings in Ghana.

This amendment is a progressive development that accords with technological advancement. It affords lawyers licensed to practice in Ghana some flexibility, particularly during legal vacations, to effectively conduct their cases within or outside the borders of Ghana.