



Analysing virtual court hearings in the national industrial court of Nigeria

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Abstract

The Paper inquires whether virtual hearing introduced in the National Industrial Court of Nigeria (NICN), through its Practice Directions and Guidelines for Court Sitting 2020, as a result of the Covid-19 is unconstitutional. This is against the backdrop of section 36 (1), (3) and (4) of the Nigerian Constitution which stipulates that the proceedings and decisions of a court should be held in public. It uses the rules of judicial interpretation as a framework and argues that a broad interpretation could be applied by the higher courts to section 36(1), (3) and (4) of the Constitution to validate virtual hearing in the NICN. It further relies on other grounds to argue that virtual hearing is not unconstitutional. Attempt was also made to answer the question whether virtual hearing in the NICN is a temporary or permanent procedure. Virtual hearing in the NICN has been used to advance the arguments herein.

Keywords: virtual hearings, industrial court, constitution, judicial interpretation, Nigeria

Introduction

The National Industrial Court of Nigeria (NICN) was established or set up under the Trade Disputes Act 1976. And it has exclusive jurisdiction to hear matters related to employment, industrial relations, workplace and labour ^[1] and also criminal matters connected thereto ^[2]. Covid-19 has given rise to some practice rules in Nigeria. One of such rules applicable to hearing of cases in the NICN is the National Industrial Court of Nigeria Practice Directions and Guidelines for Court Sitting 2020 (PD). It was issued by the President of the National Industrial Court of Nigeria (NICN) and commenced on the 18th of May 2020. Prior to the introduction of virtual court hearing the proceedings of the NICN were held in a physical court which the public can access in accordance with section 36 (1), (3) and (4) of the Constitution. That section stipulates that the proceedings of a court should be held in public.

The PD was made to put in place procedures that guarantee access to speedy disposal of cases and justice while minimizing the danger of spreading Coronavirus (Covid-19). Most of the court procedures stipulated in the PD are done by electronic means. That is filing of processes ^[3], payment for filing processes ^[4], serving of hearing notices (including other processes) ^[5], hearing ^[6], adopting written addresses ^[7] and delivery of ruling and judgment ^[8] are done through online facilities. The PD is only for non-contentious matters or all cases that do not require evidence to be tendered or taken. Also, all rulings, judgments, and directions can be delivered by the NICN virtually ^[9]. Physical court sitting is now limited to time bound, essential and extremely urgent matters that cannot be heard by the NICN virtually ^[10]. Virtual hearing is also referred to as 'online court sitting', or 'remote court sitting' or 'virtual court sitting' in the PD ^[11].

The focus of this paper is virtual hearing introduced in the NICN. The virtual hearing is usually through zoom or video conferencing ^[12] and usually accessible by the public through zoom as stipulated in the PD ^[13]. The Paper is divided into several sections. Section 1 is introductory. Conceptual clarification of

some terms is the focus of section 2. Some rules guiding judicial interpretation of statutes is the nucleus of section 3. A possible way of interpreting section 36(1), (2) and (4) to validate or cover virtual hearing was discussed and suggested in section 4. Other grounds why virtual hearing in the NICN is not unconstitutional is articulated in section 5. Section 6 attempts to answer the question whether virtual hearing is a temporary or permanent procedure in the NICN. And section 7 is the conclusion

Clarification of some Terms

It is important to explain some terms used in the paper.

'Virtual hearing'

'Virtual hearing' is neither defined in the Constitution nor the PD, but can be explained to be a court hearing or proceedings conducted by video or audio-visual devices ^[14]. It is variously referred to as 'remote court sitting', virtual court sitting 'or 'online court sitting' in the PD. Section 7 (13) of the PD states that in order to satisfy the requirement of public hearing of cases there should be live streaming of all virtual hearings or virtual court proceedings through a web address or uniform resource location ('url') or any other social media platform through which the public can access the court proceedings.

Public hearing

'Public hearing' was not defined by the Constitution but **has** been described as a hearing that is open to anybody who wishes to access or observe it ^[15] It is important to note that what makes a hearing public is the accessibility of the members of the public to the court proceedings.

Some Judicial Rules in the Interpretation of Statutes

This section explains some rules of judicial interpretation and then used it as a framework for discussing the possibility of applying a broad interpretation to section 36(1), (2) and (4) of the

Nigerian Constitution. to cover virtual hearing in the NICN. The discussion involves the 'literal rule', the 'golden rule' and the 'mischief rule' of judicial interpretation. The literal rule, stipulates that in the interpretation of statutes the words used should be given their plain or grammatical sense ^[16]. In other words, once the words of the statute are unambiguous then the ordinary meaning of the words should be followed ^[17]. The golden rule allows a judge to depart from the plain or grammatical sense if it would lead to absurdity ^[18]. In such situation where the plain sense of the words leads to absurdity, the words may be modified or varied to avoid such absurdity ^[19]. The mischief rule is applied to ascertain the purpose of the statute and to interpret it to fulfil that aim or purpose ^[20]. The mischief rule becomes applicable where the words of the statute are ambiguous ^[21]. In such situation, it becomes important to find out the position of the law before the statute was made, what was the mischief, for which the previous law could not provide and the solution or relief which the previous law did not provide and the solution or relief stipulated by the statute to correct the mischief ^[22] The statute is then interpreted to suppress the mischief and advance the correction or suppress the mischief and promote the remedy ^[23].

Other rules of interpretation which guide the Interpretation of the Nigerian Constitution

Regarding the Nigerian Constitution, it will appear that its interpretation is not restricted to the literal, golden and mischief rules of interpretation but includes interpretations which the Supreme Court have termed either 'common sense', ^[24] or 'liberalism' ^[25] or as explained in *Nafiu Rabi'u v The State* ^[26] where the enquiry is whether the words stated in the Constitution has a wide or narrow sense, the judge or court should rely on or be guided by where the justice lies in the case and interpret the words broadly unless there is an understanding in the context or the rest provisions of the Constitution which shows that a narrow interpretation will project best its purpose or aims ^[27]. The reason for these foregoing rules of interpretation is to ensure that the purpose and object of the Constitution is best carried out ^[28]. Or put in another way, so that the ends for which the Constitution was made to serve is not defeated by judicial interpretation but to protect and enforce such ends ^[29].

In *Attorney General of Bendel State v. Attorney General of the Federation and others* ^[30] the Supreme Court explained some of the principles which guide it in the interpretation of the Constitution. They include:

- a. Force or impact should be conferred to each word,
- b. An interpretation which cancels a particular stipulation will not be assumed unless required by the surrounding circumstances,
- c. The power to interpret the Constitution cannot be used to attain a result that is unconstitutional,
- d. Once the words in any of its provisions are clear, plain meaning should be given to them,
- e. It must be interpreted wholly and a specific provision cannot be severed from the rest in interpretation,
- f. Changes in society will add new and fuller meaning to words used,
- g. A provision will not be interpreted to overthrow or overcome the purpose,
- h. Where a provision confers a particular power, such power must be conferred otherwise such power cannot be exercised,

- i. Power of the National Assembly (legislature) to delegate its important function is prohibited by the Constitution,
- j. Once the words of a provision are plain there is no time for any alternative interpretation,
- k. The idea for which the Constitution was made rather than exact sense of the words weighs the objective and extent of its provisions,
- l. Provisions of the Constitution are not to be interpreted to frustrate or narrow its purpose ^[31].

Commenting on the 12 principles formulated by the Supreme Court in the foregoing case, it will appear that they comprise of the literal rule, the golden rule, mischief rule and what can be described as 'purpose or objective- of- the- Constitution rule' of interpretation. The latter rule can be explained to be any interpretation that will ensure the purpose or objective of the Constitution is attained. The words in the numbers above which suggest that the Supreme Court's 12-point interpretation guide of the Constitution in *Attorney General of Bendel State v. Attorney General of the Federation and others* ^[32] comprises of the literal rule, the golden rule, mischief rule and purpose or objective- of- the- Constitution rule can be analysed thus: The words used in number i, iv, and x suggest literal interpretation. Number vi suggests the golden rule. The mischief rule is suggested in the words contained in number ii. And the words in the following number suggest purpose or objective- of- the- Constitution rule: iii, v, vii, viii, ix, xi and xii. From the analysis it will appear that the purpose or objective -of- the -Constitution rule is indicated in 7 numbers. What the latter suggests is that the Supreme Court will lean or rely more on the purpose or objective -of- the - Constitution rule in the interpretation of the Constitution than any other rule of judicial interpretation. The Preamble to the Constitution states its purpose to include good governance, peoples' welfare based on the principles of justice, equality and freedom for the purpose of unity ^[33].

Possible Way of Interpreting section 36(1),(3), (4) of the Nigerian Constitution to Validate Virtual Hearings in the NICN

Before considering a possible way of interpreting section 36 ((1), (3), (4) of the Constitution it will be worthwhile to set out its provisions thus:

36. (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal

The likely parts of the foregoing provision which a higher court will interpret to inquire whether virtual hearing is constitutional or not are subsections (3) and (4) set out above. Subsection (3) partly states that 'The proceedings of a court...shall be held in public' and subsection (4) stipulates that: 'Whenever any person

is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public... by a court'. Neither the Constitution nor the Interpretation Act ^[34] explained the term 'public'. But the proceedings of a court being held in public can be explained to mean that members of the public can physically access the proceedings of the court or put in another way the court proceedings are not held in private. In virtual hearing, public access to proceedings is usually through electronic means either zoom or video conferencing ^[35]. This should be seen as satisfying the constitutional requirement of public access to the court proceedings or proceedings held in public.

Alternatively, the approach that could be used to interpret these parts of the provision are those recommended by the Supreme Court as a guide in interpreting constitutional provisions as projected in various cases ^[36]. It could either be 'common sense', ^[37] or 'liberalism' ^[38] or that put further by the Supreme court in *Rafiu Nabiu v State* ^[39] that will best carry out the purpose and object of the Constitution ^[40]. An interpretation that will best carry out the purpose of the Constitution was explained by the Supreme Court in the latter case as broad interpretation.

A broad interpretation can be understood to be an interpretation that is wide and all inclusive.

It can be argued that when a broad interpretation is applied to the phrase 'proceedings held in public' then that phrase should include virtual court hearing. And by this it can be said that the constitutional requirement of 'proceedings held in public' is satisfied once the members of the public can access court proceedings either physically or virtually (by electronic means). And by this it can be said that virtual court hearing introduced in the National Industrial Court of Nigeria is not unconstitutional.

Other Reasons Why Virtual Hearings in the NICN is not Unconstitutional

a. Provisions in the Practice Directions which stipulate public access to virtual hearings

It will appear that the reason why the Constitution enjoined court proceedings to be held in public is to allow the public access court proceedings. Accessibility by the public to court proceedings is therefore the crucial reason or factor why court proceedings are held in public. I argue that the requirement of accessibility to NICN proceedings has been met by it allowing electronic access to its proceedings. Section 7 of the National Industrial Court of Nigeria Practice Directions and Guidelines for Court Sitting of 2020 (PD) provides for virtual hearing. This commenced in the NICN 18th May 2020. The purpose of highlighting the following provisions of the PD is to show that the PD contains sufficient provisions which enable the public to access hearings virtually in the NICN. This can be argued to satisfy the requirement of section 36 (1)(3) and (4) of the Constitution that 'the proceedings of a court should be held in public'. I argue that what satisfy the constitutional requirement of court proceedings held in public is accessibility of the public to the court proceedings. If the public has access to hearings virtually it should be understood to have satisfied the requirement of 'proceedings held in public' stipulated by the Constitution and thus such proceedings are not unconstitutional.

The provisions in the PD which allow the public virtual access to NICN proceedings include:

- a. Virtual hearing can be through video conferencing or any means permitted by the NICN ^[41].
- b. Notice of virtual hearing is written on the cause list and the NICN's website ^[42].
- c. The NICN ensures that virtual hearing is open to the public except proceedings by *ex parte* application or required to be held in Chambers ^[43].
- d. The NICN is expected to publish for the public weekly the matters to be heard virtually ^[44].
- e. Upon application by any of the parties to a case he can obtain a record of any proceedings of the NICN held virtually. Also, a Counsel can be permitted upon application to record proceedings to be held virtually ^[45].
- f. In order to ensure that the public have access to proceedings held virtually, the NICN ensures live streaming through a web address or Uniform Resource Location (url) of the NICN or other specified social media ^[46].
- g. The NICN is required to publish the proceedings held virtually in the same manner it publishes physical proceedings and to specify the web address where the proceedings could be accessed ^[47].

b. No prohibition of virtual hearing

There is no express provision of the Constitution that prohibit virtual hearing in the NICN. To that extent it can be argued that virtual hearing is not unconstitutional

I turn now to recent developments which seem to support the argument that virtual hearings in the NICN cannot be said to unconstitutional.

c. Recent development developments which seem to suggest that section 36 (1) (3) (4) of the Constitution could be understood to include virtual hearing.

Regarding the foregoing provision, the question is whether the requirement that proceeding should be held in public can be understood to include virtual hearing. Currently, there is no court decision or legislation on this point but there are two new developments which seem to suggest that section 36 (1) (3) and (4) of the Constitution could be understood to include virtual hearing. The developments are: First, a recent ruling of the supreme court of Nigeria in the following two cases: *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly* ^[48] and *Attorney General of Ekiti State v Attorney General of the Federation & 2 others* ^[49] regarding virtual hearing and secondly a bill before the National Assembly (legislature) for the amendment of section 36 (4) to include virtual court hearing.

I turn now to analyse the two developments:

- a. Ruling of the Supreme Court regarding virtual hearings in these two cases: *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly* ^[50] and *Attorney General of Ekiti State v Attorney General of the Federation & 2 others* ^[51].

In the Attorney General of Lagos State v Attorney General of the Federation & the National Assembly, ^[52] the Lagos State Govt filed a suit at the Supreme Court of Nigeria against the Attorney General of the Federation to inquire whether virtual/ hearing commenced in the Lagos State High Court or any other court is constitutional. This is because of section 36(1), (3) and (4) of the Constitution which required court proceedings to be held in public. Also, in Attorney General of Ekiti State v Attorney General of the Federation & 2 others, ^[53] the Ekiti State government asked an order of the Supreme Court of Nigeria to nullify an instruction by the Attorney General of the Federation made on 20th April 2020 to heads of all courts in the country directing virtual court hearing. It stated that the instruction contravened the Constitution particularly sections 1(3), 4(6), 5(2) and (), 6(2), 36(34), 272 and 274 of the Constitution.

Regarding the two suits, the Supreme Court stated that until there is an infringement of a right by the virtual hearing, the suits are speculative and premature. It ruled that virtual court hearings are not unconstitutional. By this ruling the two suits were withdrawn. It can be argued that though the pronouncement of the Supreme Court regarding virtual hearing is a ruling and not a judgment, it is a pointer to what its judgment would be when a matter regarding infringement of right concerning virtual hearing occurs (that is when there is a substantive case before it). The likely judgment would be that virtual court hearings are not unconstitutional. With this development, it is likely that all matters heard virtually in the NICN will not be nullified.

a. The Bill ^[54] before the National Assembly (the legislature) Presently, there is a bill ^[55] before the National Assembly (legislature) seeking to legalize virtual court hearing. Hopefully, when it signed into law, it will validate virtual court hearing and will lay to rest the issue about the constitutionality of virtual court hearings. The bill is entitled: 'Constitution of the Federal Republic of Nigeria 1999 (Alteration) Bill, 2019.' ^[56]

I turn now to consider the question whether virtual hearing in the NICN is temporary or permanent procedure.

Virtual Hearing: Temporary or Permanent Procedure?

One relevant question is whether virtual hearing is a temporary or permanent procedure devised by the NICN to hear matters. It will appear from the provisions of the PD that even if the Covid-19 comes to an end, matters (especially non-contentious matters) will continue to be heard virtually by the NICN. There are several provisions of the PD which support this assertion. Section 1 (1) stipulates that one of the aims of the PD is to regulate the hearing and filing of cases during and after the Covid-19 pandemic ^[57]. Section 7(2) of the PD also stipulates that with a view to promoting and encouraging virtual hearing all cases that do not require the court taking evidence would be conducted virtually. Furthermore judgments, directions and rulings could be delivered virtually. Though virtual hearing was introduced as a temporary procedure. It is most likely permanent.

Conclusion

The paper inquired whether virtual hearing introduced in the NICN as a result of the Covid-19 was unconstitutional. This investigation became necessary because section 36 (1), (3) and (4) of the Constitution required the proceedings and decisions of a court to be held in public. It used the rules guiding interpretation of statutes especially rules guiding the interpretation of the

Constitution as a frame work and argued that section 36 (1) (3) and (4) could be interpreted broadly by the higher courts to validate virtual hearing introduced by the NICN as a result of the Covid-19. It argued also that there is no express provision of the Constitution that prohibits virtual hearing in the NICN

It further relied on some recent developments to support the position that virtual hearing in the NICN is not unconstitutional. Firstly, in the following two cases, (Attorney General of Lagos State v Attorney General of the Federation & the National Assembly, ^[58] and Attorney General of Ekiti State v Attorney General of the Federation & 2 others ^[59], the Supreme Court of Nigeria said (in a ruling) that virtual court hearings are not unconstitutional. It can be argued that though the pronouncement of the Supreme Court regarding virtual hearing is a ruling and not a judgment, it is a pointer to what its judgment would be when a substantive matter concerning virtual hearing before it. The likely judgment would be that virtual court hearings are not unconstitutional. The implication of the supreme ruling is that virtual court proceedings in the NICN will not be overruled. Secondly, there is a bill currently before the National Assembly (legislature) seeking to validate and legalize virtual hearings by the courts. Once it is signed into law all arguments concerning the constitutionality of virtual hearing in the NICN will be laid to rest. An attempt was also made to answer the question whether virtual hearing in the NICN will be made permanent, (that is after the Covid-19). The paper noted that some provisions of the PD seem to suggest that virtual hearing procedure will be made permanent especially in non-contentious matters.

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