A Newsletter on Labour Law and Emerging Trends

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Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

OUTSOURCING RELATIONSHIPS - WHO IS MY TRUE EMPLOYER?

Alex was engaged by Utopia Limited (*fictional*), an ICT firm, and was redeployed to work at ABC Bank. Even though his letter of employment was issued by Utopia Limited, Alex was required to resume daily at ABC Bank, wear the Bank's branded shirt and provide all such services required of him by the Bank. In view of the nature of his job role, Alex is required to resume as early as 7.00am to set-up all the equipment required for the smooth operation of the Bank during official work hours which starts by 8.00am. On a fateful day, Alex in his usual manner left his home as early as 5.00am and boarded a bus on his way to the Bank, which unknown to him was occupied by robbers. Unfortunately, he was robbed, shot at this right arm and thrown off the moving bus as the criminals escaped with his properties.

As a result of the injuries sustained during the attack, Alex was taken to the hospital where he received treatment at his own cost. Utopia Limited denied responsibility for the hospital bills, and the Bank claimed that Alex is not its employee and as such, would not be responsible for his bills. A week later, Alex resumed his duties at the Bank, but was having difficulties effectively executing his tasks due to his injuries. About a month later, Utopia Limited, on the written instruction of the Bank, wrote a letter to Alex disengaging him with immediate effect, and with no terminal benefits whatsoever. Aggrieved, Alex has sued both ABC Bank and Utopia Limited for compensation and payment of his terminal benefits. Some of the issues before the Court relate to, who, between the Bank or Utopia, is Alex's employer; and who is responsible for his safety, compensation and terminal benefits. The above scenario represents many outsourcing relationships adopted by several organisations today, and the issues encountered by outsourced workers. This article therefore reviews the current position of the law with regards to such arrangements.

Generally, outsourcing is a common business practice whereby a company contracts out certain obligations or a portion of it to third parties. Some of the reasons why organisations appear to prefer outsourcing arrangements are for the purpose of expertise, flexibility, reducing overhead costs and in certain cases, for the purpose of avoiding the liabilities and/or responsibilities ordinarily imposed on employers by law. Under outsourcing arrangements, the contract regulating the obligations of the parties is essentially between the service provider (outsourcing firm) and the end-user, whereupon, the employees of the service provider are redeployed to execute the terms of the contract.

The traditional position of the law is that parties are bound by the written terms of the contract mutually agreed and executed by them. Accordingly, the common law principle of privity of contract stipulates that only parties

to a contract can enforce the terms of that contract. Whilst the privity rule is premised on the notion that a person who is not a party to a contract cannot make any claim or take benefit from it, the law recognizes that the privity rule is not absolute and thus, may admit exceptions in appropriate circumstances[1]. The broad wording of the outmoded Labour Act in defining an employer and worker, is perhaps flexible enough to accommodate a co-employer arrangement in outsourcing relations. Section 91(1) of the Labour Act 2004 defines an employer to mean "*any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person, and includes the agent, manager or factor of that first-mentioned person and the personal representatives of a deceased employer*". The Act also defined a worker to mean *"any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour"*.

It is perchance in light of the flexibility presented by the broad definitions of employers/workers, that the National Industrial Court (NIC) has now moved away from the traditional or orthodox strict interpretation of written contracts. Consequently, the nature of a relationship is now largely determined based on the principle of the primacy of facts, bearing in mind the provisions of Section 91 of the Labour Act. In other words, the determination of the existence of an employment relationship is now guided by what was agreed and performed by the parties, and not by the name given to the contract. Therefore, in fitting circumstances, express contractual terms may be ignored if they are inconsistent with the reality of the relationship.

How then does this affect outsourcing relationships? Our labour laws, during the pendency of an employment relationship, admit that the character of that relationship may be altered as between the parties with or without the interposition of third parties. It is in this sense that the triangular employment relationship or co-employer status evolved. A triangular relationship has been defined as a relationship that occurs when employees of an enterprise (the 'provider') perform work for a third party (the 'user enterprise') to whom their employer provides labour or service.[2] In *PENGASSAN V. Mobil Producing Nigeria Unlimited*, the NIC held that triangular employment relationships come in a variety of forms, the best of which is the use of contractors and private employment agencies. In the same case, the NIC recognized what the International Labour Organisation (ILO) terms as *'disguised or objectively ambiguous employment relationship'*, which is meant to either mask the identity of the employer (where the person designated as an employer is an intermediary with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers) or mask the form in which the relationship is established (as where the nature of the employment relationship is intentionally misrepresented so as to deny certain rights and benefits to dependent workers). In *PENGASSAN's* case, the Court held that the disguised employment relationship between the parties constitutes a triangular employment relationship.

[1] Ayaogo & Ors v. MPN Unlimited & Anor & Anor (2013) 30 NLLR (Pt. 85) 95
[2] PENGASSAN v Mobil Producing Nig. Unlimited (2013) 32 NLLR Pt. 92

Furthermore, the Supreme Court[3] has set out certain factors to be taken into consideration in determining the nature of the relationship that exists between contracting parties. In essence, an employment relationship will be deemed to exist where:

a. payments for labour are made by way of "wages" or "salaries.";
b. the employer supplies the tool and other capital equipment of the trade, as opposed to the individual providing the capital for the work to progress;
c. the hours of work are fixed;
d. the work is to be carried out on the employer's premises;
e. an office accommodation and a secretary are provided by the employer.

A careful review of the above parameters laid down by the Supreme Court will reveal that most outsourcing arrangements fall within the scope of a contract of employment as articulated above. With regards to the issue of liability of the parties in a triangular relationship, the existence of an outsourcing relationship does not automatically translate into liability for the end-user. The determination of the liability or otherwise of the parties in an outsourcing or triangular relationship will depend on the facts of the case and the arrangement between the parties. For instance, an arrangement which purports to shield an end-user from its statutory obligations or deny the rights and benefits of employees will be disregarded by the Court.

In *Maduka v. Microsoft Nig. Ltd & Ors*[4], a case borders on sexual harassment, the 2nd respondent had argued that it was not the claimant's employer, and that it has a separate legal personality from the 1st respondent. However, upon a careful review of the facts of the case, the Court found that the 1st respondent was the agent of the 2nd respondent and thus a co-employer of the applicant (employee). The Court went further to hold the respondents jointly liable for the violation of the fundamental rights of the employee, and further directed the 1st and 2nd respondents as co-employers to immediately implement a sexual harassment policy to prevent a recurrence of a hostile environment or sexual harassment in the 1st respondent company.

In light of the above, the need for a clear classification of the relationship between the parties in an outsourcing arrangement cannot be overemphasized. This is because the present stance of the NIC is to determine the relationship between the parties and apportion liabilities based on the principle of the primacy of facts. To this end, it is not enough for an end-user to absolve itself of liability in a written contract, including as it relates to employee benefits and entitlements. It is also pertinent for the end-user to ensure that the outsourcing company or service provider complies with all the requisite statutory and contractual obligations applicable to the outsourced employee.

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[3] Shena Security Co. Ltd v. Afropak (Nig.) Ltd & ors [2008] 4 – 5 SC (Pt. II) 117
[4] (2014) 41 NLLR (Pt. 125) 67 NIC