# IS TRIANGULAR EMPLOYMENT IN CONFORMITY WITH NIGERIAN LAW-

## A REVIEW OF LUCK GUARDS NIGERIA LIMITED V FELIX ADARIKU & 5 ORS

*The lack of clarity as regards what is permissible outsourcing work arrangement in Nigeria has been unprecedented. In the absence of specific legislation on outsourcing/ triangular employment, the National Industrial Court (NIC), has sought to create a new jurisprudence on what is permissible and what is not permissible - outsourcing/contract staffing/ triangular employment. In the process of defining what is acceptable, NIC has in some judgments-imposed liability on third parties, in instances where it imputed the existence of Triangular Employment or Co-employment arrangements. Against these divergent decisions of NIC, the Court of Appeal, Abuja division in Appeal Number:* ***CA/A/1061/2020- Luck Guards Nigeria Limited V Felix Adariku & 5 Ors,*** *calms the storm by this decision; and pivots the direction of future decisions of the trial court, by restating the basis of all contractual arrangements entered under Nigerian law is premised on the principle of privity of contract.*

The doctrine of privity of contract is the fulcrum of contractual relationship under Nigerian Law. The principle provides that only a person who is a party to a contract can sue on it. It also follows that only those who have furnished consideration towards the formation of the contract can bring an action on it**[1]**. Therefore, any contract that is contrary to this principle is unenforceable and incompetent under Nigerian law for want of privity**[2]**. Though many common law legal systems have since amended the common law/Nigerian law position, through legislation; Nigerian law still holds firmly to this principle of law. This doctrine is applicable to all contracts governed by Nigerian law, including by extension contracts of employment.

[1] I.E Sagay- Nigerian Law of Contract. 3rd Edition pg 572
[2] See Ilesa L.P.A v. Oluyede [1994] 5 NWLR(Pt.342) 91at 104, paras.D-G;U.B.A. Plc v. Jargaba [2007] 11 NWLR (Pt.1045)247 at 266-267

The Court of Appeal, Abuja Division, in Appeal Number: **CA/A/1061/2020 -Luck Guard Limited v. Mr. Felix Adariku & 5 Ors** delivered on 15th December 2022 reiterated that the principle of privity of contract guides employment contracts. The Court of Appeal by unanimous opinion of the Court, held that employment contracts follow the principle of privity of contracts, and therefore did not uphold the decision of the lower court which gave recognition to the concept of triangular employment.

The dispute at the trial court, was that the 2nd Respondent (Total E & P Nigeria Limited), an oil exploration and production company, outsourced its non-core operations to the Appellant & 3rd to 6th Respondents and other outsourcing companies not named as parties in the appeal under service contract agreements, in line with the Guidelines on Labour Administration, Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector ("the Guidelines"). The Guidelines, recognizes that the employees of the Outsourcing Companies who are deployed to the oil and gas companies are not employees of the Oil and Gas Companies. Thus, the Outsourcing Companies acted as employers of their employees for all purpose and in its capacity as employer, negotiated the employment contracts, issued letters of employment, paid salaries and allowances, remitted pension payments to pension fund administrators, supervised, and disciplined their employees that were deployed to the 2nd Respondent. Pursuant to the outsourcing arrangement, the 1st Respondent and other personnel were deployed to the 2nd Respondent by their respective employers (i.e., the Appellant & 3rd to 6th Respondents) and continued in such positions, until they were disengaged by their respective employers.

Following their disengagement, the 1st Respondent and 257 personnel whom he represented, filed an action at the National Industrial Court of Nigeria, claiming that the 2nd Respondent employed them and subsequently handed over or rolled them over to the Appellant & 3rd to 6th Respondents, without issuing them letters of employment. The 1st Respondent claimed declaratory orders to enforce their rights, including a declaration that the 2nd Respondent is the employer of the 1st Respondent and 257 personnel and that the failure of the 2nd Respondent to issue the 1st Respondent an employment letter within 3 months of resumption was unlawful and an unfair labour practice.

The lower Court raised suo motu the issue of triangular employment relationship between the 2nd Respondent, 1st Respondent and the 257 personnel, and the Appellant & 3rd to 6th Respondents. The lower Court delivered its judgment and found that there was a triangular employment relationship between the 2nd Respondent, 1st Respondent and the 257 personnel, and the Appellant & 3rd to 6th Respondents and that the failure of the 2nd Respondent to issue the 1st Respondent an employment letter within 3 months of resumption was unlawful and an unfair labour practice. Dissatisfied with the decision of the lower Court, the Appellant appealed to the Court of Appeal.

On appeal, the Court of Appeal was asked to determine whether the trial court was right to have held that there was a triangular employment relationship between the 1st Respondent, 2nd Respondent and the Appellant. In deciding this issue, the court recognised the ILO Scope of employment relationship canvassed by the 1st Respondent- however it held that only parties to a contract can sue or be sued on the said contract. It further held that the doctrine of privity will not inure or apply to a non-party to the contract who may have unwittingly being dragged into the contract with a view to becoming a shield or scapegoat against the non-performance of one of the parties. Triangular employment contemplates a tripartite work relationship that involves three parties, namely -the employer (Agent), the employee and a third party who may control the employee. The concept is credited to the International Labour Organisation ("ILO"). The ILO guideline recognised the dynamics of the relationship and advised that each Country deal with the subject with specific indigenous legislation.

Nigeria has not developed a specific legislation for Triangular Employment, save for guidelines issued by the Ministry of Labour on the subject such as the "Guidelines on Labour Administration, Issues in Contract Staffing/ Outsourcing in the Oil and Gas Sector 2011 and Guidelines on Labour Administration Issues in Contract Staffing/ Outsourcing Non-Permanent Workers in Banks, Insurance and Financial Institutions 2022. In the absence of specific legislation, the National Industrial Court ("NIC") has developed a jurisprudence on triangular employment, which goes against the grain of our contract law; and also contrary to extant labour jurisprudence, that the contract of employment is the foundation of every employer-employee relationship.

In **Oyewumi Oyetayo v. Zenith Bank Plc[3],** the NIC found that Zenith Securities Limited was a subsidiary of the Defendant and as such, both entities were co-employers to the Claimant.

[3] [2012] 29 NLLR (Pt. 84) 370 (NIC).

In **Ejieke Maduka v. Microsoft Nigeria Ltd[4]**, the NIC applied the principle that a parent or affiliate may be responsible in appropriate cases if evidence is shown that both the parent and/or affiliate are co-employers of the employee. The Court held that although the Applicant's letter of employment was written by the 1st Respondent, the Release Agreement given to the Applicant stated that the 1st Respondent was entering into the Agreement both for itself and as agent for its holding company, subsidiaries, shareholders, directors, officers and employees. Thus, the Release Agreement established that both entities were co-employers. In **Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor[5]**, the Court held that the 1st Defendant employed the Claimants as call centre agents, confirmed their employment, and even reviewed their salaries, before it transferred the Claimants to other third-party employers, for its sole benefit. The NIC affirmed that the transfer or secondment of the Claimants by the 1st Defendant to 2nd Defendant does not mean that the 1st Defendant was no longer an employer of the Claimants.

Similarly, in **Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd[6]**, the 1st Defendant employed the Claimant and seconded him to the 2nd Defendant, Ecobank Nigeria Plc. to work as transaction officer. The NIC, in the absence of a contract of employment between the Claimant and the 2nd Defendant, held that the 1st & 2nd Defendants were co-employers. This was premised on the letter of offer of employment issued by the 1st Defendant which categorically stated the Claimant "will be employed as a transaction officer and seconded to Oceanic International Bank Plc." **In Anthony Agum v. United Cement Company Ltd.(UNICEM)Anor[7]**, the 1st Defendant entered into a service contract with MS Outsourcing Services (2nd Defendant) to provide and manage the provision and management of Drivers, Cooks and Stewards. It was the 2nd Defendant who employed the Claimant and assigned him to the 1st Defendant. Notwithstanding that there was a letter of appointment from the 2nd Defendant alone, the NIC held that the parties had a co-employment or triangular employment relationship.

In **Diamond Bank Plc v. National Union of Banks, Insurance and Financial Institutions Employees[8]**, the Claimant as a matter of convenience, outsources the provision of certain services under a Labour Service Agreement to contractors who send their employees to the Claimant to perform the services. The contractor is responsible for the employment, conditions of service, remuneration, discipline, welfare, promotion and disengagement of such workers sent to the Claimant. The Claimant entered into a Labour Service Agreement with C & M Exchange Limited (the Contractor) and the

[4] Suit No. NICN/LA/492/2012 (unreported judgment of Hon. Justice O. A. OBASEKI-OSAGHAE, J., delivered on December 19, 2013).
[5] Suit No: NICN/LA/453/2012: (unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered December 13, 2016-12-13)
[6] [2015] 57 NLLR (Part 195) 268 (NIC).
[7] Suit No: NICN/CA/71/2013 (unreported judgment of Hon. Justice E. N. Agbakoba, J., delivered on March 3, 2017).
[8] [2015] 57 NLLR (Part 195) 268 (NIC).

2nd & 3rd Defendants (employees of the Contractor) who were members of the 1st Defendant, were deployed to the Claimant. Subsequently, the employees of the Contractor working with the Claimant embarked on a riot and disrupted the services of the Claimant to its customers at its head office and branch offices. In determining whether there was a contract of employment between the Claimant and the employees of the Contractor to justify picketing, the NIC held that the Labour Service Agreement effectively created a triangular employment relationship between the Claimant, the Contractor and the employees of Contractor supplied to the Claimant.

However, in **James Francis Etim v. Ikeja Electricity Distribution Plc[9]**, the NIC held that the transfer of the employment of the Claimant to the Defendant does not mean that PHCN, Eko Zone, ceased to be the employer of the Claimant. Similarly in **Engineer Ignatius Ugwoke v. Aeromaritime (Nigeria) Limited[10]**, the NIC held that the transfer or secondment of an employee by an employer to another employer does not necessarily imply that the transferring employer is no longer an employer of the employee.

"It is certain that where Parliament dreads to tip toe, a court should be wary of staging a march past".**[11]** Judge made law though a source of law is not at large but circumscribed within the remit of existing legal principle and statute. Decisions of the Supreme Court have warned against judicial legislation**[12]**, and the courts are adjured to follow precedent set by a higher court.

The pandora box of uncertainty surrounding the arcane subject of Triangular employment has accordingly been settled. Save where there is evidence of a contractual arrangement that bifurcates responsibility of employer between several parties or where the employer is anonymous; privity of contract principles shall continue to abide the basis of determining whether such contracts are valid or not under Nigerian Law.

[9] Suit No. NICN/LA/12/2017: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered October 9, 2018.
[10] Suit No. NICN/LA/482/2013 unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered on November 30, 2016.
[11] Where Parliament fears to tread, it is not for the courts to rush in - Lord Reid in Shaw v D.P.P (1962) AC 220 @ 275. See also D. C. J. D, Poverty and Tyranny of Judicial Passivism : Imperative of Judicial Activism in Nigeria, Journal of the Indian Law Institute Vol. 39, No. 2/4 (APRIL-DECEMBER 1997), pp. 338-347 available at https://www.jstor.org/stable/43953279 (last accessed 3 February 2022).
[12] Brig-Gen Mohammed Baba Marwa & Anor v. Admiral Murtala. Nyako & Ors (2012) LPELR-7837(SC)"In this constitutional role of interpretation vested by Section 6 of the 1999 Constitution - this Court is not expected to expand the law as that is the legitimate duty of the legislature but to expound the law." Per OLUFUNLOLA OYELOLA ADEKEYE, JSC (Pp 168 - 168 Paras E - F); Rt. Hon. Rotimi Chibuike Amaechi v. INEC & ORS (2008) LPELR-446(SC) Aderemi JSC: "The fundamental duty of the Judge is to expound the law and not to expand it. He must decide what the law is and not what it might be."

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