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**THE IMPACT OF COVID-19 ON COURT PROCEEDINGS IN NIGERIA**

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## COVID-19: THE RUDE AWAKENING

On the 23<sup>rd</sup> of March 2020, the National Judicial Council, acknowledging the danger of Covid-19 pandemic and the severe threat it poses to human health, vide its circular with Ref No. NJC/CIR/HOC/11/631, directed all Heads of Courts thus: *"... in view of the reality of the COVID-19 in the country and in order to take further preventive steps, all Heads of Courts are, from tomorrow, the 24<sup>th</sup> day of March 2020, directed to suspend Court sittings for an initial period of two weeks at the first instance, except in matters that are urgent, essential or time-bound according to our extant laws."*

In the later circular issued on the 6<sup>th</sup> of April, 2020, with Ref. No. NJC/CIR/HOC/11/656, the National Judicial Council, extended the suspension of court sittings till further notice, in order to curb the spread of the novel Covid 19 pandemic, except for matters that are urgent, essential or time-bound according to laws.

In his effort to curb the spread of the Coronavirus in Lagos State, the Governor has issued the Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020 pursuant to his powers under the State's Public Health Law and the Federal Quarantine Act, Q2 LFN 2004. A breach of the Regulations is an offence under the Quarantine Act, and Lagos Public Health Law and an offender upon conviction would be liable to a fine or imprisonment or both in accordance with those laws.

President Buhari, on Monday 30<sup>th</sup> of March 2020, signed the Covid-19 Regulations 2020, which declared Covid-19 a dangerous infectious disease and authorised lockdown of activities in Federal Capital Territory Abuja, Lagos and Ogun states to enable the government to contain further spread of the Coronavirus. In promulgating the Regulations, the President relied on the powers conferred on him by sections 2, 3, and 4 of the Quarantine Act, CAP Q2 Laws of the Federation of Nigeria 2004 and all powers enabling him in that behalf.

The Covid-19 Regulations gave legal backing to all the measures outlined by the President in his nationwide broadcast of Sunday the 29<sup>th</sup> of March 2020. The Regulations, however, granted exemptions to specific categories of persons and organisations regarded as essential workers and service providers, such as hospitals and related medical establishments; healthcare-related manufacturing and distribution; food processing, distribution and retail entities; petroleum distribution and retail entities; power generation, transmission and distribution entities, etc. As part of the COVID-19 Regulations also, the President granted an exemption for the financial and money markets to run very skeletal activities and to ensure that Nigerians can still perform online transactions and as well use their ATMs during the period.

It also granted critical staff of the Central Bank of Nigeria (CBN), Deposit Money Banks (DMBs), Nigeria Interbank Settlement System (NIBSS) Plc, Switching companies, Mobile money operators, as well as payment solution service providers exemption to go out during the lockdown to deliver essential duties. Furthermore, as part of the essential services exempted from the general lockdown, paragraph 7 of the Covid-19 Regulations granted an exemption

for Court matters that are urgent, essential, or time-bound according to extant laws, which is consistent with the Chief Justice of Nigeria's Circular No. NJC/CIR/HOC/11/631.

Upon the expiration of the 14 days restriction of movement order made under the Covid-19 Regulations on Monday the 13th of April 2020, President Muhammadu Buhari issued the Covid-19 Regulations No. 2 of 2020, on the same Monday 13<sup>th</sup> of April, by which the President ordered restriction/ cessation of movement in Lagos State, the Federal Capital Territory, Abuja, and Ogun State, for a further period of 14 days, with effect from the 14th of April 2020.

Based on the above provisions of the Covid-19 Regulations, the Courts are also regarded as essential services in certain cases, at this critical time. Indeed, under the Covid-19 Regulations, judicial workers can do skeletal works during this period of lockdown, in response to urgent court proceedings and time-bound matters. This directive essentially places judges and judicial workers as essential workers.

It was against this background that the Attorney-General of the Federation and Minister of Justice, Mr. Abubakar Malami (SAN), by his letter of the 1st of April 2020 addressed to all Heads of Courts conveying the COVID-19 Regulation 2020, directed that courts should attend to matters that are urgent, essential or time-bound even during the lockdown.

Based on the above, the Supreme Court of Nigeria, on Friday, 3<sup>rd</sup> of April 2020, sat to strike out the fraud charges filed by the Economic and Financial Crimes Commission (EFCC) against a former governorship candidate of the defunct Action Congress of Nigeria (ACN) in Kwara State, Mr. Mohammed Dele Belgore (SAN). The apex Court allowed the appeal against the ruling of the Court of Appeal and trial Court delivered in November 2018, by Justice Rilwan Aikawa of the Federal High Court, Lagos Division.

The Supreme Court had also, on Friday 27<sup>th</sup> of March 2020, delivered a judgment on the All Progressives Congress (APC) application praying the Supreme Court for a review its judgment on the Zamfara state gubernatorial election dispute. The Court dismissed the APC's application for review, holding that the Court lacked the jurisdiction to review its judgment and that the application constituted a gross abuse of the Court process.

It is instructive to note that apart from the apex Court, some other Courts conducted proceedings across the country to hear some urgent applications in line with the Chief Justice of Nigeria's directive. In Lagos State, for instance, the Federal High Court presided over by Justice Mohammed Liman recently on Thursday the 26th of March 2020, granted a post-conviction bail to a former Director of Finance and Account at the Abia State Government House, Mr. Jones Udeogu, who was sentenced to 10 years imprisonment in December 2019, alongside his principal and former Governor of Abia State, Senator Orji Uzor Kalu, who bagged 12 years imprisonment.

On the same day also, following an ex parte application by the Economic and Financial Crimes Commission (EFCC), Justice Liman ordered temporary forfeiture of N293,000,000.00, six (6) parcels of land and 30,000 MTN shares recovered from a former Commander of the Military Joint Task Force, Operation Pulo Shield, in the Niger Delta, Major Gen. Emmanuel Atewe (retired), to the Federal Government of Nigeria.



It should be noted however that in conducting proceedings during this period, the Courts are required to ensure that judicial workers take all necessary steps to ensure the safety of management and staff, by preventing the gathering of more than 20 people at a time in the court room and specifically preventing people from accessing the Court, except parties to a case and their Counsel. This prescription is contained in the circular issued by the National Judicial Council on 20<sup>th</sup> of March 2020, titled "Preventive Measures on the Spread of Corona Virus (Covid-19) and the Protection of Justices, Judges and Staff of Courts".

## **THE STATE OF NIGERIAN LAWS**

The current situation of COVID-19 is still largely unpredictable, and the time it would take for normalcy to return remains unknown. Access to Court, which has however, remained the potent tool in maintaining law and order, cannot be held in abeyance for too long. The following analyses, therefore, are an attempt to examine the status of the various laws and rules of procedure for a possible way out of the conundrum. However, as stated above, the position of the law regarding access to justice during the COVID 19 lockdown is quite clear from the extant regulations and directives from heads of courts. Save for urgent, essential, or time-bound matters as prescribed by law; other cases are to be suspended till the end of the lockdown.

### **The Court of Appeal**

The Court of Appeal has recently issued new practice guidelines for expeditious proceedings in Court and election petition matters, to reduce the amount of time that parties spend in the Court and as a tacit response to the COVID-19 situation. The new guidelines were rolled out by the Acting President of the Court of Appeal, Justice Monica Dongban-Mensem, to enhance expeditious hearing of pending cases, while still ensuring safety in court and election petition tribunals.

The new practice guidelines direct lawyers to stipulate on their letterhead all relevant details of their processes, such as names of Counsel, the parties represented, the appeal number, designation of Counsel, dates of the court processes and filing dates, the names of processes, (e.g., Appellant or Respondent brief of argument, Reply brief, etc.) The Counsel must also clearly indicate the Judgment of the Court and division appealed against, dates when the records were transmitted, as well as other relevant details. The Acting President of the Court of Appeal directed that all the above details should be submitted electronically to the office of the Chief Registrar for onward transmission, and copies must be sent to the respective Deputy Chief Registrars.

The Acting President of the Court of Appeal noted that the use of electronic channels of communication reduces the amount of time expended in addressing the Court which may lead to unwittingly spewing of saliva which predisposes people to health hazards, especially in this period of the Covid-19 pandemic. With regards to election petition matters, the new guidelines provide that "where witnesses are taken, persons who are not witnesses before the court shall not be admitted." The guidelines provide further that "The Chairman and members of the tribunal shall determine the number of people allowable in court at any



particular sitting but should not be more than 20 people, depending on the size of the court hall.”

### **The Federal High Court**

The Federal High Court (Civil Procedure) Rules gives room for some level of flexibility in the adjudication process. Order 46 of the Rules provides that the Court may, at its discretion, appoint any day and place from time to time for the hearing of an action as *circumstances require*.

This provision, in our opinion, can be utilised by the Court as well as parties to conduct some proceedings (excluding trials) by digital means, i.e., virtual proceedings. With the right equipment in place, such as internet-enabled computers/ laptop, the parties and the Judge can conduct their proceedings in real-time through video conferencing. Considering the circumstance of the Covid-19, it is our position that the Court may choose a *virtual place* for the conduct of its business. The provision is not ambiguous when it states, “*any place*.” Thus, it is our opinion that the Court may permit parties to ventilate their matters through digital means.

### **The National Industrial Court**

The National Industrial Court Rules represents one of the new vistas of procedural laws to provide for digital means towards access to justice in Nigeria. Although the Rules do not explicitly provide for any video conference, it should be noted that by Order 3 of the National Industrial Court (NIC) Rules, 2017, the Court may direct a departure from its Rules where the interest of justice so requires. We are of the view that this provision may be utilised by the National Industrial Court to permit video conferencing and avoid Court crowding, thereby preventing the spread of the Covid-19 virus.

Order 6(3) of the NIC Rules stipulates that in any proceeding before the NIC, the Court shall apply fair and flexible procedure and shall not allow mere technicalities to becloud doing justice to the parties based on the law, equity and fairness while also considering the facts of any matter before it.

By Order 9(1), where a matter arises for which no provisions or adequate provisions are made in the NIC Rules, the Court may adopt and apply any procedure as will, in its view, do substantial justice to any of the parties concerned in the matter. Under this particular provision, the Court may allow the use of video conferencing to conduct some urgent court proceedings, where doing so may do substantial justice to any of the parties. It must also be stated that the NIC Rules has put in place electronic filing and service, though the provisions are yet to be made fully operational.

### **The High Court of Lagos State**

The High Court of Lagos State (Civil Procedure) Rules, 2019, have some provisions that are useful in times of global health emergency, such as the current COVID-19 pandemic.

Order 54 (2) of the Rules, permit the Court upon an application to take any proceedings apart from trial in chambers. Thus, where there are applications or matters that need to be disposed expeditiously, parties may do so in the chambers of the court. This also ensures the safety of parties, their counsel and the judge as no one has to contend with any crowd in open court.

It should also be borne in mind that Order 49 of the Rules, which has a similar provision in the Federal High Court Rules provides that the judge may, in his discretion, appoint any day and place for the hearing of the causes as circumstances require. We believe that this provision gives the judge a wide latitude to determine a forum that is convenient for the parties, and that subject to the extant provisions on evidence, the forum may be online/ virtual.

## **CONCLUSION**

The temporary cessation of general court proceedings due to the COVID-19 pandemic, cannot continue to halt the process of administration of justice. While the temporary closure of courts is meant to limit court hearings to essential and time-bound cases, there is the need to look beyond the existing Regulations towards achieving justice delivery to all and sundry. After a painstaking overview of the extant provisions of the various Rules of Court, we state that there is no provision in the rules preventing a party from exploring telephone or video conferencing or digital technology in achieving the ends of justice.

Therefore, at a critical moment like this, a Court, with the concurrence of the parties, can still conduct non-contentious proceedings via video conferencing, especially where the case is urgent and of a commercial nature, thereby saving time and costs for the parties as well as the courts. Also, section 234(3) of the Administration of Criminal Justice Act, 2015, provides that where in any proceedings the court determines it is necessary to protect the identity of the victim or a witness, the court may receive evidence by video link. More so, there is no judicial magical wand about sitting in a court room to conduct any matter. It is, therefore, our view that a matter held via video conferencing or teleconferencing will satisfy the requirement of publicity, as long as interested members of the public have access to the live proceedings.

### **1. Alternative Dispute Resolution (ADR)**

Considering the fact that commercial disputes are an integral part of any commercial activities or transactions, parties to contracts cannot wait endlessly for the court to be re-opened, before they can have their disputes resolved. Therefore, if the closure of courts lingers for too long as a result of the Covid-19 pandemic, parties to commercial contracts may explore any of the various Alternative Dispute Resolution (ADR) mechanisms for the resolution of their disputes. The ADR mechanisms are, by nature simple and more flexible than litigation. ADR mechanisms such as arbitration, mediation, conciliation, med-arb, expert determination, etc. give parties much more control over their disputes and allow them to have their disputes resolved timely, without necessarily affecting their contractual relationship. We will dwell more on arbitration under this heading.

Arbitration grants parties to the arbitral proceedings leeway to conduct the arbitration in a manner they see fit. Unlike litigation, parties to an arbitration agreement can go ahead and conduct their proceedings virtually, even during this Covid-19 situation. The Arbitration and Conciliation Act (ACA) has some useful and flexible provisions which can allow for effective use of video or teleconferencing to conduct arbitral proceedings and do justice between disputing parties.

What is mandatory in the conduct of any arbitration proceedings is that the arbitral tribunal must accord all the parties equal treatment and that each party is given full opportunity of presenting his case (Section 14 ACA). Parties to an arbitration agreement can agree on their choice of law, place of arbitration, number, and nomination of arbitrators. In addition to the above, section 16(2) of the ACA provides that: *"... Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property."*

The parties can also decide how the arbitral proceedings can be conducted, whether by holding oral hearings for the presentation of evidence or oral arguments or on the basis of document only or by holding both oral hearings and on the basis of documents or other materials - Section 20 ACA.

In addition to the above provisions of the ACA, some institutional arbitration rules contain provisions that support virtual hearings in arbitration proceedings. Examples of such rules include Article 24(1) of the ICC Rules of 2017 referring to Appendix (IV) and Article 19.2 of the LCIA Arbitrations Rules 2014. The above rules allow for arbitration proceedings to be conducted via telephone or video conferencing.

Flowing from the foregoing, where the tribunal considers video conference appropriate, the same can be utilised without any hiccups. The only condition is for each party to be given adequate time and equal opportunity of presenting his case.

Therefore, parties to commercial transactions who have urgent need to resolve some commercial disputes and whose agreements do not contain arbitration clauses can amend their contracts to include an arbitration clause. Also, willing parties can also enter into a submission agreement to submit their dispute to arbitration. The arbitration can then be conducted virtually by video conference, as the parties deem fit, during this Covid-19 situation.

## **2. Case Management**

Case management generally connotes the entire set of actions that a court takes to monitor and control the progress of a case, from initiation through trial or other disposition of the matter, in order to ensure effective justice delivery in the matter. The various rules of court provide for multiple systems of case management.

With effective case management, the Courts, as well as the parties, can agree on ingenious ways of conducting proceedings, albeit non-contentious ones, even during this period of the Covid-19 pandemic.

### **3. Contract Renegotiation**

Owing to the Covid-19 pandemic, with the consequential lockdown, border closures as well as travel restrictions, a lot of contractual obligations would no doubt have been adversely affected. For instance, where a party is contractually obligated to deliver goods during this period of the Covid-19 uncertainty and which is essentially time-bound, is it expected that such a party would not be in a position to perform the obligation. Usually, most contracts have provisions on force majeure, which would exclude liability for non-performance due to supervening events, which is beyond the power and control of the contracting parties. Where the contract does not have a saving provision or a force majeure provision, the party who is under obligation may rely on the doctrine of frustration, provided the conditions are met.

More importantly, it behoves on contractual parties in a situation such as the Covid-19 pandemic, to renegotiate their contract in order to save the same as well as salvage the contractual relationship between the parties. The parties must be ready to explore viable and creative ways of saving their contract. This is with the exception of goods and services which are exempted by the Regulations 2020 promulgated by the President.

### **Contributors**

*Ibidolapo Olufade*

*Ismail Muftau*



## Key Contacts



**Asamah Kadiri**  
Partner & Practice Head  
e: [asamahkadiri@jacksonettiandedu.com](mailto:asamahkadiri@jacksonettiandedu.com)



**Ismail Muftau**  
Senior Associate  
e: [ismailmuftau@jacksonettiandedu.com](mailto:ismailmuftau@jacksonettiandedu.com)

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RCO Court 3-5, Sinari Daranijo Street,  
Victoria Island, Lagos, Nigeria.

t: +234 (1) 4626841/3, +234 (1) 2806989 f: +234 (1) 2716889  
e: [jacksonettiedu@jacksonettiandedu.com](mailto:jacksonettiedu@jacksonettiandedu.com) [www.jacksonettiandedu.com](http://www.jacksonettiandedu.com)