IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
BEFORE HIS LORDSHIP HON. JUSTICE B. B. KANYIP, PHD, OFR
PRESIDENT, NATIONAL INDUSTRIAL COURT OF NIGERIA

DATE: 30 MAY 2023 SUIT NO. NICN/ABJ/270/2022

BETWEEN
1. Federal Government
2. Federal Ministry of Education - Claimants

AND
Academic Staff Union of Universities (ASUU) - Defendant

REPRESENTATION
J. U. K. Igwe SAN, with Senator (Dr) Ita Enang OFR, E. D. Gbetsere, Valentine O. Nonso, Imoh Bassey, Miss Florence Ani Oku-Ita and Don Eyoette, for the claimants.
Femi Falana SAN, with Marshall Abubakar and Dr Hassan Bala, for the defendant.

JUDGMENT

INTRODUCTION
1. The Honourable Minister of Labour and Employment, acting pursuant to section 17 of the Trade Disputes Act (TDA) Cap T8 LFN 2004, referred this matter to this Court vide a referral instrument dated 7 September 2022. The forwarding letter is, however, dated 8 September 2022. The referral instrument reads thus:

> WHEREAS a trade dispute has arisen and now exists between the Federal Government/ Federal Ministry of Education and the Academic Staff Union of Universities (ASUU);
>
> CONSIDERING the fact that members of ASUU have been on strike since February 14, 2022 till date even when the strike action/dispute had been apprehended by the Honourable Minister of Labour and Employment (HML&E);
>
> AND WHEREAS all effort to promote settlement through Conciliation at the level of the Federal Ministry of Education (FME), and Tripartite-Plus Social Dialogue/Meeting which were on-going but had now failed;
>
> FURTHER CONSIDERING that the Public Universities in the nation have been closed since the commencement of the strike, hereby jeopardizing the national Education system;
>
> AND IN CONFORMITY with the provision of Section 17 of the Trade Disputes Act. CAP T8 Law of the Federation, 2004;

NOW THEREFORE, I. SENATOR (DR) CHRIS NWABUEZE NGIGE, OON, MD; THE HONOURABLE MINISTER OF LABOUR AND EMPLOYMENT, in the exercise of the powers conferred on me by Section 17 of the Trade Disputes Act CAP T8, Law of the Federation of Nigeria (LFN), 2002 (sic) hereby refer this matter to the National Industrial Court of Nigeria (NICN) for adjudication and to:

A. Inquire into the legality or otherwise of the on-going prolonged strike by ASUU leadership and members which had continued even after apprehension by the Minister of Labour and Employment.

B. Interpret in its entirety, the provisions of section 18, LFN 2004 especially as it applies to cessation of strike once a trade dispute is apprehended by the Minister of Labour and Employment and conciliation is on-going.

C. Interpret the provisions of Section 43 of the Trade Disputes Act. CAP T8 LFN 2004 titled "specially Provision with Respect to Payment of Wages During Strikes and Lock-Outs" specifically dealing with the rights of employers and employees/ workers during the period of any strike or lock-out. Can ASUU or any union that embarked on strike be asking to be paid salaries even with the clear provision of the law. Determine whether ASUU members are entitled to emolument or "strike pay" during their period of current strike which commenced on February 14, 2022, more so in view of our national law as provided in Section 43 of the Trade Disputes Act and the International Labour Principles on the Rights to Strike as well as the Decisions of the ILO Committee on Freedom of Association on the subject.

D. Determine Whether ASUU has the right to embark on strike over disputes as is the case in this instance by compelling the Federal Government to deploy University Transparency and Accountability Solution (UTAS) developed by ASUU in the payment of the wages it its members as against Integrated Payroll and Personnel Information System (IPPIS) universally used by the Federal Government in the nation for payment of wages of all her Employees (Workers) in the Federal Government Public Service of which university workers including ASUU members are part of, even where the Government via NITDA subjected the ASUU and their counterpart SSANU/NASU UPPPS-University Payment Platform System software to integrity test (Vulnerability and Stress Test) and they failed same.

E. Determine the extent of fulfilment of ASUU's demands by the Federal Government as follows since the 2020 Memorandum of Action with Federal Government.

i. Funding for Revitalisation of Public Universities as per 2009 Agreement

ii. Earned Academic Allowance (EAA) payments

iii. State Universities Proliferation

iv. Constitution of Visitation Panels/Release of White Paper on report of Visitation Panels

v. Reconstitution of Government Renegotiation Team for the renegotiation of 2009 Agreement which was renegotiated 2013/2014 and due for re-negotiation by 2018/2019

vi. The migration of ASUU members from IPPIS to University Transparency and Accountability Solution (UTAS) developed by ASUU which is currently on test at Nig Tech. Dev. Agency (NITDA)

F. Issue ORDER for ASUU members to resume work in their various Universities while the issues in dispute are being addressed by the NICN in consonance with the provisions of Section 18(i)(b) of the Trade Disputes Act, CAP T8, LFN 2004.

2. Starting with the claimants, parties were asked to file their respective processes. The claimants in that regard filed their affidavit of facts with supporting documents and a written address. The reaction of the defendant was to file a preliminary objection challenging the competence of the referral itself. In a considered ruling delivered on 28 March 2023, this Court held that the Minister of Labour and Employment appropriately referred this matter to this Court, and so the referral is competent and this Court has the jurisdiction to hear and determine it.

3. Besides the preliminary objection, the defendant did not file any other defence process within the time allowed it by the Court. The application by the defendant for leave to extend this time was rejected by the Court since copies of the defence processes were not exhibited alongside the application for extension of time. This meant that the defendant had no defence process in this suit.

4. The defendant, however, orally urged this Court to make use of its counter-affidavit filed on 16 September 2022 against the motion of the claimants for interlocutory orders, a motion already moved and ruled upon. No authority was cited by the defendant for this bizarre procedure — and I could not find any that permits a court to use a counter-affidavit to a motion that has been ruled upon as the defence to the substantive matter. It was the argument of the learned senior counsel for defendant that since this Court can look at any process in the file when writing its judgment, he is accordingly urging the Court to so do by looking at the said counter-affidavit. But the discretion that this Court has to look at any document in the file when writing its judgment is one that inures to the Court *suo motu*, not one to be urged on the Court by counsel. The senior counsel for the defendant further submitted that this Court, in ruling over the motion on notice, to which the said counter-affidavit relates, had actually ruled on some of the reliefs in the substantive suit. If this be the case, then the task before the Court is to merely reiterate them, not necessarily reconsider them as the defendant seems to think.

5. The long and short of it is that the defendant's submission that the Court should consider its counter-affidavit to the claimants' motion for interlocutory orders, having been moved and ruled on, cannot be considered as the defence of the defendant to the substantive suit. The counter-affidavit had served its purpose i.e. as the defence to the motion for interlocutory orders. It is not the defence of the defendant to the substantive suit. In any event, when this Court refused to grant the defendant's application for extension of time, the prayer of the defendant for the said extension of time was to enable the defendant file its "counter-affidavit and witnesses' depositions". Aside from the questionable relationship of a "counter-affidavit" and "witnesses' depositions", as framed by the defendant, the application intuits that these processes are the

defendant's defence processes, not the counter-affidavit to the motion for interlocutory orders. Like I pointed out in the considered Bench ruling of 2 May 2023 in which I rejected the application for extension of time, strategic blunders by counsel in the conduct of a case should earn no sympathy from the court. See *Isitor v. Fakorade* [2018] All FWLR (Pt. 955) 494 at 507 - 509 per His Lordship Eko, JSC.

6. Furthermore, like I equally pointed out in the considered Bench ruling of 11 May 2023, citing *Mr Victor Adegboyu v. UBA* unreported Appeal No. CA/IL/20/2021, the judgment of which was delivered on 14 April 2022 per His Lordship Amadi, JCA, time is of the essence in labour adjudication; and so the mantra of labour adjudication is: *it is better to have a bad judgment quickly, than a good one too late*. See *The Federal Polytechnic, Mubi v. Mr Emmanuel Peter Wahatana* unreported Appeal No. CA/YL/175M/2021, the ruling of which was delivered on 27 April 2023 per His Lordship Affen, JCA.

7. All this said, the oral application to use the defendant's counter-affidavit to the motion of interlocutory orders in this judgment is hereby refused. I so rule.

8. This means that only the claimants' processes are available for consideration for purposes of this judgment. In other words, this case remains undefended as far as the defendant is concerned. But the fact that the defendants did not file any defence process does not absolve the claimant from proving its case to the satisfaction of this Court. In *Attorney General Osun State v. NLC & ors* [2013] 34 NLLR (Pt. 99) 278 NIC, given a similar scenario, this is what this Court said:

> The defendants at first did not enter any memorandum of appearance, or show up, or were represented by counsel, or file any defence process in this matter; and this was despite the service of the respective hearing notices on them. Order 9 of the National Industrial Court Rules 2007 enjoins a party served with a complaint and the accompanying originating processes and who intends to defend the action to file defence processes as provided therein. Order 9, therefore, recognizes the right of a defendant not to defend an action filed against him/her. And by Order 19 Rule 2, where the defendant is absent at the trial and no good cause is shown for the absence, the claimant may prove the claim in so far as the burden of proof lies upon him or her. This Rule, of course, accords with the minimal evidential requirement, which is to the effect that a plaintiff cannot assume that he is entitled to automatic judgment just because the other party did not adduce evidence before the trial court as held in *Mr. Lawrence Azenabor v. Bayero University, Kano* [2011] 25 NLLR (Pt. 70) 45 CA at 69 and *Ogunyade v. Oshunkeye* [2007] 4 NWLR (Pt. 1057) 218 SC at 247…

See also *The Shell Petroleum Development Company of Nigeria Limited v. The Minister of Petroleum Resources & 2 ors* unreported Suit No. NICN/LA/178/2022, then judgment of which was delivered on 28 July 2022.

THE SUBMISSIONS OF THE CLAIMANTS

9. The process filed by the claimants consists of the Notice of Questions as Raised by the Federal Government of Nigeria and orders sought, the Affidavit of facts in support of the position of the

Federal Government, Exhibits, and the Written address in support of the affidavit of facts of the Federal Government of Nigeria. Pursuant thus to the referral by the Minister of Labour and Employment, the claimants raised the following questions:

(i) Having regards to the provision of Sections 4, 5, 6, 8 and 18(1) of the Trade Dispute Act, Cap T8 Laws of the Federation of Nigeria, whether the ongoing prolonged strike by the Academic Staff Union of Universities (ASUU) which started since 14 February 2022 is legal even after statutory apprehension by the Minister of Labour and Employment?

(ii) Having regards to the provisions of Section 43(1)(a) Trade Disputes Act, Cap T8 Laws of the Federation of Nigeria titled 'Special provision with respect to payment of wages during strikes and lock outs and which provides expressly that —

(1) Notwithstanding anything contained in this Act or in any other law —

(a) where any worker takes part in a strike, he shall not be entitled to any wages or other remuneration for the period of the strike, and any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly

whether it shall be lawful to pay wages and or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases?

(iii) Having regards to provisions of Sections 5(1)(a) and (b), 148(1), 150(1) 162(1) and (2) Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 6 National Information Technology Development Agency Act, Section 1(1), 3(1), (a), (g), (f), (m), 6, 10 and 15 of the National Salaries, Incomes and Wages Commission Act, the demand by the Academic Staff Union of Universities seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, University Transparency and Accountability solution (UTAS) in payment of salaries and wages to academic staff of universities as against the Integrated Payroll and Personnel Information System (IPPIS) nationally used by the Federal Government as the employer for payment from the federal government treasury of all employees of labour in the federal service of the Federation of which the academic staff of universities is a part, constitutes an infringement of the rights and exclusive powers of the employer, in this case the federal government of Nigeria for the fair, equitable and national management and regulation of the payment platform for all categories of employees in Nigeria, inclusive of the members of the Academic Staff Union of Universities?

(iv) Having regard to the provision of memorandum of action dated 23 December 2020 reached at the conciliation meeting between the representatives of the Federal Government of Nigeria and leadership of the Academic Staff Union of Universities held on 22 December 2020 at the instance of the Minister of Labour and Employment, whether the continued indefinite strike by the Academic Staff Union of Universities is fair and equitable considering the extent of the fulfilment by the Federal Government of Nigeria of the demands by the Academic Staff Union of Universities?

(v) Having regards to the provisions of Section 4 and 5 of the Constitution of the Federal Republic of Nigeria, whether the demand by the Academic Staff Union of Universities

for executive interference in a Draft Bill before the National Assembly on the National Universities Commission is inconsistent with the provisions of the Constitution?

(vi) Having regard to the applicable principles of law and circumstances of this dispute, whether the Academic Staff Union of Universities, its members and agency ought to be restrained from continuing to shut down universities in Nigeria and continuing on the prolonged strike which started since 14 February 2022?

10. Whereof the claimants prayed for the following reliefs pursuant to the referral by the Minister of Labour and Employment:

(i) A declaration that having regards to the provisions of Sections 4, 5, 6, 8 and 18(1) of the Trade Disputes Act, Cap T8, Laws of the Federation of Nigeria, the ongoing prolonged and indefinite strike by the Academic Staff Union of Universities (ASUU) which started since 14 February 2022 is illegal after statutory apprehension by the Minister of Labour and Employment.

(ii) A declaration that having regards to the provisions of Section 43(1)(a) Trade Disputes Act, Cap T8 Laws of the Federation, it shall be unlawful to pay wages or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases.

(iii) A declaration that having regards to provisions of Sections 5(1)(a) and (b), 148(1), 150(1), 162(1) and (2) Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 6 National Information Technology Development Agency Act, Sections 1(l), 3(1), (a), (g), (f), (m), 6, 10 and l5 of the National Salaries, Incomes and Wages Commission Act, the demands by the Academic Staff Union of Universities seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, University Transparency and Accountability Solution (UTAS) in payment of salaries and wages to academic staff of universities as against the Integrated Payroll and Personnel Information System (IPPIS) nationally used by the Federal Government for payment of all employees of labour in the federal service of the Federation of which the academic staff of universities is a part, constitutes an infringement of the rights and exclusive powers of the employer, particularly the federal government of Nigeria for the fair and national management and regulation of the payment platform for all categories of employees, inclusive of the members of the Academic Staff Union of Universities.

(iv) A Declaration that having regards to the provisions of Sections 4 and 5 of the Constitution of the Federal Republic of Nigeria, the demand by the Academic Staff Union of Nigerian Universities for executive interference in a Draft Bill before the National Assembly as a condition for calling off their strike is unconstitutional and unlawful.

(v) A declaration that having regard to the provision of memorandum of action dated 23 December 2020 reached at the conciliation meeting between the representatives of the Federal Government of Nigeria and leadership of the Academic Staff Union of Universities held on 22 December 2020 at the instance of the Minister of Labour and Employment and the extent of fulfillment by the Federal Government of Nigeria of the demand by the Academic Staff Union of Universities shutting down universities in

Nigeria by the strike embarked upon by the Academic Staff Union of Universities since 14 February 2022 and preventing innocent citizens who are not parties to this disputes from having access to development and wellbeing through education is unfair.

(vi) AN ORDER OF INJUNCTION restraining the Academic Staff Union of Universities and or its agents and members from continuing to shut down universities in Nigeria and continuing on the strike prolonged which started since 14 February 2022.

11. The claimants then adopted all the questions and issues as raised in the referral by the Minister of Labour and Employment for determination by this Court; and then situated them within the provisions of the law in Nigeria on the subject matter of the dispute between the parties. In doing this, the claimants submitted six issues for determination, namely:

(1) Having regards to the provision of Section 4, 5, 6, 8 and 18(1) of the Trade Dispute Act, Cap T8 Laws of the Federation of Nigeria, whether the ongoing prolonged strike by the Academic Staff Union of Universities (ASUU) which started since 14 February 2022 is legal even after statutory apprehension by the Minister of Labour and Employment?

(2) Having regards to the provisions of Section 43(1)(a) Trade Dispute Act, Cap T8 Laws of the Federation of Nigeria whether it shall be lawful to pay wages and or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases?

(3) Having regards to provisions of Sections 5(1)(a) and (b), 148(1), 150(1) 162(1) and (2) Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 6 National Information Technology Development Agency Act, Section 1(1), 3(1), (a), (g), (f), (m), 6, 10 and 15 of the National Salaries, Incomes and Wages Commission Act, the demand by the Academic Staff Union of Universities seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, University Transparency and Accountability solution (UTAS) in payment of salaries and wages to academic staff of universities as against the Integrated Payroll and Personnel Information System (IPPIS) nationally used by the Federal Government as the employer for payment from the federal government treasury of all employees of labour in the federal service of the Federation of which the academic staff of universities is a part, constitutes an infringement of the rights and exclusive powers of the employer, in this case the federal government of Nigeria for the fair, equitable and national management and regulation of the payment platform for all categories of employees in Nigeria, inclusive of the members of the Academic Staff Union of Universities?

(4) Having regards to the provisions of Section 4 and 5 of the Constitution of the Federal Republic of Nigeria, whether the demand by the Academic Staff Union of Universities for executive interference in a Draft Bill before the National Assembly on the National Universities Commission is inconsistent with the provisions of the Constitution?

(5) Having regard to the provision of memorandum of action dated 23 December 2020 reached at the conciliation meeting between the representatives of the Federal Government of Nigeria and Leadership of the Academic Staff Union of Universities held on 22 December 2020 at the instance of the Minister of Labour and Employment,

whether the continued indefinite strike by the Academic Staff Union of Universities is fair and equitable considering the extent of the fulfilment by the Federal Government of Nigeria of the demands by the Academic Staff Union of Universities?

(6) Having regard to the applicable principles of law and circumstances of this dispute, whether the Academic Staff Union of Universities, its members and agency ought to be restrained from continuing to shut down universities in Nigeria and continuing on the prolonged strike which started since 14 February 2022?

12. On issue (1), the claimants first quoted sections 4, 5, 6, 8 and 18(1) of the Trade Disputes Act (TDA) Cap T8 LFN. And then submitted that from Exhibits 4 and 5 before this Court, the Minister of Labour and Employment duly statutorily apprehended the dispute and a Conciliator/ Conciliation Committee was duly set up. That while the conciliation was ongoing, the Academic Staff Union of Universities (ASUU) by Exhibits 1 and 2 not only rolled over the strike it started on 14 February 2022 but called and embarked upon an indefinite strike action thereby breaching the provisions of section 6 of the TDA. That it is trite that where a statute clearly provides for a particular act to be performed, failure to perform that act will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. In such a situation, the consequences of non-compliance follow, notwithstanding that the statute does not specifically provide for a sanction, citing *Corporate Ideal Insurance Ltd v. Ajaokuta Steel Company Limited & 2 ors* [2014] 2 SC (Pt. I) at 107, *Adesanoye v. Adewole* [2006] 7 SC (Pt. III) 19, *Wada & 2 ors v. Bello* [2016] 17 NWLR (Pt. 1542) 379, *Saude v. Abdullahi* [1989] 4 NWLR (Pt. 116) 387 at 421 and *Ameachi v. INEC* [2008] 5 NWLR (Pt. 1080) 220.

13. To the claimants, embarking on a roll-over strike and indefinite strike when the trade dispute had been statutorily apprehended by the Minister of Labour and Employment, a conciliator/ conciliation process set in motion in breach of sections 6 and 18(1)(a) and (b) of the TDA is unlawful. It is a conduct that ought to be deprecated and set aside. Accordingly, that issue (1) ought to be resolved in favour of the Federal Government.

14. For issue (2) i.e. the lawfulness of paying wages and or other remuneration to the academic workers of Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases, the claimants submitted that from Exhibit 3 placed before the Court (memorandum dated 31 August 2022 by ASUU), one of the core demands upon which the indefinite strike by the union is based, is for: "Payment of withheld salaries of university academic since March 2022". That from Exhibits 1, 2 and 7, ASUU has been on strike since 14 February 2022 and rolled over the strike on 29 August 2022. That ASUU further embarked on an indefinite strike on 29 August 2022. In other words, a core demand upon which their indefinite strike is hinged is that they be paid salaries or remuneration for the period they were on strike, a period they did not work.

15. That section 43(1)(a) of the TDA specifically and expressly contains a special provision with respect to payment of wages during strikes and lock-outs in the following words:

(1) Notwithstanding anything contained in this Act or in any other law –

(a) where any worker takes part in a strike, he shall not be entitled to any wages or other remuneration for the period of the strike, and any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly.

16. That this above provision is very clear and unambiguous and ought to be given its literally interpretation, a duty this Court has, citing *Nwankwo & 2 ors v. Yar'Adua & ors* [2010] 2 - 3 SC (Pt. III) 1 at 73, *AG, Nasarawa State v. AG, Plateau State* [2012] 3 SC (Pt. ll) 1 at 23 and *Nyame v. Federal Republic of Nigeria* [2010] 3 SC (Pt. I) 78 at 130. That the Federal Government will be in breach of the clear provisions of the law to pay wages and or other remuneration to the academic workers of Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceased. Also, that it will accord with the law that the period from 14 February 2022 until the day the strike ceased shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment are prejudicially affected accordingly. That this is not a matter of policy adopted by the present Federal administration but a matter of law in force in Nigeria since 1 January 1976. Accordingly, that issue (2) ought to be resolved against ASUU.

17. Issue (3) is a long sentence. In effect, it states thus: given sections 5(1)(a) and (b), 148(l), 150(1), 162(1) and (2) of the 1999 Constitution, section 6 of the National Information Technology Development Agency Act, sections 1(1), 3(1)(a), (g), (f) and (m), 6, 10 and 15 of the National Salaries, Incomes and Wages Commission Act, the demand by ASUU seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, "University Transparency and Accountability Solution (UTAS)", in payment of salaries and wages to academic staff of Universities as against the Integrated Payroll and Personnel Information System (IPPIS) nationally used by the Federal Government of Nigeria as employer for payment from the Federal Government treasury all employees of labour in the Federal service of the Federation of which the academic staff of Universities are a part, constitutes an infringement of the rights und exclusive powers of the employer, in this case the Federal Government of Nigeria for the fair, equitable and national management and regulation of the payment platform for all categories of employees in Nigeria, inclusive of the members of ASUU.

18. To the claimants, from Exhibit 3 titled, "Highlights of events and demand in current strike action", one of the core issues upon which the strike is hinged is the demand by ASUU that the Federal Government adopts, "University Transparency and Accountability Solution (UTAS) as salary payment platform for University staff in place of IPPIS". That IPPIS is the Integrated Payroll and Personnel Information System, currently nationally used by the Federal Government of Nigeria for payment of all employees of labour in the Federal service of the Federation of which the academic staff of Universities are a apart — as clearly stated in the affidavit of Okechukwu Nwamba on behalf of the Federal Ministry of Labour and Employment/Federal Government:

The University Transparency and Accountability Solution UfAS being insisted upon for adoption by the Academic Staff Union of Universities failed the technical integrity,

vulnerability and stress test made by the National Information Technology Development Agency.

19. That aside the discrimination of other workers that the ASUU UTAS would introduce in Nigeria, it failed the transparency, vulnerability and stress test by the appropriate agency of government, the National Information Technology Development Agency. Accordingly, that it will promote inefficiency and discrimination in the public service of Nigeria to adopt such a system.

20. The claimants went on that both the provision and regulation of the platform for payment of salaries are within the province of the executive powers of the Federal Government, both as regulator and employer, citing sections 5(1)(a) and (b), 148(1), 150(1), 162(1) and (2) of the Constitution; as well as section 6 of the National Information Technology Development Agency Act that confers on the Agency the powers to –

> (a) create a framework for the planning, research, development, standardisation, application, co-ordination, monitoring, evaluation and regulation of information technology practices, activities and systems in Nigeria and all matters related thereto and for that purpose, and which without detracting from the generality of the foregoing shall include providing universal access for Information Technology and systems penetration including rural, urban and underserved areas;
> (b) provide guidelines to facilitate the establishment and maintenance of appropriate infrastructure for information technology and systems application and development in Nigeria for public and private sectors, urban-rural development, the economy and the government; and
> (c) develop guidelines for electronic governance and monitor the use of electronic dats interchange and other forms of electronic communication transactions os on alternative to paper-based method in Government, commerce, education, the private and public sectors, labour, and other fields, where the use of electronic communication may improve the exchange of data and information.

21. The claimants also referred to section 15 of the National Salaries, Income and Wages Commission Act; and then submitted that the demand by ASUU seeking to compel the Federal Government of Nigeria to deploy their own invented platform in payment of salaries and wages to academic staff of Universities as against the Integrated Payroll and Personnel Information System nationally used by the Federal Government for payment from the Federal Government treasury for all employees of labour in the Federal service of the Federation, of which the academic staff of universities are a part, constitutes an infringement of the rights and exclusive powers of the Federal regulatory agencies. That it is also unfair and inequitable to other sectors and workers other than ASUU members and will be inconsistent with national management and regulation of the platform for all categories of employees in Nigeria. Accordingly, that issue (3) ought to be resolved against ASUU.

22. Issue (4) asks whether given sections 4 and 5 of the 1999 Constitution, the demand by ASUU for executive interference in a Draft Bill before the National Assembly on the National Universities Commission is inconsistent with the provisions of the Constitution. To the claimants, from Exhibit 3 (the memorandum by ASUU dated 31 August 2022), one of their core demands upon which the prolonged strike has been based is that the Federal Government should intervene in the legislative process of the National Assembly relating to a Draft Bill before the National Assembly. In the demands of ASUU –

> Our prayers for the quick resolution of the ongoing strike action:
> Intervention on the Draft Bill for empowering NUC to curb proliferation of Universities, especially by state governors.

23. That sections 4, 5 and 6 of the Constitution clearly demarcated the boundaries of legislative, executive and judicial powers of the Federation. By section 4(1), the legislative powers of the Federal Republic of Nigeria are vested in a National Assembly of the Federation consisting the Senate and House of Representatives. That underpinning a prolonged strike action on the basis of a non-interference process of the executive over the legislative process of the National Assembly that is ongoing and using such a demand to shut out innocent citizens of Nigeria out of university education is to say the least, condemnable, referring to Appeal No: CA/A/122/2014: *Federal Inland Revenue Service v. TSKJ Construcoes International Sociadade Unipersonal LDA* delivered 17 July 2017 where the Court of Appeal held *inter alia* at pages 39 to 40 of the certified true copy of the judgment:

> It is submitted for the Appellant that the learned trial Judge lacked the competence to restrain the Minister of Finance from carrying out her lawful duties within the confines of the powers conferred on her by the FIRS (Establishment) Act 2007, pursuant to Section 59 and 60 of the Act and paragraphs 1(2), 2, 3, 4, 5, 7 and 21 of the s to Schedule to the Act ... Section 60 of the said Act confers a statutory authority on the Minister of Finance to give to the FIRS such directives of a general nature or relating generally to matters of policy .. That said, I am in agreement with the submissions of learned Senior Counsel to the Appellant (J.U.K. Igwe, SAN) that the trial Judge with respect, lacked the competence to restrain the Minister of Finance from carrying out her lawful duties within the confines of the powers conferred on him by the FIRS (Establishment) Act 2007. It is against the principles of separation of powers.

24. The claimants continued that same submission applies to the National Assembly, that cannot be restrained by injunction from carrying out their legislative duties or coerced by an executive interference in the conduct of their legislative duties, citing *Attorney General Abia State & 2 ors v. Attorney General of the Federation & 33 ors* [2006] 7 SC (Pt. I) 51, where the Supreme Court held (leading Judgment of Niki Tobi JSC at page 120) thus:

> It is not best law to grant an injunction to restrain a Legislature from performing its constitutional duties, although it can do so in most deserving circumstances of unconstitutionality. I do not think I am prepared to exercise the discretionary power vested in me to grant an injunction. This court should be very careful in granting

injunctions against the legislature because there is the danger of courts below it to use it as precedent, I do not want to send such a signal to the courts below. I will soy no more.

25. Accordingly, that issue (4) ought to be resolved against ASUU.

26. Issue (5) is: having regard to the provision of memorandum of action dated 23 December 2020 reached at the conciliation meeting between the representatives of the Federal Government of Nigeria and leadership of ASUU held on 22 December 2020 at the instance of the Minister of Labour and Employment, whether the continued indefinite strike by ASUU is fair and equitable considering the extent of the fulfilment by the Federal Government of Nigeria of the demands by ASUU. To the claimants, from the memorandum dated 23 December 2020 a conciliation was reached between the Federal Government and ASUU (referring to Exhibit 3). That as contained in paragraph 19 of the affidavit of Okechuwu Nwamba on behalf of the Federal Ministry of Labour and Employment.:

(i) N40B was paid to the ASUU led University Unions in March 2021 for Earned Academic Allowances (EAA).

(ii) The President, Federal Republic of Nigeria gave 'Clemency' for the 9 months backlog of their salaries from April - December 2020 when they were at home and refused to do virtual teaching, which was the normal for COVID era. This money was paid in 3 tranches of 3 months per tranche starting February 2021 with January 2021 as starter and over N100b (One Hundred Billion Naira) was paid out during this period to ASUU members.

(iii) The Federal Government paid N30B (Thirty Billion Naira) as Revitalization Fund to Federal Universities about July 2021. As of the date of this affidavit, only about 23 Universities were fit to draw their own shares as most others have been unable to satisfactorily or failed and or neglected to retire the earlier released fund of N200b under the previous administration and the Supplementary of N30B (2021).

(iv) Federal Government worked out their EAA and specially midwifed into the 2021 Supplementary Budget and the sum of N22.728 and was paid September/October 2021 to ASUU and others. ASUU never mentions all these collections which aggregate is over N200B in 2021 alone for a Government battling to come out of Covid-19 recession.

(v) Even in this period of their Strike the Federal Government of Nigeria in May 2022 paid N37 Billon to all workers, Lecturers inclusive, as 10 percent rise in salaries Consequential Minimum Wage Adjustment arrears.

(vi) Despite all these, Academic Staff Union of Universities is determining (sic) a whopping N170 Billion in one fell swoop despite the MOA dated 23 December 2020 which requires for transparency purposes that previous ones be retired before fresh ones are collected.

27. That weighing all the above on a scale of justice, it will be unfair and inequitable to continue to shut out innocent Nigerians from university education by the prolonged strike action of ASUU. That where the rights of innocent persons who are not parties to a dispute are grossly affected by the subject of the dispute between parties, the court ought in its equitable and

inherent jurisdiction to hear in favour of the course that protects the rights of innocent third parties. Accordingly, that issue (5) as raised by the Federal Government ought to be resolved against the ASUU.

28. Issue (6) is: having regard to the applicable principles of law and circumstances of this dispute, whether ASUU, its members and agency ought to be restrained from continuing to shut down Universities in Nigeria and continuing on the prolonged strike which started since 14 February 2022. To the claimants, the facts and circumstances of this matter clearly demonstrate breach of laws in Nigeria by ASUU, particularly gross breach of sections 6, 8 and 18(1)(a) and (b) of the Trade Disputes Act. Also. that some of the demands by ASUU upon which their strike is based such as urging the Executive to intermeddle with the legislative work process of the National Assembly or insisting on adoption of their own invented payment platform against those by the agencies of government clearly enacted in the laws are either unconstitutional or unlawful, referring to sections 4, 5, 6, 148(1), 162(1) and (2) of the Constitution, section 6 of the National Information Technology Development Agency Act and sections 1, 3, 6, 18 and 15 of the National Salaries, Incomes and Wages Commission Act. That it is trite law that a strike action or any action whatsoever cannot be founded on illegality or unconstitutionality of actions sought to be implemented, citing *Aghedo v. Adenomo* [2018] 13 NWLR (Pt. 1636) 2645 page 303 — questionable pagination.

29. The claimants continued that section 18(1)(f) of the Trade Disputes Act expressly prohibits a strike or lock-out where "the dispute has subsequently been referred to the National Industrial Court under section 14(1) or 17 of this Act"; referring also to *Corporate Ideal Insurance Ltd v. Ajaokuta Steel Company Limited & 2 ors* [2014] 2 SC (Pt. I) 107, *Adesanoye v. Adewole* [2006] 7 SC (Pt. III) 19 and *Wada & 2 ors v. Bello* [2016] 17 NWLR (Pt. 1542) 379 page 7453 — questionable pagination.

30. Accordingly, that an injunction ought to be issued restraining ASUU, its members and agents from continuing to shut down universities in Nigeria and continuing on the prolonged strike which started since February 2022. That issue (6) thus ought to be resolved against ASUU.

31. In concluding, the claimants submitted that a law still in force in Nigeria, the Trade Disputes (Essential Services) Act Cap T9 LFN in section 7(c) defines essential service as including any service, "in connection with teaching or the provision of educational services at primary, secondary or tertiary institutions". That it is very fundamental for this Court to exercise its equitable and inherent powers in protecting this sector. That the Court ought to take judicial notice of the damage likely to have been done to the educational sector by the prolonged strike by ASUU and the health, mental and physical damages done to innocent citizens who have been forced out of universities by the prolonged strike.

32. That weighed in context, this Court ought to:

(i) make a declaration that having regards to the provisions of Sections 4, 5, 6, 8 and 18(1) of the Trade Disputes Act, Cap T8, Laws of the Federation of Nigeria, the ongoing

prolonged and indefinite strike by the Academic Staff Union of Universities (ASUU) which started since 14 February 2022 is illegal after statutory apprehension by the Minister of Labour and Employment.

(ii) make a declaration that having regards to the provisions of Section 43(1)(a) Trade Disputes Act, Cap T8 Laws of the Federation, it shall be unlawful to pay wages or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases.

(iii) make a declaration that having regards to provisions of Sections 5(1)(a) and (b), 148(1), 150(1), 162(1) and (2) Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 6 National Information Technology Development Agency Act, Sections 1(l), 3(1), (a), (g), (f), (m), 6, 10 and l5 of the National Salaries, Incomes and Wages Commission Act, the demands by the Academic Staff Union of Universities seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, University Transparency and Accountability Solution (UTAS) in payment of salaries and wages to academic staff of universities as against the Integrated Payroll and Personnel Information System (IPPIS) nationally used by the Federal Government for payment of all employees of labour in the federal service of the Federation of which the academic staff of universities is a part, constitutes an infringement of the rights and exclusive powers of the employer, particularly the federal government of Nigeria for the fair and national management and regulation of the payment platform for all categories of employees, inclusive of the members of the Academic Staff Union of Universities.

(iv) make a Declaration that having regards to the provisions of Sections 4 and 5 of the Constitution of the Federal Republic of Nigeria, the demand by the Academic Staff Union of Nigerian Universities for executive interference in a Draft Bill before the National Assembly as a condition for calling off their strike is unconstitutional and unlawful.

(v) make a declaration that having regard to the provision of memorandum of action dated 23 December 2020 reached at the conciliation meeting between the representatives of the Federal Government of Nigeria and leadership of the Academic Staff Union of Universities held on 22 December 2020 at the instance of the Minister of Labour and Employment and the extent of fulfillment by the Federal Government of Nigeria of the demand by the Academic Staff Union of Universities shutting down universities in Nigeria by the strike embarked upon by the Academic Staff Union of Universities since 14 February 2022 and preventing innocent citizens who are not parties to this disputes from having access to development and wellbeing through education is unfair.

(vi) MAKE AN ORDER OF INJUNCTION restraining the Academic Staff Union of Universities and or its agents and members from continuing to shut down universities in Nigeria and continuing on the strike prolonged which started since 14 February 2022.

COURT'S DECISION

33. After a careful consideration of the processes and submissions before the Court, I need to reiterate that the Honourable Minister of Labour and Employment referred five main issues (referral issues A, B, C, D and E) to this Court for determination. The sixth issue (referral issue

F) is actually a prayer for an order for ASUU members to resume work in their various Universities while the issues in dispute are being addressed by this Court in consonance with section 18(1)(b) of the Trade Disputes Act (TDA) Cap T8 LFN 2004. By section 18 of the TDA, an employer shall not take part in a lockout and a worker shall not take part in a strike in connection with any trade dispute where any of the dispute resolution processes of Part I of the TDA has been activated — and this includes reference of a trade dispute to this Court under section 14(1) or 17 of the TDA. The present referral was done pursuant to section 17 of the TDA. This means that the trade dispute in this case is also caught up by section 18 of the TDA.

34. Referral issues A and B respectively deal with the legality or otherwise of the strike by the Academic Staff Union of Universities (ASUU) that led to this referral, and the interpretation of section 18 of the TDA especially as it applies to cessation of strike once a trade dispute is apprehended by the Minister of Labour and Employment and conciliation is on-going. I just indicated that once any of the dispute resolution processes of Part I of the TDA is activated (and conciliation is one such process), no employer shall take part in a lockout and no worker shall take part in a strike in connection with the trade dispute in issue. This means that such a strike or lockout must cease immediately. It is on this basis that His Lordship Hon. Justice P. I. Hamman in his ruling of 21 September 2022 in this matter restrained ASUU and its members from continuing with the indefinite strike that it embarked on.

35. ASUU accordingly called off the strike. It will be idle to thus consider further issues A, B and F beyond what I just did. And I must stress here, the legality or validity of a strike or industrial action is determined on a case by case basis. It is not carried over to another. And so where the strike in issue had been called off while the matter was still pending before this Court, this Court in *Oyo State Government v. Alhaji Bashir Apapa & ors* [2008] 11 NLLR (Pt. 29) 284 held thus:

> …the applicant argued that the strike embarked upon by the respondents was illegal and so the respondents and their members are not entitled to salaries. The parties are agreed that the strike has been called off given the said settlement of the issues between them. It will, therefore, be academic to remark on the legality or otherwise of the strike…

36. This being so, I say no further regarding referral issues A, B and F, the strike by ASUU having been called off.

37. I turn to the other issues (referral issues C, D and E). Before considering these issues in greater details, I need to point out that in paragraph 6.2 of their written address, the claimants referred to an unreported decision of the Court of Appeal: Appeal No: CA/A/122/2014: *Federal Inland Revenue Service v. TSKJ Construcoes International Sociadade Unipersonal LDA* delivered 17 July 2017. A copy of the unreported decision was not forwarded to this Court as enjoined by Order 45 Rule 3(1) of the NICN Rules 2017. This Court is accordingly not obliged to give any consideration to the cited unreported case (Appeal No: CA/A/122/2014). As His Lordship Augie, JSC intoned in *Major General Kayode Oni (Rtd) & 4 ors v. Governor of Ekiti State & anor* [2019] LPELR-46413(SC):

> It is an elementary principle, very elementary, that Counsel who want the Court to make use of authorities cited in Court must provide the name of Parties, the year the case was decided, and where the case is reported, name of the Law Report, the year, volume and page must be cited. But if the said case is unreported, Counsel must provide the Court with a certified true copy of the Judgment sought to be relied upon - see *Chidoka & anor v. First City Finance Co. Ltd* [2013] 5 NWLR (Pt. 1344) 144 and *Ugo-Ngadi v. FRN* [2018] LPELR-43903(SC)…

38. In fact, I deprecated this very fact (having to cite an unreported case without submitting the certified true copy to the Court) in the ruling I delivered in this same case i.e. *Federal Government & anor v. ASUU* unreported Suit No. NICN/ABJ/270/2022, the ruling of which was delivered on 28 March 2023.

39. Referral issue C deals with the interpretation of section 43 of the TDA, which provides as follows:

> (1) Notwithstanding anything contained in this Act or in any other law
>
> (a) where any worker takes part in a strike he shall not be entitled to any wages or other remuneration for the period of the strike and any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly; and
>
> (b) where any employer locks out his workers the workers shall be entitled to wages and any other applicable remuneration for the period of lockout and the period of the lockout shall not prejudicially affect any rights of the workers being rights dependent on the continuity of period of employment.
>
> (2) If any question should arise as to whether there has been a lockout for the purposes of this section, the question shall on application to the Minister by the workers or their representatives be determined by the Minister whose decision shall be final.

40. I take section 43(2) of the TDA first. Paragraphs 907, 909 and 910 of the International Labour Organisation's (ILO's *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (International Labour Office: Geneva), 2018, 6th Edition (the use of this ILO's literature/jurisprudence is explained later in this judgment) acknowledge that the responsibility for declaring a strike illegal should not lie with the Government, but with an independent and impartial body, which has the confidence of the parties involved; and that the judicial authority is best placed to act as an independent authority. Accordingly, section 43(2) of the TDA, in providing that "if any question should arise as to whether there has been a lockout for the purposes of this section, the question shall on application to the Minister by the workers or their representatives be determined by the Minister whose decision shall be final", falls foul of Convention No. 87 when it made the decision of the Minister to be final. In any event, the determination of the question whether there has been a lockout, is a question for the court to determine, not for the Executive arm of government. To that extent, section 43(2) of the TDA falls foul of section 6 of the 1999 Constitution, which places judicial power in the Judiciary, and

not the Executive arm of government, which is what the Minister responsible for labour represents. Section 43(2) of the 1999 Constitution is accordingly unconstitutional, null and void. I so rule.

41. This said, I proceed to consider section 43(1) of the TDA. On the question whether strikers (like ASUU in the instant case) are entitled to wages or salaries for the period of the strike, the contention of the claimants is that the Federal Government will be in breach of section 43(1)(a) of the TDA to pay wages and or other remuneration to the academic workers of Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceased. It is also the claimants' contention that it will accord with the law that the period from 14 February 2022 until the day the strike ceased shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment are prejudicially affected accordingly.

42. From the submission of the claimants, there are two aspects of its argument: ASUU and its members are not entitled to salary for the period of the strike they embarked on; and the period of the strike they embarked on should not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment are prejudicially affected accordingly. I shall take these issues one after the other.

43. On whether ASUU and its members are entitled to salary for the period of the strike they embarked on, section 43(1)(a) of the TDA is quite clear in providing that notwithstanding anything contained in this Act or in any other law, where any worker takes part in a strike he shall not be entitled to any wages or other remuneration for the period of the strike. As far back as 2007, before the Third Alteration to the 1999 Constitution, this issue came up before this Court in *Senior Staff Association of Nigerian Universities (SSANU) v. Federal Government of Nigeria (FGN)* unreported Suit No. NIC/8/2004, the judgment of which was delivered on 8 May 2007. This is what this Court held:

> …The appellant contended that the issue is not whether the appellant should be paid wages for the period of strike but who ought to determine the liability of the strikers. In this contention, the appellant seems to overlook the fact that section 42(1)(a) [now section 43(1)(a)] of the TDA is self-executory. Its implementation, without more, does not depend on a further enquiry in the manner that the appellant canvasses. A strike, whether legal or not, falls squarely within the ambit of the said section and for which the strikers are disentitled from wages and other benefits envisaged by the section. This statement of principle accords with the International Labour Organisation (ILO) jurisprudence on the matter where at para. 588 of the Freedom of Association: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fourth (revised) edition, Geneva, the norm is that 'salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles'. And to the learned authors, Bernard Gernigon, Alberto Odero and Horacio Guido – 'ILO principles concerning the right to strike' [1998] *International Labour review* Vol. 137 No. 4 at p. 471, the Committee of Experts on the Application of

> Conventions and Recommendations (CEACR) of the ILO 'has refrained from criticizing the legislation of member States which provide for wage deductions in the event of strike action and has indicated that, as regards strike pay, "in general the parties should be free to determine the scope of negotiable issues"'. It is in this light and given the self-executory nature of the said section 42(1)(a) [now section 43(1)(a)] that it is perfectly lawful for an employer to choose to dispense with the 'no work, no pay' rule. In other words, strike pay is lawful if an employer chooses to pay same and not to penalize the strikers in any other way for the strike. In the same vein, it is lawful for workers to agree with their employer that wages will be paid and no other detriment suffered even when strike actions are embarked on. All of this will not be possible if the argument of the appellant, that before section 42(1)(a) [now section 43(1)(a)] of the TDA comes to play, a court order is required, is accepted. It will defeat the principle of harmonious labour relations upon which the ILO jurisprudence on the matter is hinged. We do not, therefore, agree with the submissions of the appellant regarding section 42(1)(a) [now section 43(1)(a)] of the TDA.

44. The points to note with *SSANU v. FGN* are: even before the Third Alteration to the 1999 Constitution, this Court applied International Labour Organisation (ILO) jurisprudence as to section 43(1)(a) of the TDA. Secondly, ILO does not frown on the principle of 'no work, no pay'; as such, it is perfectly legal not to pay salaries or wages to strikers during an industrial action. Thirdly, parties in respect of a strike action are entitled to jettison the 'no work, no pay' rule and agree on salaries or wages to be paid even for the period of a strike action. *SSANU v. FGN* as well as *Oyo State Government v. Alhaji Bashir Apapa & ors* [2008] 11 NLLR (Pt. 29) 284 are quite emphatic that it is perfectly lawful for an employer to choose to dispense with the 'no work, no pay' rule. In other words, payment of wages or salaries for the period of a strike action is lawful if an employer chooses to pay same and not to penalize the strikers in any other way for the strike. In the same vein, it is lawful for workers to agree with their employer that wages will be paid and no other detriment suffered even when strike actions are embarked on. The bottom line is that an agreement between an employer and strikers to pay wages or salaries for the period of a strike action is legal as the agreement acquires a life of its own, and section 43(1)(a) of the TDA cannot be called to use in such a case.

45. In the instant case, there is no such agreement before this Court on the part of the parties that salaries or wages would be paid to ASUU members for the period of the strike they embarked on. If anything, the claimants are praying this Court for a declaration that it shall be unlawful to pay wages or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases. On record, the claimants did not pay or agree to pay ASUU members wages or salaries for the period of the strike they embarked on. The claimants are not even ready to pay. Does this accord with the law? By section 43(1)(a) of the TDA, the answer is in the affirmative. Does ILO Convention No. 87 as well as the ILO jurisprudence in that regard lend further support to section 43 of the TDA? Going by *SSANU v. FGN*, the answer is in the affirmative. In that case it was pointed out that by para. 588 of the Freedom of Association: *Digest of decisions and principles*

of the Freedom of Association Committee of the Governing Body of the ILO, Fourth (revised) edition, Geneva, the norm is that 'salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles'. This position is now reinforced by the Third Alteration to the 1999 Constitution. This is what I intend to address now.

46. Section 254C(1)(f) and (h), and (2) of the 1999 Constitution and section 7(6) of the National Industrial Court (NIC) Act 2006 permits this Court to, when adjudicating, apply international best practices in labour, and the Treaties, Conventions, Recommendations and Protocols on labour ratified by Nigeria. They accordingly form part of the corpus of our labour laws in the country, which can be judicially noticed. Of recent, this has been done by this Court in *Tricycle Owners Association of Nigeria v. Federal Ministry of Labour and Employment & anor* unreported Suit No. NICN/ABJ/216/2022, the judgment of which was delivered on 17 January 2023 and *Yusuf Abdullahi Abdulkadir, Esq & ors v. Minister of Labour & Employment & ors* unreported Suit No. NICN/AK/04/2022, the judgment of which was delivered on 16 May 2023.

47. The Supreme Court had as far back as 2000 in two concurring judgments of Achike, JSC and Uwaifo, JSC in *Abacha & ors v. Fawehinmi* [2000] LPELR-14(SC); [2000] 6 NWLR (Pt 660) 228 respectively held that "conventions and treaties create rights and obligations not only between Member States themselves but also between citizens and Member States and between ordinary citizens"; and that "the spirit of a convention or a treaty demands that the interpretation and application of its provisions should meet international and civilized legal concepts… concepts which are widely acceptable and at the same time of clear certainty in application". Additionally, by section 19(d) of the 1999 Constitution, the foreign policy objectives of Government include the respect for international law and treaty obligations. Accordingly, section 254C(1)(f) and (h), and (2) of the 1999 Constitution and section 7(6) of the National Industrial Court (NIC) Act 2006 merely keep faith with section 19(d) of the 1999 Constitution.

48. By 2020, His Lordship Ogakwu, JCA in *Sahara Energy Resources Ltd v. Mrs Olawunmi Oyebola* [2020] LPELR-51806(CA) would read section 254C(1)(f) and (h), and (2) of the 1999 Constitution as imposing an "obligation on [the National Industrial Court of Nigeria - NICN] to now apply good or international best practices in adjudication". His Lordship proceeded to hold thus:

> …I am mindful of the fact that it may appear that international best practices, like public policy, may be an unruly horse and might be difficult to apply. Alluding to a similar situation as it relates to public policy in ENDERBY TOWN FC vs. FOOTBALL ASSOCIATION (1971) 1 CH 591 at 606-6077, Lord Denning, MR asseverated that public policy is an unruly horse. So obstreperous is the horse that no judge should ever try to mount it lest it runs away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice. Now, on my part, I ask if a judge is such a good man (jockey)? I would think so. If the Judge of the lower Court, that specialized Court in employment and labour related matters, be that intrepid man of great

> learning, then the application of international best practices would not be difficult, abstruse or arcane in its application and would always end up on the side of justice…

49. In an earlier case, *Ferdinand Dapaah & anor v. Stella Ayam Odey* [2018] LPELR-46151(CA); [2019] 16 ACELR 154, His Lordship Nimpar, JCA held that this Court "was also empowered by the Constitution to rely and apply international conventions which have close bearing to claims related to workplace, employment and labour matters… ([2019] ACELR at 181).

50. His Lordship Affen, JCA in *The Federal Polytechnic, Mubi v. Mr Emmanuel Peter Wahatana* unreported Appeal No. CA/YL/175M/2021, the ruling of which was delivered on 27 April 2023, relying on *Sahara Energy Resources Ltd v. Mrs Olawunmi Oyebola* [2020] LPELR-51806(CA), reiterated the specialist nature of this Court in these words:

> …appellate courts often defer to the specialist knowledge of employment judges who bring industrially informed perspectives to bear in their decisions; they have a good knowledge of the world of work and a sense, derived from experience, of what is real and what is mere window-dressing; they are to be 'realistic and worldly wise' and 'sensible and robust ... in order to prevent form from undermining substance'…

51. Now, Nigeria is a member of the International Labour Organisation (ILO), and in virtue of its membership is bound by the ILO Convention No. 87, a core Convention, which Nigeria ratified on 17 October 1960. See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103259 as accessed on 19 May 2023. Since this Court is now obliged to apply this ratified Convention No. 87, I will need to refer to ILO jurisprudence on Convention No. 87 to ascertain how it is understood and applied by the ILO. In this regard, reference will be to ILO's *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (International Labour Office: Geneva), 2018, 6th Edition. (Note that in *SSANU v. FGN*, it was the Fourth Edition of this ILO work that was referred to.) Article 8 of Convention No. 87 acknowledges that in exercising rights under the Convention, the law of the land is to be respected, but this must not be at the expense of the guarantees provided by the Convention.

52. On wage deductions during strikes, paragraph 942 of ILO's *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (International Labour Office: Geneva), 2018, 6th Edition states that "salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles". This fact was accepted by this Court as can be seen from *SSANU v. FGN*. By paragraph 950: "Salary deductions for days of strike should only apply to workers who have taken part in the strike or a protest action". And by paragraph 943: "Additional sanctions, such as deductions of pay higher than the amount corresponding to the period of the strike, amount in this case to a sanction for the exercise of legitimate industrial action". All these provisions permit the 'no work, no pay' rule; such that an employer is legally permitted not to pay strikers salaries or wages for the period of the strike they undertook. A clause such as the last clause at the last page of Exhibit 8 attached to the affidavit

evidence of Okechukwu Nwamba i.e. "IT WAS AGREED THAT NOBODY SHALL BE VICTIMIZED IN ANY WAY WHATSOEVER FOR HIS/HER ROLE IN THE PROCESS LEADING TO THIS MEMORANDUM OF ACTION", aside from the fact that it is not related to the strike of 14 February 2022, and even if it is, does not take away the sting of the "no work, no pay" rule as enjoined by section 43(1)(a) of the TDA; and ILO Convention No. 87: "salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles".

53. This means that in the instant case, the claimants are legally permitted, not just by section 43(1)(a) of the TDA, but by ILO Convention No. 87 and its accompanying ILO jurisprudence, to withhold, and so not pay, the salaries of members of ASUU who partook in the strike that commenced on 14 February 2022 and was called off merely upon the order of the Court of Appeal. I so rule.

54. Relying on section 43(1)(a) of the TDA, it is the argument of the claimants that the period of the strike embarked on should not count for the purpose of reckoning the period of continuous employment of members of ASUU who partook in the strike, and all rights dependent on continuity of employment are prejudicially affected accordingly. I shall once again turn to ILO jurisprudence to see how this issue is treated. And here, paragraphs 951 to 964 of ILO's *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (International Labour Office: Geneva), 2018, 6th Edition are critical. These provisions deal with ILO's jurisprudence as to sanctions that are often imposed in the event of a legitimate strike. The following particular paragraphs are critical here:

> Paragraph 951: "Imposing sanctions on unions for leading a legitimate strike is a gross violation of the principles of freedom of association".
>
> Paragraph 953: "No one should be penalised for carrying out or attempting to carry out a legitimate strike".
>
> Paragraph 954: "Penal sanctions should not be imposed on any worker for participating in a peaceful strike".
>
> Paragraph 956: "Legislative provisions which impose sanctions in relation to the threat of strike are contrary to freedom of expression and principles of freedom of association".

55. These provisions frown on penal sanctions being imposed on peaceful strikers. There is nothing before this Court showing that members of ASUU were not peaceful during the strike that commenced on 14 February 2022. Is the part of section 43(1)(a) which states that the period of the strike embarked on should not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment are prejudicially affected accordingly penal? I think so. This being so, the submission and prayer of the claimants that this part of section 43(1)(a) of the TDA should be applied to the members of ASUU who partook in the strike of 14 February 2022 cannot be granted. It is hereby rejected and hence dismissed. I so rule.

56. Referral issue D seeks this Court to determine if ASUU has the right to embark on strike over disputes, as is the case in this instance, by compelling the Federal Government to deploy University Transparency and Accountability Solution (UTAS) developed by ASUU in the payment of wages to its members as against Integrated Payroll and Personnel Information System (IPPIS) universally used by the Federal Government for payment of wages of all her employees (workers) in the Federal Government Public Service of which University workers including ASUU members are part of, even where the Government via NITDA subjected the ASUU and their counterpart SSANU/NASU UPPPS (University Payment Platform System) software to integrity test (Vulnerability and Stress Test) and they failed same.

57. My understanding of this question is whether ASUU can go on strike over the kind of platform used to pay its members their salaries. The Federal Government is said to have deployed IPPIS as the platform for paying the salaries of its employees. ASUU is said to have developed the University Payment Platform System (UPPS) as the platform to be used in paying its staff their salaries. The Federal Government is said to have directed that members of ASUU are to be paid vide the IPPIS platform. ASUU is said to have rejected this. Instead, it developed its own platform called the University Transparency and Accountability Solution (UTAS), and asked that this be allowed to be used in the Universities. The story line from the claimants is that the University Payment Platform System (UPPS) software developed by ASUU and its counterpart unions, SSANU and Non-Academic Staff Union of Universities (NASU), failed the integrity test (Vulnerability and Stress Test) it was subjected to by the National Information Technology Development Agency (NITDA). Now, both referral issue D and the affidavit of Okechukwu Nwamba on behalf of the Federal Ministry of Labour and Employment/Federal Government are silent on UTAS as far as the integrity test by NITDA is concerned. If anything, referral issue E(vi) talks of "The migration of ASUU members from IPPIS to University Transparency and Accountability Solution (UTAS) developed by ASUU which is currently on test at Nig Tech. Dev. Agency (NITDA)". In other words, while referral issue D stated that UPPS failed the integrity test of NITDA, referral issue E(vi) states that UTAS is currently on test at NITDA. Can ASUU go on strike on this issue? This remains the question.

58. The claimants' argument, for which they seek a declaration, is that the demands by ASUU seeking to compel the Federal Government of Nigeria to deploy their own invented platform titled, UTAS, in the payment of salaries and wages to academic staff of Universities as against IPPIS nationally used by the Federal Government for payment of all employees of labour in the Federal service of the Federation, which the academic staff of universities is a part, constitutes an infringement of the rights and exclusive powers of the employer, particularly the Federal Government of Nigeria for the fair and national management and regulation of the payment platform for all categories of employees, inclusive of the members of ASUU. In making this submission and prayer, the claimants relied on the following provisions:

- Sections 5(1)(a) and (b), 148(1), 150(1), 162(1) and (2) of the 1999 Constitution — these provisions (aside from sections 150(1) and 162, which respectively deal with the office of the Attorney General of the Federation and revenue allocation) emphasis the executive powers of the President;

- Section 6 of the National Information Technology Development Agency Act — this provision deals with the functions of NITDA; and
- Sections 1(l), 3(1), (a), (g), (f), (m), 6, 10 and l5 of the National Salaries, Incomes and Wages Commission (NSIWC) Act — these provisions deal with the establishment, functions, duties, powers and independence of the NSIWC.

59. Given these constitutional and statutory provisions, the claimants' argument is that, aside from the right of the Federal Government as an employer of labour to determine the platform which is to be used in paying the wages or salaries of its employees, to adopt UTAS will promote inefficiency and discrimination in the public service of Nigeria. The proof of all this is the affidavit of Okechukwu Nwamba in support of the claimants' case. Accordingly, in paragraph 10 of the affidavit of Okechukwu Nwamba on behalf of the Federal Ministry of Labour and Employment/Federal Government, it is stated thus:

> The University Transparency and Accountability Solution UTAS being insisted upon for adoption by the Academic Staff Union of Universities failed the technical integrity, vulnerability and stress test made by the National Information Technology Development Agency.

60. Beyond this assertion by Okechukwu Nwamba, the proof of the failure of UTAS of the technical integrity, vulnerability and stress test made by NITDA was not exhibited. And so, it is questionable this piece of evidence by Okechukwu Nwamba, who is not even a staff of NITDA. His Lordship Affen, JCA had cautioned against affidavits being sworn to by persons who do not have personal knowledge of the facts being sworn to, brandishing such as hearsay. Hear His Lordship in *Ibeto & anor v. Oguh* [2022] LPELR-56803(CA):

> The rather forceful submission of learned counsel for the Respondent to the effect that 'a deponent of an affidavit is a witness that can depose to facts that are within his personal knowledge or information which he believes to be true and same will be admitted in Court as evidence and not treated as hearsay provided that such deponent disclosed the source of his/her information' clearly loses sight of the probative value or forensic utility of such evidence. Whilst it is correct that Section 115(4) of the Evidence Act 2011 permits a deponent to swear to facts derived from a third party in an affidavit insofar as the source of his information is properly disclosed, such depositions are of very little forensic Utility as they constitute hearsay evidence. The factum that such information was given is all that there is to such information, but qualitatively, the truth of such information is a different thing entirely: it is hearsay evidence as to the truth which remains inadmissible. See ORUNOLA v ADEOYE [1995] 6 NWLR (PT. 401) 338 at 353 - per Nsofor JCA and NIGERIA PORTS AUTHORITY v AMINU IBRAHIM & CO. supra at 500 - 501 - per Agbo JCA. Hearsay is evidence given by a person who cannot vouch for the truth thereof. It is a piece of evidence which does not derive its value solely from the credit given to the witness himself, but rests in part on the veracity and competence of some other person e.g. the statement of a person who is himself not called as a witness but what he said is repeated by another witness who is called. See OJO v GHARORO (2006) 2 - 3 SC. 105, AROGUNDADE v STATE (2009) LPELR-559(SC)

and SUBRAMANIAM v PUBLIC PROSECUTOR (1956) 1 WLR 965 at 969. That is why it is always ill-advised for a lawyer or his clerk or secretary to depose to facts intended to prove a case as they are not in any position to vouch for the truth or accuracy of information derived from clients. Even the evidence of an employee of a company who was not directly involved in a transaction is to be treated with caution as it is scarcely of equal stature with, and may be insufficient to contradict the evidence adduced by the adverse party who was directly involved in the transaction. See KATE ENTERPRISES LTD v DAEWOO NIG LTD [1985] 2 NWLR (PT. 5) 116 where the Supreme Court held that any employee of a company who is conversant with a transaction is competent to testify in Court on behalf of the company, and not only those who were directly involved in the transaction, but proceeded to sound a note of caution that even though the evidence adduced by an employee who was not directly involved in a transaction is admissible, the question of the weight or probative value to be ascribed to his/her evidence is an entirely different matter. In the instant case, the evidence in support of the Respondent case was based entirely on the affidavit evidence of Chisom Ibe: a lawyer's clerk who deposed to facts based on information derived from the Respondent. To the extent that the averments contained in the affidavit of Chisom Ibe seek to establish the truth of the transaction between the Appellants and the Respondent, they constitute inadmissible hearsay and incapable of sustaining the Respondent's claim before the lower Court.

61. And in *Matthew & ors v. Chevron (Nig) Ltd* [2023] LPELR-59523(CA), though not directly relevant to the instant case but nevertheless instructive, the Court of Appeal deprecated the practice of legal practitioners deposing to affidavits, especially contentious ones, in matters in which they are counsel.

62. By these authorities, the affidavit evidence of Okechukwu Nwamba is hearsay evidence; and so must be discountenanced by this Court, which I hereby do.

63. The argument of the claimants that to adopt UTAS will promote inefficiency and discrimination in the public service of Nigeria has not been shown by any evidence other than the submission of the learned senior counsel to the claimants. No matter how brilliantly crafted an address of counsel is, it neither constitutes, nor can it take the place of evidence. See *APC v. Sheriff & ors* [2023] LPELR-59953(SC). And a a bare statement from the Bar by a counsel has no force of legal evidence. See *Maduabuchi Onwuta v. The State of Lagos* [2022] LPELR-57962(SC).

64. Aside from the fact that the issues canvassed by the claimants as per referral issue D are unsubstantiated given that the affidavit evidence of Okechukwu Nwamba in that regard is hearsay going by *Ibeto & anor v. Oguh*, there is the question whether the demand of ASUU to adopt UTAS (or even UPPS) as the platform for paying the salaries of their members is not supported by law, contrary to the argument of the claimants. ASUU is the union for academic staff of Universities. Federal Government owned Universities are governed by their respective

enabling statutes as well as the Universities (Miscellaneous Provisions) (Amendment) Act 2003. I took time to look into this Act.

65. The Universities (Miscellaneous Provisions) (Amendment) Act 2003 amended the Universities (Miscellaneous Provisions) Act No. 11 of 1993 and made new provisions, among other things, for the autonomy, management and re-organization of the Universities in Nigeria. Section 2AA as inserted provide as follows:

> The powers of the Council shall be exercised, as in the Law and Statutes of each University and to that extent establishment circulars that are inconsistent with the Laws and Statutes of the University shall not apply to the Universities.

66. Section 2AAA dealing with independence of the Council in exercise of its functions, on its part, as inserted, provides thus:

> (1) The Governing Council of a university shall be free in the discharge of its functions and exercise of its responsibilities for the good management, growth and development of the university.
> (2) The Council of a university in the discharge of its functions shall ensure that disbursement of funds of the University complies with the approved budgetary ratio for -
> (a) personnel cost;
> (b) overhead cost;
> (c) research and development;
> (d) library developments; and
> (e) the balance in expenditure between academic vis-a-vis non academic activities.

67. The cumulative effect of these provisions, as indeed the Universities (Miscellaneous Provisions) (Amendment) Act in general, is that autonomy amongst other things was granted to the Universities. The *New Oxford American Dictionary* defined 'autonomy' as:

- the right or condition of self-government…
- a self-governing country or region…
- freedom from external control or influence; independence…

68. For present purposes, "the right or condition of self-government" and "freedom from external control or influence; independence", are the useful variants of the definition.

69. University autonomy would, therefore, mean the independence of the University from the State and other pressures of the society in order to make decisions regarding its self-governance, finance, administration and establish its policies. University autonomy comes in four fronts: academic, organizational, financial and staff autonomy. But this does not mean that Government no longer has a say or stake in the Universities. By section 2AA as inserted by the Universities (Miscellaneous Provisions) (Amendment) Act 2003, a University is no longer bound by establishment circulars that are inconsistent with the enabling statutes and laws of the University. So, can the directive of the claimants that Universities should fall within the dragnet of IPPIS as the platform for paying their staff salaries be said to be in consonance with the autonomy

envisaged under the Universities (Miscellaneous Provisions) (Amendment) Act 2003? I do not think so. Section 2AAA as insetted by the Universities (Miscellaneous Provisions) (Amendment) Act 2003 obliges the Council of a University, in the discharge of its functions, to ensure that disbursement of funds of the University complies with the approved budgetary ratio for personnel cost. Personnel cost relates to salaries and other perquisites of employment. So long as each University complies with the budgetary ratio for personnel cost, it is not open to the claimants to dictate to the Universities the platform to be used in paying salaries. This is against the letter and spirit of autonomy granted the Universities by the Universities (Miscellaneous Provisions) (Amendment) Act 2003.

70. I must note here that the claimants are aware of, and in fact acknowledge, this university autonomy. In Exhibit 4 attached to the affidavit evidence of Okechukwu Nwamba, the Permanent Secretary of the 2nd claimant reported to the Permanent Secretary of the Federal Ministry of Labour and Employment in paragraph 3 that in renegotiating the 2009 Agreement, the Draft Report reached in June 2022 had an offer to ASUU of a 35% increase in the salary of a Professor and 23.5% increase for other staff. In particular, that "the leadership of ASUU was further informed that any other payments outside the consolidated salary as offered by Government would be borne by the respective Governing Councils of the Universities". See paragraph 5 of Exhibit 4. The same Exhibit 4 would in paragraph 7 proceed to state that Government rejected ASUU's request that IPPIS be replaced with UTAS, as the payment platform for the University System. This rejection of UTAS in favour of IPPIS by the Federal Government is not in tandem with the letter and spirit of autonomy granted the Universities by the Universities (Miscellaneous Provisions) (Amendment) Act 2003 and even the acknowledgement in Exhibit 4 "that any other payments outside the consolidated salary as offered by Government would be borne by the respective Governing Councils of the Universities". If it is within the remit of University Councils to do this, it can as well be within their remit to ascertain the payment platform of their salaries. This being so, I must answer referral issue D against the claimants. The claimants were wrong to have imposed IPPIS on the defendant. I so rule.

71. Referral issue E seeks the determination of the extent in which the Federal Government has fulfilled ASUU's demands. The ASUU demands relate to the following:

(i) Funding for Revitalisation of Public Universities as per 2009 Agreement
(ii) Earned Academic Allowance (EAA) payments
(iii) State Universities Proliferation
(iv) Constitution of Visitation Panels/Release of White Paper on report of Visitation Panels
(v) Reconstitution of Government Renegotiation Team for the renegotiation of 2009 Agreement which was renegotiated 2013/2014 and due for re-negotiation by 2018/2019
(vi) The migration of ASUU members from IPPIS to University Transparency and Accountability Solution (UTAS) developed by ASUU which is currently on test at Nig Tech. Dev. Agency (NITDA)

72. The issue of migration of ASUU members from IPPIS to UTAS has already been remarked on, considered and ruled upon in terms of referral issue D. My ruling in that regard accordingly abides referral issue E(vi). I so hold.

73. This leaves out referral issue E(i) to (v). Items (i) and (ii) approximate to claims for special damages, which must be strictly proved by credible evidence. See *UTC Nig. Plc v. Samuel Peters* [2022] LPELR-57289(SC). Oral evidence is discouraged. See *Mr Joseph Akinola & ors v. Lafarge Cement WAPCO Nigeria Plc* [2015] LPELR-24630(CA). In the instant case, the only evidence before the Court here is the affidavit evidence of Okechukwu Nwamba. His deposition in paragraph 19 of the affidavit, as to the payments made by the Federal Government to ASUU, is one that is not substantiated by any specific documentary evidence. As held in *Ibeto & anor v. Oguh*, this piece of evidence by Okechukwu Nwamba is nothing but hearsay evidence. Even if it were not hearsay evidence, it is one that is not credible enough to meet the formulation in *UTC Nig. Plc v. Samuel Peters*. Exhibit 6 attached to the affidavit evidence of Okechukwu Nwamba, which in paragraph 6(ii) has it that information by the 2nd defendant is that "the Federal Government has committed the sum of fifty billion Naira (50 billion naira) for the payment of Arrears of Earned Academic Allowances (EAA) and Earned Allowances for the Unions in the Universities (Copy attached as annexure 3)", does meet the requirement of strict proof enjoined by cases like *UTC Nig. Plc v. Samuel Peters*. For one, Exhibit 6 talks of the sum of N50 Billion being "committed" for payment. This is not payment itself. Secondly, annexure 3 said to be attached to Exhibit 6 is not before the Court.

74. Item (iii) deals with "State Universities Proliferation". To the claimants, from Exhibit 3 (the memorandum by ASUU dated 31 August 2022 — it is actually titled, "Highlights of Events and Demands in the Current Strike Action"), one of their core demands upon which the prolonged strike has been based is that the Federal Government should intervene in the legislative process of the National Assembly relating to a Draft Bill before the National Assembly. At page 4 of Exhibit 3, under the heading, "Our Prayers for the quick resolution of the ongoing strike action", ASUU demanded thus:

> Intervention on the Draft Bill for empowering NUC to curb proliferation of universities, especially by State Governors.

75. The argument of the claimants is that this prayer by ASUU cannot be met as the claimants are of the Executive arm of Government distinct from the Legislative arm, from which the said Draft Bill is expected to be passed into law. This should not in the first place be an item of a trade union agreement since it cannot be policed. If ASUU feels strongly about this, as a trade union, their recourse must be to the National Assembly itself where they can put forward their stance in opposition to the said draft bill. Calling on the Executive arm of Government to intervene is uncalled for. This said, I must note that the argument of the claimants that there is a limit to which the Executive arm of Government can interfere with the Legislative arm of Government is blind to the fact that it is the Executive arm of Government, in the person of the President, Commander-in-Chief of the Armed Forces, that signs Bills into law. This role is profound in the law making process, as without it, there can be no valid statute except overridden by two-third

votes of the National Assembly. In any event, in paragraph 6(iii) of Exhibit 6, "Government posited that the NUC Act should be reviewed to empower the NUC" to deregister unviable Universities, and register State Universities only when factors like financial viability and availability of necessary infrastructure are ensured.

76. As for items (iv) and (v) of referral issue E, which respectively deal with Constitution of Visitation Panels/Release of White Paper on report of Visitation Panels, and Reconstitution of Government Renegotiation Team for the renegotiation of 2009 Agreement which was renegotiated in 2013/2014 and due for re-negotiation by 2018/2019, little or nothing was put before this Court in order to determine the extent of the fulfilment by the Federal Government of ASUU's demands as prayed for under referral issue E. The only thing before the Court is paragraph 7 of Exhibit 6, which has it that it was resolved that the Federal Government shall within a time frame of two months conclude process for the release of the white papers on Visitation Panel Reports and ensure their early implementation. Annexure IV said to be attached is not even before the Court.

77. On delay in renegotiating the 2009 Agreement, paragraphs 9 and 10 of Exhibit 6 merely reiterated the content of Exhibit 4, upon which I had already remarked.

78. In all of this, the affidavit evidence of Okechukwu Nwamba, on the authority of *Ibeto & anor v. Oguh*, cannot be relied upon. What all of this means is that referral issue E cannot be resolved in favour of the claimants. I so rule.

79. On the whole, after due inquiry, interpretation, and determination of the issues referred to this Court by the Honourable Minister of Labour and Employment vide his referral instrument of 7 September 2022, and for the avoidance of doubt, I declare as follows:

> (1) Given that the legality or validity of a strike or industrial action is determined on a case by case basis, for it is not carried over to another, because the strike in issue in this suit had been called off in virtue of the ruling of His Lordship Hon. Justice P. I. Hamman of 21 September 2022 in this matter, and on the further authority of this Court's decision in *Oyo State Government v. Alhaji Bashir Apapa & ors* [2008] 11 NLLR (Pt. 29) 284, I say no more beyond the ruling of His Lordship P. I. Hamman regarding referral issues A, B and F.
>
> (2). I declare that the part of section 43(2) of the TDA, which provides that "if any question should arise as to whether there has been a lockout for the purposes of this section, the question shall on application to the Minister by the workers or their representatives be determined by the Minister whose decision shall be final", falls foul of Convention No. 87 when it made the decision of the Minister to be final. The determination of the question whether there has been a lockout, is a question for the court to determine, not for the Executive arm of government. To that extent, section 43(2) of the TDA also falls foul of section 6 of the 1999 Constitution, which places judicial power in the Judiciary, and not the Executive arm of government, which is what the Minister

responsible for labour represents. That part of section 43(2) of the TDA is accordingly unconstitutional, null and void.

(3) I declare that in the instant case, the claimants are legally permitted, not just by section 43(1)(a) of the TDA, but by ILO Convention No. 87 and its accompanying ILO jurisprudence, to withhold, and so not pay, the salaries of members of the defendant union (ASUU) who partook in the strike that commenced on 14 February 2022 up to the date it was called off.

(4) The prayer of the claimants that the period of the strike embarked upon by members of the defendant union (ASUU) shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected is rejected and dismissed.

(5) I declare that the claimants acted in error to impose IPPIS on the defendant union (ASUU). The issue of which payment platform is to be used in paying the salaries or wages of staff of the Universities is one that is within the discretion of the individual Councils of the Universities in line with the autonomy granted them by the Universities (Miscellaneous Provisions) (Amendment) Act 2003.

(6) The claimants' prayers as to referral issue E have not been substantiated and so cannot be granted.

80. Judgment is entered accordingly. I make no order as to cost.

……..……

Hon. Justice B. B. Kanyip, PhD, OFR