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THE DILEMMA OF AN INJURED EMPLOYEE AND THE DOCTRINE OF EXHAUSTION UNDER THE EMPLOYEE'S COMPENSATION ACT

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Adedayo, a staff of one of the leading Fast-Moving Consumer Goods (FMCG) companies in Nigeria, works in the food and beverages section of his company as a Factory Manager.

As part of his functions in the factory, he supervised the factory workers on all manufacturing operations. On a fateful day, his subordinates had complained that the tilter used for crating and loading food products was faulty; he had guessed the fault was from the power source and suggested that the machine be connected to a different power plant. Whilst the cables were being disconnected, the tilter powered on with extreme vibration that the loaded materials tumbled as the container was raised. There were no straps/barriers on the products, so they tumbled on Adedayo as he was standing by the tilter while the other factory workers were disconnecting the cables.

He was rushed to the Accidents and Emergency Unit of the General Hospital where he had to be confined to a wheelchair as he had a fractured spine. With so much grief, he approached the Management of his company to take care of his medical expenses and compensate him for the injury. His employers took care of his medical bills but neither compensated him nor reported the injury he sustained to the NSITF Board.

With no other choice, he approached his lawyers to file a complaint against his employers at the National Industrial Court,

with his main reliefs being compensation for incapacitation arising in the course of his employment.



He was however taken aback when his lawyers advised that recourse had to be made to the NSITF Management Board first before approaching the National Industrial Court. Adedayo was reluctant to adhere to the multi-level dispute resolution procedure as he was confident that the National Industrial Court was established to determine disputes arising in the course of employment and labour relations.

The dilemma of the likes of Mr. Adedayo is prevalent in recent times. The repeal of the Workmen Compensation Act Cap W6 LFN 2004 (WCA) and subsequent enactment of the Employee's Compensation Act (ECA) in 2010 is a contributing factor to the prevalence of this dilemma.

In a bid to address the inadequacies of the provisions of the WCA, the ECA was enacted to provide a seamless system for compensating employees that sustain injuries or lose their lives during the course of employment.

Under the WCA, the High Courts had the powers and jurisdiction to investigate and determine any question or issue arising therefrom, but with the enactment of the ECA, the responsibility of implementing the ECA and the Fund for compensating employees has been vested in the Nigeria Social Insurance Trust Fund Management Board (NSITF or the Board).

Under the ECA, the procedure for pursuing claims is that upon incapacitation or death, the employee or his dependant is to notify his employer within 14 days of the occurrence. The employer must report the information to the NSITF Board within 7 days of receiving notification from the employee or his dependants. In the case of death, it must be reported immediately to the Board and to the local representative of the Board. Where the Board has been notified by the Employer, the employee or the employee's dependant is also required to fill and sign the application for compensation using **Form ECS.CCF0**.

The Act presupposes that circumstances may arise where the employee is dissatisfied with the compensation provided by the Board or the decision of the Board refusing the employee's

application for compensation. Section 55 of the ECA provides for the procedure to be followed by such employee or his/her dependant. The section provides that the employee or his dependant must first make an appeal in writing to the Board within 180 days of the date of the decision for same to be reviewed. The Board is further mandated to make a decision on the appeal within 180 days¹.

The Act further provides that where the employee or his/her dependant is further aggrieved by the decision of the Board, he/she may make an appeal to the National Industrial Court.

Section 254C (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution) provides amongst other things, that the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to, connected with or arising from Factories Act, Trade Disputes Act, Trade Unions Act, Employees' Compensations Act or any other Act or Law relating to labour, employment, industrial relations, workplace or any other enactment replacing the Acts or Laws².

¹ If the appeal is not made to the Board within the prescribed period, the person loses his or her right to appeal the decision.

² Act No. 3 of 2010 which commenced on 4th March 2011.

The poser presented by the provisions of section 55 of the ECA is whether the exclusive powers conferred on the NICN by section 254C(1)(a)(b) of the Constitution with respect to matters relating to or connected with the ECA has been taken away and vested in the Board?

If the above poser is answered in the affirmative, the potency of section 55 of the ECA may be challenged on the strength of section 1(3) of the Constitution which is to the effect that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

The practice of exhausting internal remedies provided in statutes before litigant can resort to Court is not alien to our civil jurisprudence and our Courts have been reiterated in a litany of judicial authorities that where a statute prescribes the legal line of action for the determination of an issue, an aggrieved party must exhaust all the internal remedies contained therein before going to court. This principle of law was well elucidated by the

Supreme Court, **Per Belgore, JSC** in the case **EGUAMWENSE V. AMAGHIZENWEM**³.

It is the writer's considered view that the provisions of section 55 of the ECA is not inconsistent with the provisions of the Constitution for the reason that the provisions of the ECA sets out internal procedures/mechanisms which must be exhausted by an aggrieved employee or his/her dependant before approaching the National Industrial Court. The provisions of the ECA, is not in any way tantamount to extinguishing the powers conferred on NICN by section 254C of the Constitution; rather, both provisions are complementary.

This writer further opines that what the Constitution vested on the NICN with respect to matters relating to the ECA is somewhat in the nature

of an appellate jurisdiction. Although, NICN is the only Court that has powers to entertain matters relating to the ECA to the exclusion of all other Courts, the NICN is not

the first point of call on matters relating to the ECA⁴.

³(1993) 9 NWLR (PT. 315) P. 1

⁴There's a clear difference between original jurisdiction and exclusive jurisdiction. Whereas **exclusive jurisdiction** exists where one court has the power to adjudicate a case to the exclusion of all other courts, **original jurisdiction** refers to the powers of the court to hear a case for the first time.



This position was affirmed by the NICN in the case of **MADUKA v. EARTH MOVING INTERNATIONAL LIMITED & ANOR**⁵ where it was stated at page 332 Paras F-G as follows:

‘The National Industrial Court of Nigeria does not have original Jurisdiction over matters stipulated under the Employees’ Compensation Act, 2010. A claimant has to follow the process outlined in the ECA 2010 before he can go to the NICN in its appellate jurisdiction as stipulated by section 55(4) of the ECA 2010 which states as follows ‘An appeal shall lie from any decision of the Board under subsection (1) of this section to the National Industrial Court.’

Although there is a dearth of cases on the ECA, the NICN in the case of **MADUKA V. EARTH MOVING INTERNATIONAL LIMITED & ANOR** *supra* at page 331 Paras E-G made a commendable effort to articulate the purport of section 55 of the ECA as follows:

‘The Employees Compensation Act provides in section 55 that a party seeking for compensation must first exhaust the procedure before the Board and thereafter he has a right of appeal to the National Industrial

Court. With this provision it is quite clear that the Claimant who is asking for Workman’s Compensation, cannot approach the Court without going through the process enshrined in the said Employee’s or Workmen’s Compensation Act.’

Strict compliance with the provisions of section 55 of the ECA is very essential. This is because, where there is non-compliance, the Suit of the litigant may turn out to be premature. This position is enshrined in the third limb of ‘competency threshold’ propounded by the Supreme Court in the celebrated case of **MADUKOLU V. NKEMDILIM**⁶ where the apex Court held that a Court is competent where the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.



⁵(2013) 33 NLLR (Pt. 95) 297

⁶(1962) 2 SCNLR 341



Addressing the effect of non-compliance with a condition precedent, the Court of Appeal in the case of *INC V. MOBIL OIL (NIG) PLC*⁷ stated that where there is non-compliance with the stipulated pre-condition for setting a legal process in motion, any suit maintained in contravention of the pre-condition provision of the relevant law is incompetent and a court of law, is for that reason lacking in jurisdictional powers to entertain it.

However, in a recent Ruling delivered in March 2018 by the NICN, Lagos Judicial Division in one of the cases being handled by the writer, the Court maintained a different position. In that case, the Claimant had filed a Suit claiming compensation, amongst other reliefs, for injury that purportedly arose during the course of employment. A Preliminary Objection was raised on the ground that the Claimant did not exhaust the internal remedies provided in the ECA. And that it was the Nigerian Social Insurance Trust Fund Management Board that had original jurisdiction over the matter.

After hearing argument of Counsel on the Preliminary Objection, the Court held that at Common Law, an employee may elect to sue his employer for compensation either in tort or in contract. The Court noted that section 12 of the ECA gave an employee the option to sue either under the ECA or under Common law.

It is the writer's respectful view that the decision of the Court was not founded on good law and was made under an erroneous interpretation of section 12 of the ECA. For the purposes of clarity, the provisions of section 12 of the ECA is stated hereunder:

***“(1) The provisions of this Act are in lieu of any right of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which an employee, dependant or member of the family of the employee is or may be entitled against the employer of the employee, or against any employer within the scope of this Act, or against any employee, in respect of any death, injury or disability arising out of and in the course of employment and where no action in respect of it lies.*”**

⁷(1999) 5 NWLR (PT. 601) 13

(2) The provisions of sub-section (1) of this section shall apply only when the action or conduct of the employer, the servant or agent of the employer or the employee, which caused the breach of duty, arose out of and in the course of employment within the scope of this Act.”

The main operative words in the abovementioned section 12 is the words “in lieu”. This is contained in the opening phrase of the said section which reads ***“The provisions of this Act are in lieu of any right of action, statutory or otherwise...”***.

The pertinent question therefore is whether the provision envisages that it will apply mandatorily to an employee or whether an employee has an option to sue under the Act or under Common Law.

The writer did not find any other judicial interpretation on section 12 of the ECA. However, there has been some decisions on the meaning of the phrase “in lieu”. In the case of **Udemba v. Nwabueze (2016) LPELR-41314(CA)**, the Court of Appeal relied on the definition provided in the Black's Law Dictionary (Nineth Edition), at page 558, in holding that the words ‘in lieu’ means ‘instead of or in place of, in exchange or return for’.

By the above authority, the import of section 12 of the ECA is that **“the provisions of this Act are instead**

of or in place of any right of action, statutory or otherwise...”. Therefore, it is the writer's view that once the injuries of an employee arise during the course of employment, such an employee cannot institute an action at the National Industrial Court without first exhausting the procedure for application for compensation under the ECA.

Conclusion

It is hoped that in the near future, the appellate courts will provide clear interpretation of the position of the law on the issues raised in this paper. Until then, it is advisable that once an employee notifies an employer of any injury or death that arises during the course of employment, it is very imperative for such employer to report the information to the Board within the required time-frame. The employee is also obligated to approach the NSITF Board within the stipulated timeframe with its application for compensation in the event of injury/incapacitation during the course of employment.

In closing, it is imperative to state that in this era of strict regulatory enforcement regime by most regulators, employers are advised to comply with the contributory obligations imposed on them under the ECA to avoid any exposures.

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