



# **THE JUDICIAL APPLICATION OF ELECTION AND COURT PRACTICE DIRECTIONS 2007**

*A Diagnostic Analysis of Select Decisions of the Court of  
Appeal and Supreme Court and Practical Assessment of  
the Practice Directions*

By

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## FOREWORD

The relevance of any book is usually determined by the issues it attempts to address. So a book appropriately qualifies to be described as great if, for instance, the issues it explores have direct bearing on the very survival of a people, be it political, economic, cultural or social survival. ***The Judicial Application of Election and Court Practice Directions 2007: A Diagnostic Analysis of Select Decisions of the Court of Appeal and Supreme Court and Practical Assessment of the Practice Directions*** spotlights election litigation in Nigeria, and considering that the electoral system has always been the bane of the political progress of the nation, this book has a direct bearing on Nigeria's political survival. Needless to add that all other kinds of survival would pale into insignificance where political life is threatened.

That demonstrates how important this book is. Its importance is also underlined by the fact that the election petition manual, the *Practice Directions*, which is the bedrock on which all election litigation currently rests, is a new practice tool. Understandably, not a few lawyers still struggle to grapple with its prescriptions, essentially for the reason that it is only just being put to use; having only been issued in 2007 by the President of the Court of Appeal.

Against this background, no time could have been more appropriate for the publication of ***The Judicial Application of Election and Court Practice Directions 2007***. To what extent has the *Practice Directions* aided speedy and judicious disposal of election petitions? By and large, this is the poser ***The Judicial Application of Election and Court Practice Directions 2007*** tackles and it does it comprehensively, I must state.

Having said so, recommending it would be superfluous, for it should be a handbook really for all and sundry. Isn't every man a political animal? If so, this is a politics manual since election is at the root of politicking. So, lawyers (election petition expert or not), judges, law students, in fact everybody, this is your book!

The simplicity of the form of the book as well as that of the language employed therein for every analysis doubly recommends it.

**Norrison I. Quakers**

Legal Practitioner & Notary Public  
December 2008

## 1.0 INTRODUCTION

On 29<sup>th</sup> March, 2007, the President of the Court of Appeal issued Practice Directions<sup>1</sup> to further regulate the practice and procedure before the Election Petition Tribunals. The President of the Court of Appeal is the convening authority of the Election Petition Tribunals under the Constitution of the Federal Republic of Nigeria, 1999<sup>2</sup>. The Practice Directions came at the conclusion of the 2007 Elections and just as aggrieved politicians were preparing to approach the Election Tribunals for redress of perceived unlawful returns made by the Independent National Electoral Commission (INEC) during the elections.

There was justifiable background to the legislative intervention in the practice and procedure of Election Tribunals. There were compelling grounds to legislatively and judicially control the pace of proceedings of Election Tribunals in the interest of justice and overriding public interest. The principal mischief necessary to be curbed at the time the directions came was undue delay in disposal of petitions. Loopholes in the Election Petition Rules in the First Schedule to the Electoral Act were easily exploited by litigants to embark on long-drawn litigation that undermined the interest of justice and the entire electoral and political system.

Through delayed hearings, a person unlawfully returned in an election could find ways of delaying a petition against his/her return before a Tribunal while he/she illegally occupied the office. By the time the petition was disposed of and the election invalidated, the person would have illegally spent substantial time in office. A unique petition drew national attention to this phenomenon. It was the petition filed by Mr. Peter Obi and the All Progressives Grand Alliance (APGA) against Dr. Chris Ngige and the Peoples Democratic Party (PDP) following the return of Dr. Ngige in the Anambra State governorship election in 2003. Several petitions during the era dragged on but the Anambra scenario was remarkable because a record 500 defence witnesses were allegedly

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<sup>1</sup> The long title of the Practice Directions is Election Tribunal and Court Practice Directions 2007. It commenced on 3<sup>rd</sup> April, 2007. See Official Gazette of the Federal Republic of Nigeria Vol. 49, No. 13 of 4<sup>th</sup> April, 2007.

<sup>2</sup> See Paragraphs 1 (3) and 2(3) of the Sixth Schedule Constitution of the Federal Republic of Nigeria 1999

lined up and with the aid of several interlocutory applications all forms of red-herrings were laid against the conclusion of hearing. The proceedings before the Election Petition Tribunal sitting in Awka finally ended in favour of Mr. Peter Obi. This led to an appeal before the Enugu Division of the Court of Appeal which also ended in favour of Mr. Obi completing about three years of litigation for the governorship seat<sup>3</sup>. Note that the tenure of office of a governor under the Constitution is four years<sup>4</sup>! Dr. Ngige therefore had almost full governorship tenure before his election was invalidated. Similar cases abound around the country in all elective offices even if in lesser magnitude.

The direct consequence of the landmark delay in disposal of the Obi/Ngige governorship election dispute was the later decision of the Supreme Court interpreting the tenure of office of a State Governor. The apex Court held that Obi's tenure was four years from the date he took the oath of office of the Governor of a State in the Seventh Schedule of the 1999 Constitution<sup>5</sup>.

The Practice Directions was therefore well-received as a remedy for the delay syndrome. Politicians and legal practitioners saw it as a solution to undue delays and tool to assist in quick resolution of petitions. It was however not without its challenges. Many lawyers expressed the view that the president of the Court of Appeal lacked constitutional authority to issue the directions. The issue of legitimacy was raised before several Election Tribunals and the Court of Appeal. The issue now forms a ground of appeal in BUHARI VS YAR'ADUA before the Supreme Court<sup>6</sup>.

This advocacy tool examines the issue of legitimacy of the Practice Directions 2007, appraises the practical application of its novel provisions and examines its usefulness and continued relevance vis-à-vis the provisions of the Electoral Act 2006. It makes suggestions for strengthening of the electoral system for ongoing electoral reform and constitution amendment projects.

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<sup>3</sup> See NGIGE VS OBI (2006) 14 NWLR (PART 999) 1

<sup>4</sup> See Section 180(2) 1999 Constitution

<sup>5</sup> See OBI VS INEC & 7 ORS. (2007) 11 NWLR (PART 1046) 565

<sup>6</sup> Since the Supreme Court is yet to decide this issue, we will refrain from making prejudicial comments on the point.

## 2.0 THE PRACTICE DIRECTIONS 2007

### 2.1 JUDICIAL SPHERE OF APPLICATION

The Election Tribunal and Court Practice Directions 2007 (hereinafter called “the Practice Directions”) was made applicable to the Presidential, Governorship, National Assembly and States Assembly election petitions<sup>7</sup>.

### 2.2 THE ISSUE OF LEGITIMACY

Generally there was strong optimism about the aims of the Practice Directions and its expected positive impact on the adjudication process in Election Management in Nigeria. Notwithstanding this optimism, parties who found themselves on the wrong side of the Practice Directions challenged its constitutionality. The question of constitutional legitimacy is hinged on alleged want of authority to issue the Practice Directions.

In the consolidated petitions of **GENERAL MUHAMMADU BUHARI VS INEC & 5 ORS** and **ALHAJI ATIKU ABUBAKAR, GCON & 2 ORS VS ALHAJI MUSA YAR’ADUA & 7 ORS**<sup>8</sup>, it was contended on behalf of the General Buhari during final address that the Practice Directions was unconstitutional in that the President of the Court of Appeal lacked the power to issue it. The issue was raised because of the heavy reliance placed by the Respondents on provisions of the Practice Directions. It was argued that the authority of the President of the Court of Appeal with regard to the subject matter is limited to the provisions of Section 248 of the 1999 Constitution and Order 7 Rule 7 of the Court of Appeal Rules 2002. It was further argued that there was nothing enabling the President of the Court of Appeal to issue the Practice Directions under the applicable Rules which is the First Schedule to the Electoral Act 2006,

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<sup>7</sup> These are elections under the judicial convening authority of the President of the Court of Appeal by virtue of Sections 239, 285 and the Sixth Schedule of the 1999 Constitution.

<sup>8</sup> CA/A/EP/2/07 and CA/A/EP/3/07 Unreported Judgment of the Presidential Election Petition Tribunal (Court of Appeal, Abuja Division) delivered on 26<sup>th</sup> February, 2008

and the Federal High Court (Civil Procedure) Rules incorporated pursuant to paragraph 50 of the First Schedule.

It was further submitted that Section 285(3) of the 1999 Constitution does not empower the President of the Court of Appeal to issue the Practice Directions or any rules of trial for election adjudication in the first instance<sup>9</sup>. The Petitioner relied on the following decided cases:

- (a) HARUNA VS MODIBBO<sup>10</sup>
- (b) UNIVERSITY OF LAGOS VS AIGORO<sup>11</sup>
- (c) FALOBI VS FALOBI<sup>12</sup>

Note that Section 248 of the 1999 Constitution enables the President of the Court of Appeal to make rules regulating the practice and procedure of the Court of Appeal. Order 7 Rule 7 of the Court of Appeal Rules 2002<sup>13</sup> enables the President of the Court of Appeal to issue Practice Directions for practice in the Court of Appeal, which when issued forms part of the Court of Appeal Rules.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that if the contention was upheld, the implication would be that General Buhari's petition ought to be dismissed for not having been initiated by due process. They argued that the power of the President to issue the Practice Directions is both implied and permissible. Further, that the Courts have readily achieved a balance by applying the provisions of the Practice Directions, not by invalidating the Practice Direction but by construing same as part of the Rules of Court. The cases relied upon by the Petitioner were also relied upon in support.

The Court of Appeal expressed surprise that the issue was raised for the first time during final the address. It noted that the Petitioner relied on the Practice Directions throughout and took advantage of the provisions just

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<sup>9</sup> "In the first instance" means proceedings before the Election Petition Tribunal and before the Court of Appeal in its capacity as the Presidential Election Petition Tribunal.

<sup>10</sup> (2004) 14 NWLR (PART 900) 487 AT 535

<sup>11</sup> (1984) NSCC VOL 15 745 AT 782

<sup>12</sup> (1976) 9 - 10 SC 13

<sup>13</sup> Now Order 19 Rule 7 of the Court of Appeal Rules 2007

like the Respondents, stating that should the point be sustained the implication would be that the petition had no foundation and would be fundamentally flawed. On the validity of the Practice Directions, the Court held thus:

***“The combined reading of Sections 248 and 285(3) of the Constitution empowers the President of the Court of Appeal to make Rules and Regulations for the Practice and Procedure to be followed by the Court of Appeal, not only in its Appellate jurisdiction, while hearing appeals, but also in the exercise of its original jurisdiction under Section 239 of the Constitution. ....***

***The Practice Directions has a constitutional flavour. It is not ultra vires the powers of the President of the Court of Appeal. The Practice Directions constitute a rule for the guidance and regulation of election petition proceedings as established by the Constitution, and it must be obeyed strictly as they constitute condition precedent to the presentation and maintenance of an election petition....***

***The powers of the President of the Court of Appeal under Sections 284 and 285 of the Constitution is not limited to the Practice and Procedure of the Court of Appeal in its appellate jurisdiction, it does extend to the power to issue Practice Directions not only in the appellate jurisdiction of the Court of Appeal, but also in its original jurisdiction under Section 239 of the Constitution. The Petitioners’ counsel submitted that this Court lacks the competence to set aside the Practice Directions. It then follows that the argument is entirely misconceived and same is hereby discountenanced”<sup>14</sup>***

(Underlining ours)

It would appear that being proceedings in the original jurisdiction of the Court of Appeal under Section 239 of the 1999 Constitution (Presidential

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<sup>14</sup> per Fabiyi JCA at pages 17 – 18 of the Lead Judgment

Election Tribunal) the Practice Directions assumed a different character as one intended for the Court of Appeal in its original jurisdiction. It appears that the correctness of this decision is being tested in the Supreme Court at this stage. Given this new identity, the expected decision may likely be limited to the competence of the President of the Court of Appeal to issue the Practice Directions for application “*in the Court of Appeal in the exercise of its jurisdiction under Section 239 of the 1999 Constitution*”.

However, there are other instances where the Court of Appeal in its appellate jurisdiction was faced with the question of the validity of the Practice Directions as rules issued for use before the Election Petition Tribunal.

In **DR. MRS MARIAN NNEAMAKA COMFORT ALI & ANOR. VS SENATOR PATRICK ENEBELI OSAKWE & 2 ORS**<sup>15</sup>, the following was raised as Issue No. 2 before the Benin Division of the Court of Appeal:

***“Whether the Honourable President of the Court of Appeal was seized (sic) of the power to enact the Tribunal and Court Practice Directions 2007 published as S. 17 of 2007 (sic) preferred for use by the trial Tribunal in this petition, and whether the said Practice Directions 2007 is ultra vires the Honourable President of the Court of Appeal”***

This issue was however abandoned at the hearing and struck out. No reason appeared in the Judgment as given for this. Apparently, the abandonment was inspired by the decision in BUHARI VS INEC (SUPRA) which could easily be mistaken as having effectively resolved the legitimacy issue unless set aside by the Supreme Court. The abandonment of the issue is expensive because the issue is clearly different from the issue resolved in BUHARI VS INEC, although both issues are similar.

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<sup>15</sup> CA/B/EPT/261/2007 Unreported Judgment of the Court of Appeal, Benin Division delivered on 28<sup>th</sup> May, 2008

In **AJAO AJADI ADAMS VS BABATUNDE UMAR**<sup>16</sup>, the Appellant sought leave to raise a fresh issue in the nature of raising a proposed ground of appeal to wit:

***“1. The Learned trial Judges of the Tribunal erred in law in placing reliance on an unconstitutional and illegal instrument to wit, Election Tribunal and Court Practice Directions 2007, to hold that the Petitioner/Respondent’s Counter Affidavit and Written Address filed were filed out of time (sic) and therefore incompetent”***

The Court of Appeal, Ilorin Division, preferred to look at the issue from the standpoint of proper forum. In the Lead Judgment, Sankey JCA, held thus:

***“Learned Counsel for the Appellant/Applicant has argued that the Practice Directions is ultra vires the powers of the President of the Court of Appeal as conferred upon him by the 1999 Constitution and the Electoral Act, 2006. But the issue here is: whether the issue of the constitutionality or otherwise of the Practice Directions is a proper subject to be raised in this Court sitting as an Election Petition Appeals Tribunal. The Applicant has canvassed the affirmative answer to this question. However, I firmly believe he is wrong. The law and the authorities on the subject are very clear that an Election Tribunal is not the venue to raise and canvass matters which touch on the interpretation of the Constitution. Such should go to the High Court or the Federal High Court, as the case may be”***<sup>17</sup>.

After considering the provisions of Section 285 of the 1999 Constitution and Section 145 of the Electoral Act on jurisdiction of Election Tribunals, Section 246(1) of the 1999 Constitution on appeals to the Court of Appeal, and Section 251 of the 1999 Constitution on the jurisdiction of

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<sup>16</sup> CA/IL/EP/SH/11/2007, Unreported Judgment of the Court of Appeal, Ilorin Division delivered on 10<sup>th</sup> March, 2008

<sup>17</sup> At page 9

the Federal High Court, the Court of Appeal firmly resolved the issue of forum thus:

***“I am therefore of the considered view that if the Applicant seriously intends to canvass the issue of the constitutionality or otherwise of the Practice Directions, then he has come to the wrong forum to launch his offensive. In order to be heard, he must re-direct his energies to the Federal High Court which is properly vested with jurisdiction to hear and determine such issue as a Court of first instance. I am fortified in my view by the very recent decision of the Supreme Court in the case of Peter Obi V INEC (2007) 11 NWLR (PART 1046) 565”.***<sup>18</sup>

Note that the same issue of proper forum to challenge the constitutional validity of the Practice Directions arose in BUHARI VS INEC. Ironically, it was raised by Counsel to the Petitioner during his submission on the alleged unconstitutionality of the Practice Directions. Counsel had conceded that the Court of Appeal in its jurisdiction as Presidential Election Tribunal under Section 239 of the 1999 Constitution was hamstrung to invalidate the Practice Directions. It however appears that the Court dealt with that obiter and never considered the issue of forum on the merits. After holding that the President of the Court of Appeal had power to issue the Practice Directions for the Presidential Election Tribunal under Section 239 of the 1999 Constitution, the Court observed thus:

***“The Petitioner’s counsel submitted that this Court lacks the competence to set aside the Practice Directions. It then follows that the argument is entirely misconceived and same is hereby discountenanced”.***<sup>19</sup>

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<sup>18</sup> At page 14

<sup>19</sup> Per Fabiyi JCA at page 18 of the Lead Judgment

In **SULLIVAN I. CHIME & ANOR VS BARR OKEY EZEA & 4 ORS**<sup>20</sup>, the Enugu Division of the Court of Appeal was, inter alia, faced with the issue:

***“Whether the Election Tribunal and Court Practice Directions 2007 (Practice Direction) were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act 2006, the Federal High Court Civil Procedure Rules 2000 and the other sources of law relating to the hearing and determination of election petitions”***

The Court of Appeal relied on Section 285 (3) of the 1999 Constitution Sixth Schedule and Paragraph 50(d) of the First Schedule of the Electoral Act and held thus:

***“...the President of the Court of Appeal is vested with power under the 1999 Constitution to constitute the panel of Judges as chairman and members of the Election Petition Tribunal, with the Court of Appeal as its final appellate court in the Governorship and Legislative Houses Tribunal. He appoints the Chairman and members for the Presidential Election Petition Tribunal. The Court of Appeal has become the administrative headquarters for Election and Election related matters. By virtue of Section 10(2) of the Interpretation Act Cap. 92 Laws of the Federation –***

***“Any enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to the doing of it.***

***“In order to clothe the Chairman and members of the Election Petition Tribunal with jurisdiction over election petitions they must have all the necessary lubricant for the smooth running of the machinery of justice. Moreover, if the President of the***

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<sup>20</sup> CA/E/EPT/19/2008, Unreported Judgment of the Court of Appeal, Enugu Division delivered on 11<sup>th</sup> July, 2008

***Court of Appeal appoints the Chairman and members of an election petition panel is it not logical that he who pays the piper must dictate the tune? With the foregoing I rest my case and hold tenaciously to the opinion that the President of the Court of Appeal is the only competent and appropriate authority to issue out Practice Directions for Election Tribunals***<sup>21</sup>.

This represents the view relying on implied authority of the Constitution on the President of the Court of Appeal to issue the Practice Directions in his capacity as the convening authority of the Election Petition Tribunals. Probably the last has not been heard on the issue of legitimacy of the Practice Directions. The best way to resolve the issue with finality may be by commencement of a fresh action in the Federal High Court to determine the constitutionality of the Practice Directions. This may not be necessary though if the Supreme Court invokes its wide powers to pronounce on that beyond the scope of the appeal in BUHARI VS INEC.

### **2.3 THE FRONTLOADING REGIME**

The Practice Directions provides for the frontloading practice. Thus, all petitions to be presented before the Election Tribunal or the Court of Appeal in respect of Presidential Election Petition shall be accompanied by:

- (a) a list of all witnesses the petitioner intends to call in proof of the petition
- (b) Written statements on oath of the witnesses, and
- (c) Copies or list of every document to be relied on at the hearing<sup>22</sup>

Apparently, one essence of the frontloading regime is to reduce incidences of frivolous petitions. Of course a person who has no

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<sup>21</sup> Per Adekeye JCA at pages 52 to 53 of the Lead Judgment

<sup>22</sup> See Paragraph 1 (1) thereof

witnesses or documentary proofs to support a petition would shy away from filing a petition. But what of the fact that presently INEC, the Respondent-in-Chief to election petitions, legally has custody of the bulk of documentary evidence needed? What happens when it fails, refuses or neglects to make them available to the petitioner? Another essence of the regime is to curb delays in prosecuting petitions since petitions under the new dispensation would be half-disposed of if the witnesses and documentary evidence are before the Tribunal at the onset of hearing.

The implication of frontloading on evidence at hearing of the petition is that generally only frontloaded documents will be received in evidence at hearing. Paragraph 4(8) of the Practice Directions provides thus:

“Save with leave of Tribunal or Court after an applicant has shown exceptional circumstances, no document, plan, photograph or model shall be received in evidence at the hearing of a petition unless it has been filed along with the petition or reply in accordance with these Directions”

Note that the consequence of failure to frontload a petition is stated at Paragraph 1(2) of the Practice Directions. It states:

“a petition which fails to comply with sub-paragraph (1) of this paragraph shall not be accepted for filing by the Secretary”.

It would appear that in some cases, petitions that failed to comply were nonetheless accepted for filing by the secretary and filed. For instance see **CHIEF EMMANUEL OSITA OKEREKE VS ALHAJI UMARU MUSA YAR’ADUA**<sup>23</sup>. Abba-Aji JCA held thus:

***“The petition also fails to comply with the provisions of paragraph 1(1)(a)(b)(c) and (2) of the Election Tribunal & Court Practice Directions 2007, which provides as follows:***

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<sup>23</sup> CA/A/EP/4/2007, Unreported Ruling of the Presidential Election Petition Tribunal (Court of Appeal, Abuja Division) delivered on 20<sup>th</sup> August 2007

1. **All petitions to be presented before the Tribunal Court (sic) shall be accompanied by**
  - (a) **List of all the witnesses that the Petitioner intends to call in proof of the petition**
  - (b) **Written statement on oath of the Witnesses; and**
  - (c) **Copies or list of every document to be relied on at the hearing of the petition**
  
2. **A petition which fails to comply with sub-paragraph (1) of this paragraph shall not be accepted for filing by the Secretary.**

***In the instant petition, there was no list of witnesses that the Petitioner intends to call in proof of his petition and written statement of witnesses on oath and copies or list of documents to be relied on for the hearing of the petition were also not attached to the petition as required by the Court Practice Directions, 2007. Though it is my candid view that the Petitioner has the locus standi to present the petition by virtue of Section 144(1) (a) of the Electoral Act, 2006, nonetheless, the petition as presently constituted is not only defective but incurably defective and ought to be struck out. The preliminary objection therefore succeeds and it is hereby allowed. The petition dated and filed on the 21<sup>st</sup> May, 2007 is hereby struck out for being incompetent***<sup>24</sup>

Note that on appeal to the Supreme Court by the Petitioner, the apex Court upheld the finding of the Presidential Election Petition Tribunal and held that the provisions of the Practice Directions on frontloading must be complied with.<sup>25</sup>

The big question is whose duty is it to comply with Paragraph 1(1) of the Practice Directions. It appears that Paragraph 1(2) makes the Secretary

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<sup>24</sup> At pages 12 and 13 of the Lead Judgment

<sup>25</sup> See Unreported SC 246/2007 Chief Emmanuel Osita Okereke Vs Alhaji Umaru Musa Yar'Adua & Ors. delivered on 9<sup>th</sup> May, 2008

of the Election Tribunal the gatekeeper. The Secretary ought to refuse to accept the defective petition for filing pursuant to the Practice Directions. In so doing, the judicial time and resources expended on the defective petition before it was struck out would have been channeled to merits or otherwise of competently filed petitions. Parties would have also been saved the expended resources, time and energy. Although the Petitioner would have most likely commenced an action on denial of fair hearing against such refusal to accept the petition for filing, the directive of non-acceptance ought to be complied with and the system left to deal with any consequences.

However, having said so, it is also important to note that Chief Okereke's Case represents a rare instance of strict application of the provisions of the Practice Directions by the Court of Appeal. The case is more of an exception to the general position of the Court of Appeal in respect of the Practice Directions as will be shown from some of the randomly selected cases analyzed below.

In **CHIME VS EZE**<sup>26</sup>, the Appellants raised the issue whether the Election Tribunal was right in relying on the Practice Directions to reject the result sheets, which they sought to tender and rely upon at the trial of the petition, "thereby denying them their right to fair hearing".

Pursuant to paragraph 4(8) of the Practice Directions, the Tribunal had rejected result sheets which were not frontloaded by the Appellants at the time of filing their Reply. The Appellants contended that the provision of Paragraph 4(8) is in conflict with the provisions of the Electoral Act 2006 and the Evidence Act. The Court of Appeal correctly set out the aims of the frontloading regime in the Practice Directions. Adekeye JCA held in the Lead Judgment thus:

***"The general intention of the law is to encourage "frontloading" as a principle of civil procedure system so that a Defendant would have full knowledge and adequate notice of the cause of the other party so as to avoid delay in trials and fulfill the objective of speedy administration of***

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<sup>26</sup> Op. cit.

***justice. Any court or tribunal must realize now that Rules of procedure are important as they are handmaids of justice. They are aids to the attainment of justice to oil the wheels of justice to enable them roll and revolve smoothly to take justice to its logical conclusion and ultimate destination***<sup>27</sup>

This is a graphic summary of the intendment of Paragraph 1(1) and 4(8) of the Practice Directions. However this was how far the Court of Appeal went in upholding the aims of the Practice Directions. The Court ultimately held that the documents which were not frontloaded ought to have been accepted based on a community reading of Paragraph 4(8) of the Practice Directions and Paragraph 43(1) and (2) of the First Schedule to the Electoral Act. Paragraph 4(8) empowers the Tribunal to grant a party leave in exceptional circumstances to tender documents that were not frontloaded. Paragraph 43(1) (2) empowers the Tribunal to enlarge time for taking steps as the justice of the case demands. It was held that the Tribunal wrongly refused to accept the documents in evidence.

Also in **MR. SULLIVAN I. CHIME VS REV. DR. OSCAR EGWUONWU & ORS**<sup>28</sup>, the Enugu Division was faced with a similar situation on rejection of documents which were not frontloaded. The Appellants argued that the Tribunal wrongly elevated the Practice Directions above the relevant substantive Rules of Court and judicial authorities in rejecting documents which were not frontloaded. Reliance was placed on paragraph 2 of the Practice Directions, Section 151 of the Electoral Act 2006, Paragraph 12(1) of the First Schedule to the Electoral Act. The Appellants called in aid the following decided cases:

- (a) **NIGERIAN AIRPORT AUTHORITY VS CHIEF DIKE OKORO**<sup>29</sup>
- (b) **UNIVERSITY OF LAGOS & ANOR. VS M. I. AIGORO**<sup>30</sup>

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<sup>27</sup> At page 62 of the Lead Judgment

<sup>28</sup> CA/E/EPT/18/2008, Unreported Judgment of the Court of Appeal, Enugu Division, delivered on 11<sup>th</sup> July, 2008

<sup>29</sup> (1995) 7 SCNJ 1 at 13

<sup>30</sup> supra

- (c) **AFRIBANK (NIG) PLC VS AKWARA**<sup>31</sup>
- (d) **HARUNA VS MODIBBO**<sup>32</sup>
- (e) **ATIKU ABUBAKAR VS YAR'ADUA**<sup>33</sup>

They argued that the rejection of the documents, which were results sheets, occasioned a miscarriage of justice as the absence of the documents weighed heavily on the minds of the Judges in deciding the petition in favour of the Respondents.

The Court of Appeal identified the issue before the Court as “whether the provisions of the Practice Directions made to aid Rules of court is (sic) to override the provisions of the relevant substantive law, rules of court or judicial authorities”. Paragraph 2 of the Practice Directions provides thus:

“The respondent’s Reply shall be a statement in summary form and shall be supported by copies of documentary evidence, list of witnesses and written statement on oath.”

The Court considered this alongside Section 151 of the Electoral Act 2006, Paragraph 12(1) of the First Schedule to the Electoral Act. Also considered was Sections 6, 91(1) and 111(1) of the Evidence Act and Paragraph 4(1) of the Practice Directions which provides thus:

“Subject to any statutory provision or any provision of these paragraphs relating to evidence any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses in open court.”

The Court noted that “neither the Electoral Act 2006 including the Schedule made thereto, nor the Evidence Act made any provision to the

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<sup>31</sup> (2006) 5 NWLR (PART 974) 619 at 654

<sup>32</sup> (2004) 16 NWLR (PART 900) 487

<sup>33</sup> SC/288/2008, Unreported Judgment of the Supreme Court delivered on 25<sup>th</sup> January, 2008

effect that if a document is not “frontloaded” that same will not be admitted in evidence.”<sup>34</sup>

On the whole, the Court held thus on the rejected documents:

***“Therefore the learned trial Tribunal fell into grave error when it rejected the documents tendered by the appellant in support of his case on the ground that the documents were not front-loaded as required by the Practice Directions. This is more so when the documents which the appellant sought to be tendered, are result sheets used at the governorship election in Enugu State which are duly pleaded by the appellant and which are very relevant and germane to the determination of the petition”.***<sup>35</sup>

In **BARRISTER SULLIVAN CHIME & ANOR VS HON DUBEM ONYIA & 2,798 ORS**<sup>36</sup> the Court of Appeal considered the frontloading provision of Paragraph 2 of the Practice Direction against Paragraph 12(1) of the First Schedule to the Electoral Act. The Court held thus:

***“The provisions of the rule made under the Electoral Act 2006 do not require a Respondent to “front load” copies of documents he intends to rely upon. Also the said paragraph 2 of the Practice Direction does not provide any sanction for failure of a Respondent to front load his pleaded documents. The mere use of the word “shall” without any specific consequential sanction, does not of itself import compulsion or sanction, does not import compulsion or sanction and clearly not such a serious and severe sanction as rendering the reply incompetent”.***<sup>37</sup>

(underlining ours)

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<sup>34</sup> Per Jega JCA at page 42 of the Lead Judgment

<sup>35</sup> Ibid at page 43

<sup>36</sup> CA/E/EPT/14/2008, Unreported Judgment of the Court of Appeal, Enugu Division delivered on 11<sup>th</sup> July, 2008

<sup>37</sup> Op cit per Bada JCA at pages 30 and 31

The Court therefore resolved the issue in favour of the Appellants and held thus:

***“The trial Tribunal in my view has dealt an indelible blow to justice in the hearing of the Petition by striking out the Appellant’s reply for non-compliance with paragraph 2 of the Practice Direction 2007, and this had adversely affected the decision of the trial Tribunal”.***<sup>38</sup>

But note that the issue of absence of sanctions as grounds for permissiveness of a provision of law or procedure may not supported by case law. At least it is inconsistent with the Supreme Court’s decision in **UGWU & ANOR VS ARARUME & ANOR**<sup>39</sup>, where the issue of the legal effect of Section 34 of the Electoral Act, which foists a duty on political party and INEC in substituting a candidate without prescribing sanctions was considered. Niki Tobi JSC said:

***“The most important point here is the absence of a particular sanction in a particular section, with the greatest respect, cannot be legal basis for contending that the section is declaratory and not justiciable. If a section of a statute contains the mandatory “shall” and it is so construed by the court, then the consequence of not complying with the provision follows automatically..... I know of no canon of statutory interpretation which foists on a draftsman a drafting duty to provide for sanction in every statute. That is quite a new one to me and I am not prepared to learn it. If that is what Craies on Legislation is saying, I will never agree with him. No, not even Maxwell, the greatest world authority on Interpretation of Statutes....”***<sup>40</sup>

On the same issue Onnoghen JSC said:

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<sup>38</sup> Ibid at page 34

<sup>39</sup> (2007) 12 NWLR (PART 1048) 365

<sup>40</sup> See page 449 – 450 paragraphs H - E

***“This court has been urged to hold that the word “shall” as used in section 34(2) of the Electoral Act, 2006 is directory and not mandatory particularly as there is no sanction or penalty for failure to comply. I do not agree.***

***“Whilst it is settled law that the word “shall” when used in a statute may denote permissible or directory conduct and not mandatory, depending on the context in which it is used, I hold the view that in the instant case, the word “shall” is mandatory as that appears to be the intention of the legislature in enacting the whole of section 34. That view is strengthened by the provisions of subsection 3 of section 34 to the effect that there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of section 34 except in the case of the death of the original candidate. That amounts to a complete prohibition.***

***“It is erroneous to submit that because a law prohibiting a particular conduct fails to or does not provide for any sanction or penalty for the breach of the prohibited conduct, it is directory not mandatory, or to put it bluntly should not be obeyed, or the prohibited conduct should be taken as thereby permitted by law, is unacceptable particularly as subsection (3) of section 34 expressly provides that any substitution that is not made in accordance with subsection 1 of section 34 is invalid or ineffective. The sooner we learn that laws are not made for the fun of it but for the betterment of the society if obeyed, the better for this nation which is a nation of constitutional democracy under the rule of law, where the law is supreme to all and sundry.”<sup>41</sup>***

One is tempted to believe that if the Supreme Court is faced with an interpretation of Paragraph 2 of the Practice Directions 2007, it would most likely view it holistically and interpret it progressively as it did section 34(2) of the Electoral Act. The Practice Directions like Section 34

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<sup>41</sup> See page 486, paragraphs A - F

of the Electoral Act 2006 came out with the clear intention to curb a menace and to allow the menace continue merely because no sanction was provided sounds rather retrogressive if not defeating. In any event, the Supreme Court gave a piece of its mind on the Practice Directions 2007 in **OKEREKE VS YAR'ADUA**. Unfortunately, the apex Court will never have to directly review **CHIME VS ONYIA** although there is hope that it may later be cited as persuasive authority before the Supreme Court someday.

The governorship petition of **OLUSEGUN ADEBAYO ONI VS DR. JOHN OLUKAYODE FAYEMI & 16 ORS**<sup>42</sup>, represents another face of the frontloading regime. The Appellant sought enlargement of time to file a bundle of documents which he pleaded in his Reply. He gave reason for his tardiness in frontloading the documents as required by the Practice Directions. The reason in his affidavit was that copies initially available to him at the time of filing his Reply were not legible. He therefore approached the 2<sup>nd</sup> Respondent, INEC, for clearer certified true copies of the documents, which he only received when he had filed his Reply. The Respondents did not contest these facts by counter-affidavit, probably feeling fortified by the fact that it was an issue of law, but of course not realizing that what amounts to exceptional circumstance is at least mixed law and fact. The Tribunal refused the application on grounds that no exceptional circumstance was disclosed. The issue raised by the Appellant was whether his right to fair hearing was not breached by the Tribunal. The Court of Appeal per Sankey JCA held that the Tribunal was wrong. According to the Learned Justice:

***“If this is not a denial of the right to a fair hearing, then nothing else is. Consequently, based on the facts before the Tribunal as presented in the un-controverted affidavit evidence, (and without prejudice to our findings in respect of issue No. two), I answer this issue in the affirmative in favour of the Appellant...”***<sup>43</sup>

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<sup>42</sup> CA/IL/EPT/GOV/1/2007, Unreported Judgment of Court of Appeal, Ilorin Division, delivered on 8<sup>th</sup> November, 2007

<sup>43</sup> Ibid, at page 15

Note that the requirement for establishment of exceptional circumstances is contained at Paragraph 4(8) of the Practice Directions, which requires only frontloaded documents should be received in evidence during hearing, unless exceptional circumstance be shown why a non-frontloaded document should be accepted. Assuming the facts of tardiness deposed to in the affidavit were challenged, was the Tribunal right in requiring the standard of exceptional circumstance for the purpose of the application, 'before trial'? This forms the issue under Issue No. 2, which will be discussed below under the controversial issue of enlargement of time.

On the whole, it is doubtful if the decisions of the Court of Appeal in the above cases have not effectively weakened the Practice Directions. This is not the same as saying that the decisions are not well-founded in law following the cases upon which they are decided. The concern would however remain whether the aims of the Practice Directions can be achieved in a beaten and weak state. The decisions of the Court of Appeal virtually rendered the Practice Directions a toothless bulldog so long as frontloading is in issue. It may be difficult to reconcile the relaxed attitude adopted in these decisions with the decision of the Court of Appeal (upheld by the Supreme Court) in **OKEREKE VS YAR'ADUA** striking out the petition for being "incurably defective" because it was not frontloaded.

#### **2.4 THE VEXED ISSUE OF ENLARGEMENT OF TIME TO APPLY FOR ISSUANCE OF PRE-HEARING NOTICE**

Another issue that came up before several Tribunals and the Court of Appeal was the issue of enlargement of time to apply for issuance of pre-hearing notice under the Practice Directions. It may be necessary to set out the relevant provisions of the Practice Directions for assessment of their judicial application. Paragraph 3(1) of the Practice Directions provides thus:

"Within 7 days after the filing and service of the Petitioner's Reply on the Respondent, or 7 days after the filing and service of the Respondent's Reply, whichever is the case, the Petitioner shall apply for the issuance of pre-hearing notice as in Form TF 007."

Paragraph 3(3) of the Practice Directions provides thus:

“The Respondent may bring the application in accordance with sub-paragraph (1) above where the Petitioner fails to do so, or by motion which shall be served on the Petitioner and returnable in 3 clear days, apply for an order to dismiss the petition”

Paragraph 3(4) provides thus:

“Where the Petitioner and the Respondent fail to bring an application under this paragraph, the Tribunal or Court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained”

By Paragraph 3(5) of the Practice Directions:

“Dismissal of a petition pursuant to sub-paragraphs (3) and (4) above is final and accordingly the Tribunal or Court shall be functus officio”

The decisions of the Court of Appeal on the consequence of failure to apply for issuance of pre-hearing notice are as divergent as the Divisions of the Court of Appeal. This is one issue upon which the Court of Appeal churned out conflicting decisions. The Court of Appeal is one Court<sup>44</sup> although under its enabling Act organized into divisions for administrative convenience and easier access to appellants in all parts of the country. By the doctrine of Stare Decisis or judicial precedents, which is used to maintain consistence in judicial decisions, the Court of Appeal is generally bound to follow its decisions. Regrettably, different divisions of the Court of Appeal saw the provisions of the Practice Directions from different prisms. The ugly situation created is such that what was sanctioned in one division was treated with kid gloves in another division.

The development is unhealthy for the adjudicative system. The fate of litigants at the Court of Appeal varied according to the ‘good-luck’ or ‘ill-luck’ of their appeal falling under a division that applied the Practice Directions strictly or permissively as the case may be. What was

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<sup>44</sup> See Section 237(1) of the 1999 Constitution

considered ‘murder’ in procedure in some divisions in one part of the country was ironically given a pat on the back in some divisions in the another part of the country. One feels there is need for uniformity in the decisions of the Court of Appeal so as to maintain some form of certainty in adjudication of electoral disputes.

Unfortunately, there is no further right of appeal to Supreme Court in respect of the elections adjudicated at the Court of Appeal in its appellate jurisdiction. So whatever the conflicts that exist in the decisions would have to be cleared by the Court of Appeal itself as the opportunity arises in future.

The issue of enlargement of time to apply for issuance of pre-hearing notice looms large in the conflicts.

The case of **ALHAJI USMAN SULE RIRUWAN & 2 ORS VS MALLAM IBRAHIM SHEKARAU**<sup>45</sup> was from the governorship election in Kano State. The Kaduna Division of the Court of Appeal was faced with the issue whether the Tribunal was right in dismissing the Appellants’ petition despite the pendency of their application for extension of time within which to apply for issuance of Pre-Hearing Notice. The motion was not heard. The Tribunal dismissed the petition.

The Court of Appeal held that by virtue of Paragraph 3(4) of the Practice Directions, which provides that if parties fail to apply for pre-hearing notice within time, “no application for extension of time to take that step shall be filed or entertained”, the Tribunal lacked jurisdiction to entertain the application for extension of time. The Tribunal was right to refuse to entertain the application and the allegation of denial of fair hearing would fail.

Also in **USMAN ALI MAITSIDAU & ANOR VS ENGR HAMISU IBRAHIM CHIDARI**<sup>46</sup>, the Kaduna Division was faced with a similar situation. It was argued that the Tribunal did not apply the rule that when

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<sup>45</sup> CA/K/EP/GOV/10/2007, Unreported decision of the Court of Appeal, Kaduna Division, delivered on 10<sup>th</sup> April, 2008

<sup>46</sup> CA/ K/EP/SHA/13/2007, Unreported Judgment of the Court of Appeal, Kaduna Division, delivered

there are two applications, the one trying to kill proceedings and the other trying to save proceedings, the Court should first take the one aiming to save the suit. In strictly applying the letters of the Practice Directions, the Court held per Ba'aba JCA thus:

***“The submission of the learned counsel for the appellants relying on the authorities cited that a court faced with two applications, one to kill and one to save, should first give preference to the application to save and take it first before taking the one to kill, is sound and well founded but that only applies in ordinary civil cases as rightly submitted in my view by the learned counsel for the respondents”<sup>47</sup>.***

The Court then went ahead to hold that non-compliance with paragraph 3(1) of the Practice Directions was fatal to the petition and the Tribunal was right to dismiss it and disregard the incompetent motion for extension of time.

Relying on the decision of the Supreme Court in the case of **N.A. WILLIAMS & ORS VS HOPE RISING VOLUNTARY FUNDS SOCIETY**<sup>48</sup> the Court of Appeal held thus:

***“Rules of Court are meant to be obeyed and no favours should be shown for not obeying same. It is clear from the provisions of paragraph 3(1) of the Election Tribunal and Court Practice Directions, 2007 that the provisions of paragraph 3(1) must be complied with and cannot be circumvented. See TEJUOSHO V. OMOJOWOGBE (1998) 7 NWLR (PART 559) 628 at 634”<sup>49</sup>***

In **GARBA ADO & ANOR VS A. A. SULE LOKON MEKARA & 5 ORS**<sup>50</sup>, the Court of Appeal set out to interpret the provisions of paragraphs 3(1) – (4) of the Practice Directions 2007. The Court held

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<sup>47</sup> Ibid at page 17 of the Lead Judgment

<sup>48</sup> (1982) 1 -2 S. C. 145 at 152 - 153

<sup>49</sup> Op cit at page 20

<sup>50</sup> CA/K/EP/NA/14/ 07, Unreported Judgment of the Court of Appeal Kaduna Division, delivered on 31<sup>st</sup> March, 2008

that a letter written by counsel to the Secretary of the Tribunal cannot amount to an application as in Form TF 007 stated by the Practice Directions. Upholding the decision of the Tribunal dismissing the petition, the Court held thus:

***“In my opinion, it is crystal clear that the appellants in this appeal for reasons best known to them failed or neglected to comply with the provisions of paragraph 3(1) of the Election Petition Tribunal and Court Practice Directions, 2007 and since the application of the said provisions cannot be circumvented, there is nothing left as the Tribunal has no other option than to dismiss the petition in accordance with the provisions of paragraph 3(4) of the Election Tribunal and Court Practice Directions 2007”.<sup>51</sup>***

But in **DR (MRS) MARIAN NNEAMAKA COMFORT ALI & ANOR VS SENATOR PATRICK ENEBILI OSAKWE & 2 ORS<sup>52</sup>**, a similar issue arose before the Benin Division of the Court of Appeal. The Governorship and Legislative Houses Election Tribunal sitting at Asaba granted the Respondents’ motion to dismiss the Appellants’ petition and refused the Appellants’ motion for enlargement of time within which they, as petitioners, may apply for the issuance of pre-hearing notice. The Tribunal held that the provision of the First Schedule to the Electoral Act which allows enlargement of time was inapplicable. The issue was submitted to the Court of Appeal in this form:

“Whether the Honourable Tribunal breached the fundamental principle of FAIR HEARING when it shut-out the petitioners/Appellants depriving them of the opportunity of having their petition heard on the merit on the ground that the petitioners or their failed to apply for the issuance of pre-hearing notice within the time prescribed by the said Practice Directions 2007, and then proceeded to dismiss the petition”

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<sup>51</sup> Ibid at page 24

<sup>52</sup> Supra

Apart from difference in grammatical construction, the above issue is not different from the ones raised before the Kaduna Division in **RIRUWAN & 2 ORS VS SHEKARAU, MAITSIDAU & ANOR VS CHIDARI** and **ADO & ANOR VS MEKARA & 5 ORS**. However the Benin Division clearly saw the issue from a radically different perspective. Having found that the Appellants defaulted in applying for issuance of Pre-Hearing Notice, the Court examined the provisions of the First Schedule and cases including **UNILAG VS AIGORO** to hold that the provision of the Practice Direction excluding enlargement of time cannot stand in the face of the provision of the First Schedule to the Electoral Act which allows enlargement of time. The Tribunal was therefore wrong in dismissing the petition.

It is instructive that Respondents drew the attention of the Court to the case of **OKEREKE VS YAR'ADUA** where the Supreme Court upheld that Judgment of the Abuja Division of the Court of Appeal (Presidential Election Petition Tribunal) in which the frontloading provisions of the Practice Directions were relied upon to dismiss the Appellant's petition. The Court of Appeal however tried to distinguish the Supreme Court's decision.

In the lead Judgment, Ogunwumiju JCA observed thus on that Supreme Court authority:

*“Our attention has been drawn to the judgment of the Supreme Court in SC/246/2007 (unreported) delivered on 9/5/08 – Chief Emmanuel Osita Okereke v Alh Umaru Musa Yar’Adua & 33 Ors. The question put to the Supreme Court in that case was whether or not the Court of Appeal had the jurisdiction to determine preliminary objection of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent at the stage and time it did. The objection was determine was determined (sic) when time to apply for pre hearing notice had lapsed. The Petitioner/Appellant had argued that since the court of appeal was sitting as the presidential election Tribunal and not a pre-hearing session (sic) it had no jurisdiction to hear the preliminary objections of the Respondent even though the Justices of the Supreme Court affirmed that the Practice Direction provides that there can be no extension of time to apply for pre hearing session,*

*the question put to us here was not the question put to the Supreme Court. We are here to determine whether or not the tribunal was right to base its decision not to grant extension of time on the superiority of the Practice Directions over the Electoral Act. A case is authority for the facts and law which it decided. The authority referred to us has not been of help as the facts and law considered are quite distinguishable from the facts and law in this case.*<sup>53</sup>

In his contributory Judgment, Ibeyeye OFR, JCA, also distinguished **OKEREKE VS YAR'ADUA**. In the words of the Honourable Justice:

*"I am not unaware of the recent decision of the Supreme Court in the case of EMMANUEL OSITA OKEREKE V. ALHAJI UMARU MUSA YAR'ADUA & ORS. SC/246/07 (Unreported) delivered on 9/5/08 where it held inter alia, that practice directions must be obeyed. I am of the view, with due regard to the opinion of the Supreme Court, that since the Tribunal in point has not yet gone into hearing of the petition it should have leaned, in the interest of justice, to accommodate the application before it in order to hear the petition on the merit and not shut out the petitioner out and out by dismissing the application as it did."*<sup>54</sup>

The Court of Appeal Benin Division thus did not apply the provisions of the Practice Directions as strictly as the Supreme Court indicated in its treatment of the petition in **OKEREKE VS YAR'ADUA** that it should be applied. It rather distinguished the decision.

In **CHIEF UKWADINAMOR CLEMENT UCHECHUKWU VS JOAN ONYEMACHI BIBELONWU & 10 ORS**<sup>55</sup>, the Benin Division of the Court of Appeal was faced with a similar issue on enlargement of time within which to apply for issuance of pre-hearing notice. Realizing he was out of time, the Appellant on 25<sup>th</sup> June, 2007, filed a Motion on Notice praying

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<sup>53</sup> Supra at page 28 of the Lead Judgment.

<sup>54</sup> See page 4 of the Judgment

<sup>55</sup> CA/B/EPT/239/2007, Unreported Judgment of the Court of Appeal, Benin Division, delivered on 17<sup>th</sup> July, 2008

the Tribunal, inter alia, for extension of time within which to apply for the issuance of pre-hearing notice as in FORM TF 007.

On 26<sup>th</sup> June, 2007, two sets of Respondents filed two separate applications to dismiss the petition same having been abandoned by the Appellants. The Tribunal took the application for extension of time and dismissed the petition as “abandoned petition” having been deemed by the Practice Directions 2007 as an abandoned one since parties failed to apply for issuance of pre-hearing notice in compliance with Paragraph 3(1) of the Practice Directions.

The Court of Appeal did not think such undue weight should be attached to Paragraph 1(4) of the Practice Directions. It was held that if the Tribunal had “taken more pains in the search for justice” it would have relied on Paragraph 43 of the First Schedule to the Electoral Act to grant enlargement of time. The Court held:

***“I am of the view that excessive weight was given to the provisions of paragraphs 3(1), (3) and (4) of the Practice Directions 2007, and that substantial justice was sacrificed while technicality was enthroned and that the Appellant was not given the opportunity to ventilate his grievances”.<sup>56</sup>***

Here again the Benin Division of the Court of Appeal failed to be persuaded that the direction of the President of the Court of Appeal on “abandoned petition” should stand.

But the Ibadan Division would prefer a strict approach to the Practice Directions to the permissive approach from Benin City. At least there is one case where their Lordships sitting in Ibadan demonstrated this. In the case of **TONY AYEBUSUWA VS INDEPENDENT NATIONAL ELECTORAL COMMISSION & 15 ORS<sup>57</sup>**, the Appellant’s petition was dismissed by the Tribunal sitting in Abeokuta, Ogun State as an abandoned petition pursuant to Paragraph 3(4) of the Practice

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<sup>56</sup> Ibid per Nwosu-Iheme JCA at page 15 of the Lead Judgment

<sup>57</sup> CA/I/EPT/HA/12/07, Unreported Judgment of the Court of Appeal, Ibadan Division, delivered on 3<sup>rd</sup> July, 2008

Directions. He failed to apply for the issuance of Pre-Hearing Notice. The Appellant contested that on appeal that the Respondents only made an oral application for dismissal. Paragraph 3(3) of the Practice Directions requires a Respondent, where the Appellant did not apply for Pre-Hearing Notice, to either apply for the Notice or bring an application on notice for dismissal of petition. No such application was filed or served. But the Court reasoned that the Respondents merely called attention to the Tribunal's power to dismiss under Paragraph 3(4) and not necessarily the application contemplated by Paragraph 3(3). The Court held thus:

***“From the proceedings the application was made under paragraph 3(4) for non-compliance with paragraph 3(3) that would require an application for dismissal to be made on notice; since the application was under paragraph 3(4) under its powers therein the Tribunal could at its discretion dismiss the petition. The Tribunal could do so whether applied for or not, it could suo motu dismiss the petition for non-compliance with paragraph 3(1) of the Practice Directions, therefore there was no obligation to act on the application of any of the respondents as rightly argued by the learned counsel to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> – 15<sup>th</sup> Respondents.”<sup>58</sup>***

Accordingly, the dismissal of the petition by the Tribunal as abandoned petition was held by the Court of Appeal to be in order.

See also the case of **SARAFI O. HASSAN VS INDEPENDENT NATIONAL ELECTORAL COMMISSION & 14 ORS**<sup>59</sup>, where a similar issue arose before the Ibadan Division.

But the strict approach of the Ibadan Division does not mean that it was only the Benin Division that felt that the direction was too technical to be strictly applied or at least in conflict with the First Schedule. The Benin

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<sup>58</sup> Ibid, at page 22, per Uwa JCA

<sup>59</sup> CA/I/EPT/HA/11/2007, Unreported Ruling of the Court of Appeal, Ibadan Division, delivered on 10<sup>th</sup> July, 2008

Division has support from the Calabar Division in the conflict regime, even if under a clearer circumstance.

In **VICTOR DAVID EDON & ANOR VS BARR JACK UDOTA & 140 ORS<sup>60</sup>**, it was an issue on extension of time albeit this time not to apply for issuance of Pre-Hearing Notice. The Appellant brought a motion in the Court of Appeal for extension of time within which to file Appellant's Brief of Argument. The Respondents argued that time could not be extended as the Practice Directions No. 2 of 2007<sup>61</sup> does not allow extension of time for doing of any act, and the Court of Appeal Rules does not apply since the Practice Directions has already covered election matters. The Respondents relied on **HARUNA ABUBAKAR VS INDEPENDENT NATIONAL ELECTORAL COMMISSION<sup>62</sup>**.

The Court of Appeal held that by virtue of Order 19 Rule 7 of the Court of Appeal Rules 2007, the Practice Directions No. 2 of 2007 was an integral part of the Court of Appeal Rules. Since the Practice Directions No. 2 of 2007 did not address the issue of extension of time to file Briefs of Argument resort must be had to the Court of Appeal Rules which appropriately deals with the issue. Under Order 7 Rule 10(1) of the Court of Appeal Rules, the Court of Appeal could enlarge time for doing of an act. Also Paragraph 43 of the First Schedule allows the Court of Appeal to extend time.

As an indication of the Court's adoption of a permissive approach to election practice directions, it rejected the contention of the Respondents that the word "shall" in Paragraph 5 of the Practice Direction No. 2 of 2007 connotes a mandatory obligation. The said paragraph 5 provides thus:

***"Within a period of 10 days after the service of the record of proceedings, the Appellant shall file in the Court, and serve***

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<sup>60</sup> CA/C/140/2007, Unreported Judgment of the Court of Appeal, Calabar Division, delivered on 20<sup>th</sup> November, 2007

<sup>61</sup> Practice Direction No 2 of 2007 was issued for election petition appeals in the Court of Appeal

<sup>62</sup> (2004) 1 NWLR (PART 854) 207 at 240

***all the Respondents written brief, being a succinct statement of his argument in the appeal”***

The word “shall” was held to be directory and not mandatory as argued by the Respondents. Time was accordingly extended to accommodate the Appellant’s Brief of Argument out of time.

But in **OLUSEGUN ADEBAYO ONI VS DR. JOHN OLUKAYODE FAYEMI & 16 ORS**<sup>63</sup>, it was an issue on enlargement of time within which the Appellant could frontload any evidence. The Ilorin Division of the Court of Appeal has a different reason from the cases from Benin Division for setting aside the ruling of the Tribunal refusing the Appellant’s application for enlargement of time to frontload a bundle of documents which he failed to frontload at the time of filing his Reply. The Tribunal held that the Appellant failed to show exceptional circumstances to support the discretion under Paragraph 4(8) of the Practice Directions.

The Court of Appeal accepted the Appellant’s contention that Paragraph 4(8) of the Practice Directions was not applicable and so his type of application did not require exceptional circumstance. The contention was the Paragraph 4(8) relates to tendering of non-frontloaded documents during trial, while the application was for extension of time to frontload documents at a stage when trial had not commenced. It was submitted that the relevant rule was Paragraph 43 of the First Schedule. Paragraph 43 of the First Schedule allows for extension of time “as the justice of the case demands”. Time can be extended even if an application was brought after the appointed time had expired.

The Court of Appeal considered whether the Tribunal rightly proceeded on Paragraph 4(8) of the Practice Directions. The Court concluded that the Tribunal failed to exercise its discretion in accordance with the appropriate provision of the law governing the application and thereby exercised its discretion on wrong principles of law resulting in a miscarriage of justice.<sup>64</sup>

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<sup>63</sup> Op cit

<sup>64</sup> See page 23 of the Lead Judgment

See also **MR. DELE TAIWO OLOLADE VS INDEPENDENT NATIONAL ELECTORAL COMMISSION & 11 ORS**<sup>65</sup>, where the Court of Appeal, Ibadan Division, stated that the provision of Paragraph 3(4) of the Practice Directions is inferior to the provision of Paragraph 43 of the First Schedule to the Electoral Act, but sustained the dismissal of the petition under Paragraph 3(4) of the Practice Directions. Muhammad JCA gave the reason thus:

***“Let me outrightly stress that the tribunal’s order striking out Appellant’s application for extension of time to apply for the issuance of the pre-hearing notice for want of prosecution has not been appealed against. Rightly or wrongly, the order subsists and remains binding...”***

***It follows from these facts that at the time Appellant’s Petition was dismissed under paragraph 3(4) not only had time expired within which parties to the Petition by virtue of subparagraphs (1) and (3) of paragraph 3 could apply for the issuance of a pre-hearing notice but that the tribunal had not been prayed by the Appellant, as allowed under paragraph 43 of the 1<sup>st</sup> Schedule to the Electoral Act and Order 23 Rule 3(1) and (2) of the Federal High Court (Civil Procedure) Rules, for extension of time to allow Appellant comply with the provision of paragraph 3(1) of the Practice Direction. It is only in cases where a Petitioner prays the tribunal for extention (sic) of time to take a necessary step and the tribunal without considering the application on its merit or having found the application meritorious refuses Petitioner’s prayer under the provision of the Practice Direction inspite of the overriding provisions of the superior procedure rules that bind the tribunal that the tribunal’s preference for inferior Practice Direction will be overturned on appeal as being perverse.***

***In the instant case where the Appellant had not applied for extention (sic) of time as allowed under the Rules of Practice***

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<sup>65</sup> CA/I/EPT/HA/13/07, Unreported Court of Appeal Judgment, Ibadan Division, delivered on 10<sup>th</sup> July, 2008

***of the tribunal, the tribunal is perfectly right to have given the words which made up paragraph 3(4) of the Practice Direction their literal meaning and applied same to dismiss the petition as having been abandoned.***<sup>66</sup>

If the reasoning of the Ibadan Division is to be followed, the following points emerge-

- The lines of cases where some divisions of the Court of Appeal upheld the refusal by Tribunals to extend time in the face of application under Paragraph 43 of the First Schedule were wrongly decided
- All cases where the Court of Appeal upheld the superiority of Paragraph 43 of the First Schedule over the Practice Directions and extended time were rightly decided
- It is only in cases where a person who is out of time under the Practice Directions invokes the superior provisions of the First Schedule that the Tribunal could extend time
- As a corollary to the above, where a person merely applies for extension of time under the Practice Directions, without recourse to Paragraph 43 of the First Schedule, the application is incompetent as the words of Paragraph 3(4) of the Practice Directions would be applied to refuse the application

## **2.5 BURDEN OF PROOF UNDER THE FRONTLOADING REGIME**

A controversy over the state of burden of proof under the Practice Directions was stirred up before some Tribunals and subsequently the Court of Appeal. This, like the issues of frontloading and enlargement of time once more put the Practice Directions on collision course with substantive law, Rules of Court and judicial decisions.

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<sup>66</sup> At pages 22 and 23

In **CHIME VS EZE**<sup>67</sup>, some of the issues submitted to the Court of Appeal, Enugu Division from the Governorship/Legislative Houses Election Petition Tribunal sitting at Enugu, were as follows:

- Whether the learned trial judges were right in holding that under the Election Tribunal and Court Practice Directions 2007 (Practice Directions) the burden of proving that there was an election and that voting occurred lay with the Respondents to the petition
- Whether the learned trial judges were right in holding that the Practice Directions have displaced the principles enunciated in *Ayogu v. Nnamani* (2006) 8 NWLR Pt. 981 Pg. 160 at Pg. 187; *Nnaji v. Agbo* (2006) 2 EPR Pg. 867 at Pg. 860 as well as the other judicial authorities on the nature of quantum and quality of evidence required of a Petitioner to prove allegation of non-voting in an election.
- Whether the learned trial judges were right in holding that the onus of proving that there was an election and that voting occurred had shifted to the Respondents in the petition.

It was thought that the effect of Paragraph 2 of the Practice Directions which requires the Respondent to frontload documentary evidence he would rely upon with his Reply has placed some novel burden of proof on the Respondent (of which INEC) is the chief, to prove conduct of election.

The part of the Record containing the finding of the Tribunal on this point read as follows:

***“It is to be noted that under the Practice Directions Paragraph 2, a Respondent is mandatorily required to front-load the copies of documentary evidence that he is relying upon. Thus where a Petitioner alleges that there were no elections in most arrears, it is incumbent under the present novel procedure for the Respondents to put their cards on the table***

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<sup>67</sup> supra

***face up to show their positive averment that there was election. Thus the cases of Ayogu v. Nnamani (2006) 2 NWLR Pt. 981 Pg. 160 at 194 and Nnaji v. Agbo (2006) 2 EPR 867 at 890-891 where they state that a Petitioner should call witnesses from each polling booth and/or tender the voters register that they could vote cannot stand under the new dispensation. Once the Petitioner has been able to discharge the evidential burden on him by credible evidence which is believed, the onus shifts to the Respondent to rebut.***

***INEC who refused to front load its documentary evidence will most likely not be ready to make electoral materials in its custody available. To our mind the old practice has given way to the new one. So in this case, the Respondents have failed to give evidence in rebuttal (see Section 137(2) of the Evidence Act) since the onus has shifted to them. See also Adedeji v. Kolawole (2006) 2 EPR 70 at Pg. 87 where the Court of Appeal held that the burden of proof shifts to prove same. In the instant case, the Respondents are to rebut since the Petitioners have done so much in proof of their averment. The Respondents have failed to adduce evidence in rebuttal***.<sup>68</sup> (Underling ours)

The Court of Appeal faulted the position of the Tribunal that the frontloading provisions of the Practice Directions could change or had changed in any way the existing law on incidences of burden of proof in the Evidence Act or in decided cases. The Court held that the only novel thing about the Practice Directions is that it was promulgated with the aim of hearing, determining and attaining justice in election matters with ease, certainty and dispatch. It was held that the provisions of the Evidence Act on burden of proof have not been affected by the Practice Directions. The Court further held that since the Practice Directions could not alter judicial decisions, the provisions had not deviated from decided cases on proof of non-voting. The Court considered the following cases:

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<sup>68</sup> Supra at page 42 of the Lead Judgment

- (a) **AYOGU VS NNAMANI**<sup>69</sup>
- (b) **AWUSE VS ODILI**<sup>70</sup>
- (c) **NNAJI VS AGBO**<sup>71</sup>
- (d) **REMI VS SUNDAY**<sup>72</sup>
- (e) **ONOYON VS EGARI**<sup>73</sup>
- (f) **OKOROJI VS NGWU**<sup>74</sup>

It was held that the Practice Directions had not introduced a novel procedure that relieve the Petitioner who alleges non-voting in an election, of the onus or burden of proving that voting did not take place. The Court held per Adekeye JCA thus:

***“The general position of the law is by virtue of Sections 135, 136, 137 and 139 of the Evidence Act, that the party who asserts in his pleading the existence of a particular fact is required to prove such fact by adducing credible evidence. If he fails to do so, his case fails. On the other hand, if he succeeds in adducing evidence to prove the pleaded facts, he is said to have discharged the burden of proof that rests on him. The burden then shifts to his adversary to prove that the fact established by the credible evidence adduced would not on the preponderance of the evidence result in the court giving judgment in favour of the party. See Buhari v. Obasanjo (2005) 13 NWLR Pt. 941 Pg. 1”***<sup>75</sup>

The Court of Appeal held that the Practice Directions was not made to dispense with the nature, quantum and quality of evidence required of a petitioner to prove non-voting in an election petition, neither can it detract from the principles laid down in **AYOGU VS NNAMANI**.

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<sup>69</sup> (2006) 8 NWLR (PART 981) 160 187

<sup>70</sup> (2005) 16 NWLR (PART 952) 416

<sup>71</sup> (2006) 2 EPR 867

<sup>72</sup> (1999) 8 NWLR (PART 613) 105

<sup>73</sup> (1999) 5 NWLR (PART 603) 416

<sup>74</sup> (1992) 9 NWLR (PART 263) 113

<sup>75</sup> See page 45 of the Lead Judgment

Also in **CHIME VS EGWUONWU**<sup>76</sup>, the Enugu division was faced with a similar issue on incidences of burden of proof in election petition proceedings. The issues submitted for determination included:

- Whether the learned trial judges were right in placing the onus on the appellant to prove that he was duly elected in accordance with Section 179(2) of the 1999 Constitution
- Whether the learned trial Judges were right when relying on the Practice Directions 2007 they held that this case is exempt from the requirements of proof as established in the cases of Ayogu V Nnamani (2006) 6 NWLR (Pt. 981) at 160 and Nnaji V Agbo (2006) EPR 67

It was submitted on behalf of the Appellant that the law of burden of proof is governed by Nigeria's adjectival law of evidence and there is nothing in the Practice Directions 2007 that has automatically changed the position of the law as contained in the Evidence Act and espoused in a long litany of cases. This is so because by the provisions of Sections 135 and 136 of the Evidence Act who assert must prove. Thus who asserts that voting did not take place must have the burden of proving that assertion. This is the position of the law as indicated in the line of cases where AYOGU VS NNAMANI and AWUSE VS ODILI belong.

The Court of Appeal reviewed the line of cases and the provisions of the Evidence Act and held thus:

***“It is clear from the principle laid down in the dictums cited in the above cases, the Practice Directions did not and could not and was not intended to overrule these principles of law. A plethora of other judicial authorities are also in the same vein i.e. that a petitioner alleging non-voting in order to succeed must call voters from each of the polling booths in the affected constituency or area as witnesses who would tender their voters’ cards and testify that they did not vote on the day of the election and from which it could be ascertained***

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<sup>76</sup> Supra

*whether there were ticks against the names of registered voters on the day of the election.*

*“Further by virtue of Section 50(2) of the Electoral Act 2006 the issue of whether a voter cast his vote could be ascertained by examining the voters’ register to know whether the person’s name was marked as having voted. See Awuse V Odili (supra)*

*“The learned trial Judges of the trial Tribunal relied on the provisions of the Practice Direction to dispense with the need to require the petitioners to prove their case in the manner laid down in Ayogu V Nnamani (supra); Nnaji V Agbo (supra) and Onoyon V Egari (supra). The position of the law as it stands is that Practice Direction cannot displace the provisions of the substantive law and court decisions....*

*“From the foregoing there is nothing explicit or implicit in the said Practice Directions that could justify the said view of the lower tribunal in holding that there were indeed no elections much more creating a ‘new order’. The aforementioned principles established in the decided cases by superior courts of this country cannot be overruled or overtaken by the Practice Directions as far as proof of non-voting in a constituency is concerned.”<sup>77</sup>*

See also the case of **CHIME & ANOR VS ONYIA & 2,798 ORS**<sup>78</sup>, where the Enugu Division of the Court of Appeal took the same position. Like the two previous cases, the appeal relates to the governorship election in Enugu State.

But see the decision of the Court of Appeal, Port Harcourt Division in **PRINCE EBITIMI AMGBARE & ANOR VS CHIEF TIMPRE SYLVA & ORS**<sup>79</sup>. The decision is from the Bayelsa State Governorship election.

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<sup>77</sup> Supra at page 35

<sup>78</sup> Supra at pages 16 – 22 of the Lead Judgment of Bada JCA

<sup>79</sup> CA/PH/EPT/534/2007, Unreported Judgment of the Court of Appeal, Port Harcourt Division, delivered on 15<sup>th</sup> day of April 2008.

The Court made a finding that there was no voting in Bayelsa State not based on the standard of proof contemplated by the Enugu Division in the three CHIME CASES but based on the failure by INEC to tender Form EC8A, polling booth results. In the Lead Judgment, Ibiyeye JCA held that the polling booth results were too important to be ignored. Thus where the Appellants alleged non-voting, the failure of INEC to produce the basic evidence of voting i.e. Form EC8A, means that non-voting was proved.

Reconciling Enugu and Bayelsa is important for clarity and consistency in election disputes adjudication. Different applications of law portend confusion in respect of which position legal practitioners in election proceedings would take in articulating and presenting their case. It would also pose difficulties to Judges of the Election Tribunals in the course of carrying out their first line adjudication functions.

## **2.6 TECHNICALITY VERSUS SUBSTANTIAL JUSTICE**

The Practice Directions 2007 faced the arduous challenge of being an instrument of reform of the delay-prone election petition proceedings and at the same time not being dubbed an instrument of technical justice. It does not seem the Practice Directions succeeded in balancing the two sides of the same coin. Virtually all the innovations it introduced to checkmate the unprecedented OBI/NGIGE type of debacle has apparently been viewed by the Court of Appeal as experimentation with technical justice.

The novel provisions include those that have to do with front-loading, application for pre-hearing session, pre-hearing session, streamlining of witnesses, inadmissibility of non-frontloaded documents, extension of time, non-filing of motions outside pre-hearing session, filing of written addresses etc. Most of the procedures were permissively enforced and in many instances where a Tribunal strictly applied them, the Court of Appeal set such strict application aside as mere technical justice.

The Court of Appeal constantly pounded at the rules of procedure in the Practice Directions 2007 as untenable piece of technicalities. In **CHIME VS EZEA**, the Enugu Division said of the Tribunal's streamlining of witnesses:

***“The justice of this case demands that there must be evidence of voting at each polling booth before the court. The aspect of streamlining of witnesses must be approached by the court in the hearing of cases with extra caution.***

***It has to be applied not generally but according to the merit of each case. The number of witnesses required to prove the case of a petitioner complaining about exclusion, will defer to that in a claim about having the majority of lawful votes or that complaining of non-qualification. The practice direction is an adjunct to the Rules of Court, the Federal High Court Civil Procedure Rules and the Court of Appeal Rules. It was issued to aid the Tribunals and Courts to administer justice with ease and dispatch. It is not meant to assist the court to sacrifice justice on the altar of speed....”***<sup>80</sup>

But it is not all the Divisions of the Court of Appeal that felt a strict application of the provisions of the Practice Directions would deliver undesirable technical justice. For example in **OLOLADE VS INEC & 11 ORS**<sup>81</sup>, the Ibadan Division in dismissing the Appellant’s appeal against the dismissal of his appeal as abandoned appeal under the Practice Directions, Dattijo Muhammad JCA concluded the Lead Judgment thus:

***“My lords, the gains so far recorded by the effective use of the Practice Directions in the determination of Election Petitions must be sustained. This explains my resolution of Appellant’s lone issue against him.”***

However in **UCHECHUKWU VS BIELONWU**<sup>82</sup>, the Benin Division took time to highlight what it considered a technical application of the Practice Directions by the Tribunal. In setting aside the dismissal of the Appellant’s petition by the Tribunal pursuant to Paragraphs 3(1)(3(4) of the Practice Directions 2007, the Court held thus:

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<sup>80</sup> Supra at page 67

<sup>81</sup> Supra at 23

<sup>82</sup> Supra at page 15

**“Consequent on the above, I am of the view that excessive weight was given to the provisions of paragraphs 3(1)(3)(4) of the Practice Direction 2007, and that substantial justice was sacrificed while technicality was enthroned and that the Appellant was not given the opportunity to ventilate his grievances.”**

Thus all the mischief which the Practice Directions 2007 set out to curb may still well be staring us in the face because of the battle between technical justice and substantive justice. It is a battle which substantive justice is better positioned to win because the prevailing view in the judicial circles is that technicalities should not triumph over the merits of a case. The attitude is that while speed is important, it should not be a substitute for substantive justice. Problem is often what amounts to mere technical justice. For example an appeal which is dismissed because the Notice of Appeal was filed out of time has not been heard on the merits. It sounds technical that a party would lose an appeal “on the merits” on a calculation of time appreciated only by his lawyer! But the Court of Appeal will not close its eyes to this blunder or treat it permissively. Much is said about triumph of substantive justice over technical justice, but an examination of rules and practices of the Courts and their application reveal that the boundaries of technical justice may indeed not be clearly charted, unless the fate of the Practice Directions 2007 as a compendium of technical rules of procedure is because it is an inferior legislation, as also indicated in some of the cases. The poser is what is the place of the rule that election petitions are *sui generis* proceedings?

## **2.7 THE CHALLENGE OF HIERARCHY OF LAWS AND CONFLICTS**

The different strokes meted to the Practice Directions by different divisions of the Court of Appeal brought to the fore the challenge, if not futility, of bringing about sweeping legislative reforms which the Practice Directions 2007 clearly set out to do, through an inferior legislation.

The Court of Appeal in many decisions refused to apply the provisions of the Practice Directions due to perceived conflicts with provisions of the Electoral Act 2006, including the Rules in its First Schedule, the Evidence Act, the Federal High Court (Civil Procedure) Rules 2000 and

even judicial decisions. In **CHIME VS EZE**<sup>83</sup>, the Enugu Division held that the President of the Court of Appeal had power to issue the Practice Directions 2007, but rejected the strict application of the Practice Directions by the Tribunal. The reasoning of the Court for so doing is embedded in the hierarchy of laws. The reason was summed thus by the Court:

***“However, I hold that the hierarchy of the laws down to the Practice Directions are as follows – 1999 Constitution, Statutes, First Schedule to the Electoral Act 2006, Rules of Court and finally Practice Directions in that order. Since Practice Directions does not have the authority of Rules of Court and they are less efficacious they cannot override any of the superior laws. See University of Lagos v. Aigoro (1985) 1 NWLR Pt. 1 Pg 143”***

In **CHIME VS EGWUONWU**<sup>84</sup>, it was held thus:

***“Neither the Electoral Act 2006 including the Schedule made thereto, nor the Evidence Act made any provision to the effect that if a document is not “front loaded” that same will not be admitted in evidence.***

***“The law is that Practice Directions and Rules of Court cannot override statutory provisions. ....***

***“Beside, Practice Direction is merely direction given by the appropriate authority stating the way and manner a particular rule of court should be complied with, observed or obeyed.”***

In **ALI & ANOR VS OSAKWE & 2 ORS**<sup>85</sup>, the Benin Division of the Court of Appeal held that the Practice Directions could not take away the right to extension of time provided for in the First Schedule of the

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<sup>83</sup> Supra at page 53

<sup>84</sup> Supra at page 42

<sup>85</sup> Supra at page 25

Electoral Act 2006, which is a substantive law. Consequently, the Court held thus:

***“I am of the view that and in agreement with the general submission of learned Appellant’s counsel that excessive weight was given to the provisions of the Practice Direction to the detriment of superior legislation and that the tribunal was wrong to have held that the Practice Direction was independent of the Electoral Act to the point that its provisions being later in time had the same force and effect and they were obliged only to apply same. If the provisions were of the same force and effect then the argument that where specific provision are subsequent to general provisions, the specific provisions prevail would hold water.”***<sup>86</sup>

The low ranking of the Practice Directions on the ladder of laws thus resulted in the jettisoning of most of its novel provisions in deference to superior laws and rules. Where the Practice Directions excludes enlargement of time, some divisions of the Court of Appeal saw a conflict with the First Schedule and allowed enlargement of time. In some cases rules of evidence as stated in the Evidence Act or judicial decisions were not allowed to be ‘annulled’ by the provisions of the Practice Directions on proof and evidence generally.

As a corollary, the argument also raged before the Tribunals as to whether the provisions of the Practice Direction were mandatory or permissive. Some Tribunals held that the provisions are mandatory and applied them strictly (as in **OKEREKE VS YAR’ADUA** by both the Court of Appeal and the Supreme Court) while some held they were not mandatory and treated them permissively. The same division occurred in the Court of Appeal when the decisions of the Tribunals went on appeal.

## **2.8 ON THE CONFLICTING JUDGMENTS OF THE COURT OF APPEAL**

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<sup>86</sup> Supra at page 26

The Court of Appeal is prone to conflicting decisions. Every Court, even the Supreme Court, which does not have divisions, is prone to conflicting decisions, but the rate of occurrence is increased in the case of the Court of Appeal apparently because of the large number of divisions and Justices<sup>87</sup>. It may easily be the largest Court in Nigeria both in terms of the number of divisions and judicial officers, subject maybe to the High Court of Lagos State and a few other State High Courts, if any.

The Court of Appeal is even expected to grow larger in the shortest time, unless the 1999 Constitution is amended to further limit its appellate jurisdiction. It is doubtful if it operates effectively at its present size. Some divisions are overstretched. The result is that the Justices work under intense pressure. In some of high litigation divisions like Lagos and Enugu appeals take a long time to be disposed of because the three or five Justices are humans. It is only the creation of yet new divisions in these areas or significant increase in the number of justices and provision of more Court Rooms to accommodate more panels that can stem the appeal gluts in them.

Of course the Constitution and the Court of Appeal Rules can be amended to embrace radical reforms especially in terms of interlocutory applications. It beats imagination how three or five Honourable Justices of the Court of Appeal would robe and file out to open Court to take arguments on motion for leave to appeal or motion for extension of time to file brief of argument! One thinks it amounts to waste of judicial time and puts avoidable pressure on the Honourable Justices. Hearing of appeals, per se, do not take much time. It constitutes in adoption of briefs sometimes with some elucidation that should normally not take more than 30 minutes per counsel. It is normally a one-sitting event. The prelude to hearing takes time. In pressure divisions, a typical adjournment for motion for leave to appeal, stay of execution or enlargement of time can be from a date in October to a date in February or even March. That is half a year; for only a motion. But what are the

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<sup>87</sup> The Court of Appeal presently has about 70 Justices serving across 10 Divisions, namely, Abuja, Lagos, Ibadan, Calabar, Benin, Kaduna, Ilorin, Enugu, Port Harcourt and Jos.

conditions under which the Justices work? One is here talking about number of appeals vis-à-vis number of panels.

In the case of the Practice Directions 2007, the incidence of conflicts in the decisions churned out from various divisions on the tiny document<sup>88</sup> is perhaps unprecedented in the annals of that Court, nay, any Court.

To sustain the application of the Doctrine of Judicial Precedents, the law has taken care of the issue of conflicts. The law is that where there are two conflicting decisions of the Court of Appeal, the later in time should be followed. See **OJUGBELE V LAMIDI**<sup>89</sup>. See also **CARDOSO VS DANIEL**<sup>90</sup>.

While Courts faced with the conflicts in the decisions of the Court of Appeal on the Practice Directions 2007 may resort to this rule of law in choosing which decision to follow, given the importance of the Practice Directions to election disputes adjudication and the severity of the instant challenge, it may be better for the President to set up an administrative machinery at the earliest opportunity to resolve the conflicts. This can be done by constituting full panels of five justices to resolve key conflicts as live case opportunities arise.

As expected, public opinion has been severely critical of the divergent opinions of the Court of Appeal on the Practice Directions. Apart from unconventional strong-worded paid advertorials, which shows how parties have thrown caution to the winds, legal writers have also taken out time to criticize the Court of Appeal.

In a serialized Vanguard Essay, entitled "*Election Petitions: Practice Directions and Right of Appeal*"<sup>91</sup>, Lawrence Atsegbua<sup>92</sup>, criticized the

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<sup>88</sup> The Official Gazette copy of the Practice Directions 2007, shorn of the forms in the Schedule, is five pages.

<sup>89</sup> (1990) 10 NWLR (PART 621) 167 at 171

<sup>90</sup> (1986) 2 NWLR (PART 20) 1

<sup>91</sup> See Sunday Vanguard of August 24, 2008 pages 40 – 41 and Sunday Vanguard of August 31, 2008 page 40

<sup>92</sup> Lawrence Atsegbua, a professor of law, is with the Faculty of Law of the University of Benin

decision of the Court of Appeal in **ALI VS OSAKWE** on the vexed issue of extension of time. The Learned writer is of the view that while the case of **AIGORO VS UNILAG** is correct law that Rules of Court prevails over Practice Directions in cases of conflicts, but that would be only where the conflict is on the same subject-matter. Thus since the First Schedule does not provide for Pre-Hearing Session, it would be wrong to import the general provisions of the First Schedule on enlargement of time into the specific provision of the Practice Directions on pre-hearing sessions. The learned writer feels the opinion of the Tribunal in Asaba was more acceptable and the Court of Appeal, Benin Division should not have set it aside. One cannot agree more because election petitions are *sui generis* proceedings

The article reviewed the conflicting treatments of Practice Directions by the Court of Appeal. It cited the case of **FOLARANMI VS ABRAHAM**<sup>93</sup>, wherein the Court of Appeal held on the issue of enlargement of time to file brief of argument thus:

***“What is of moment in the instant application is non compliance with paragraph 5 of the practice directions and that such non compliance deprives the applicant the benefit of the discretion of the court to allow an enlargement of time. I agree with the decision in the lead judgment that paragraph 5 of the practice directions must be complied with. It does not admit of any circumvention and no favour should be shown for not obeying it. The consequence of non-compliance is dismissal of the application.”***<sup>94</sup>

However, in **ALI VS OSAKWE**, the Court of Appeal, Benin Division held:

***“It is also an established principle that a practice direction cannot remove the exercise of the courts’ discretion granted by them by statute such as the provision contained in paragraph 50 of the 1<sup>st</sup> Schedule of the Electoral Act 2006***

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<sup>93</sup> (2004) 10 NWLR (PART 881) 433

<sup>94</sup> Per Ibiyeye JCA at pages 450 - 451

***granting extension of time in election cases to keep the position alive.”<sup>95</sup>***

It is necessary to point out that the two decisions were decided on different provisions of Practice Directions. **FOLARANMI’S CASE** was decided on the old Practice Directions meant for election appeal practice in the Court of Appeal which had no provision for enlargement of time to file briefs. While some divisions strictly applied it and refused to enlarge time, some bent backwards and held that the regular Court of Appeal Rules would apply. **FOLARANMI’S CASE** is one of the strict views. **ALI’S CASE** is on the issue of enlargement of time within which to apply for the novel issuance of pre-hearing notice. Both cases however raise questions on enlargement of time to take a step under Practice Directions. In **FOLARANMI**, the Practice Directions uses the word “shall” to fix time for filing of briefs but is silent on enlargement of time. In **ALI** the Practice Directions uses “shall” to fix time but also goes ahead to provide that an application for extension of time shall not be filed or entertained.

Seeing a conflict between the two decisions, the learned writer submitted thus on what is relevant to the sub-topic under discussion:

***“It is important in election petition cases that courts should be consistent and avoid conflicting and inconsistent judgments. Some element of stability and uniformity is required for the development of our electoral law jurisprudence. The Practice Direction No. 5 of 2003 referred to in Folaranmi v Abraham provides that after service of record of proceedings on the appellant he shall file the appellant’s brief within 5 days. The wordings are similar to Practice Directions of 2007, paragraph 3(1).”***

The learned writer also cited the case of **IKORO VS IZUNASO**<sup>96</sup>, where the Port Harcourt Division of the Court of Appeal held that failure by the

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<sup>95</sup> Supra, per Ibiyeye JCA at page 3

<sup>96</sup> CA/PH/EPT/488/2007, Unreported Judgment of the Court of Appeal, Port Harcourt Division

Appellant to apply for pre-hearing notice was fatal to the petition. The Court held thus:

*“There would be no order in the procedure for election petitions where the provisions are not obeyed or complied with by the parties or where the parties are free to indolently disregard them by filing processes when they like outside the time prescribed and limited by the provisions...The sincere intention of the rules is that they are to be strictly complied with and applied in the determination of election petitions otherwise their very “raison d’etre” or primary objection would be compromised and eventually frustrated or defected...”*

*“Accordingly “interest of justice”, “Justice of the case”, “hearing on the merit” etc, have been taken into account and included in the provisions and rules and so should not be clung to by any unserious and indolent party to justify non compliance.”*

The learned writer feels that the decision in **ALI VS OSAKWE** cannot be reconciled with the two earlier decisions of the Court of Appeal in **FOLARANMI VS ABRAHAM** and **IKORO VS IZUNASO**. He considers the attempt to distinguish **IKORO** as unsatisfactory. He submits that the decision in **ALI** is not good law and should not be followed by any division of the Court of Appeal, since it breaches the stare decisis rule. On the need for the Court of Appeal to be consistent, he submits thus:

“The need for the divisions of the Court of Appeal to stop giving conflicting judgments on election matters was recently highlighted by Niki Tobi, JSC, while delivering judgment in the case of Charles Odedo v Obinna Chidoka (Punch Newspaper, July 14, 2008, at page 8). He said: “Let me pause here to indicate the need for divisions of the Court of Appeal to exchange their decisions immediately they are delivered. If that practice is followed, the conflicting decisions in the two cases may not have arisen.”

The attempt by the Benin Division to distinguish the Supreme Court's attitude to Paragraph 3(4) of the Practice Directions 2007 in **OKEREKE VS YAR'ADUA** is also criticized as weak. Indeed the Supreme Court held that although the provision was harsh, it was in order to dismiss petitions under the paragraph as time is of the essence in election petition matters. But the superior decision did not lay the matter to rest as the Court of Appeal in **ALI VS OSAKWE** attempted to distinguish the Supreme Court's decision. The Court of Appeal in ALI neither followed its own decisions in **FOLARANMI and IKORO** nor the decision of the Supreme Court in **OKEREKE VS YAR'ADUA**.

It is not all the time that a later decision of a court presents a better law. It may well be that the earlier decision was more correct. To adopt the rule that validates later decision may work a lot of difficulties especially in election petition proceedings where more than 98 per cent of the total petitions filed terminate at the Court of Appeal. In ordinary civil and criminal proceedings, the presence of conflicts in the decisions of the Court of Appeal is hardly a big deal. It is usually corrected by the system before any real harm is done. This is achieved either by the Supreme Court acting as clearing house when faced with the conflicts or the Court of Appeal itself resolving or explaining it in a later decision.

However, in election matters in which the Court of Appeal acts as the 'supreme court' in all petitions except presidential election petitions, it is doubtful if the system has either the mechanism or the leisure to watch the conflicts fix themselves. It may require some administrative initiatives on the part of the Honourable President of the Court of Appeal to put things in order by constituting full panels to deal with identified serious areas of conflicts once they are detected in live cases around the country. The counsel of Niki Tobi JSC in **ODEDE VS INEC** on the need for prompt exchange of judgments will also be helpful in maintaining some level of consistency.

Perhaps, it may be necessary to state that there is a justice angle to the problem of inconsistency. In the mode of the popular saying of justice not only being done but being seen to be done, a candidate who knows that a petition has been dismissed for non-compliance with Practice Directions and upheld by the Court of Appeal, will expect same treatment in his case since his opponent is 'guilty' of the same foul. Where the

Tribunal gives the same verdict and the Court of Appeal sets it aside on grounds that the rule is not mandatory, there is problem. Such a litigant may leave the Court after the judgment wondering why his case should be treated differently by the same Court. Justice must be rooted in centrality and confidence, moreso, in election petitions matters, where confidence is sometimes at its farthest stretch given the nature of Nigerian politics.

## **2.9 FINAL WORD: DO WE THROW AWAY THE BABY WITH THE BATH-WATER?**

One point which perhaps all stakeholders in election dispute resolution, including all levels of the Judiciary, concede is that the Practice Directions 2007 means well for election petition adjudication in Nigeria. The timing was central to its popular acceptance. The aims and objectives are too good in terms of their revolutionary potentials to be ignored. Even Courts that failed to strictly apply the provisions of the Practice Directions nevertheless accepted its importance as a tool for speedy resolution of petitions.

In **CHIME VS EZE**<sup>97</sup>, in which the Enugu Division hardly upheld any application of the Practice Directions, the Court of Appeal was still able to say of the Practice Directions:

***“The practice and procedure to be promulgated is not meant to be another Federal High Court Civil Procedure Rules or a Federal High Court Practice Direction meant to be an aid in the dispatch of speedy trial in view of the fact that time is of essence in election petition matters. This accounts for the contents of the Election Tribunal and Court Practice Directions 2007. The general intention of the draftsman (sic) reflected in paragraph one, is to encourage and enforce front-loading, as a principle of our modern civil procedure system so that a Defendant would have full knowledge and adequate***

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<sup>97</sup> Supra at page 52

***notice of the cause of the Plaintiff so as to avoid delays in trials and fulfill the objective of speedy administration of justice...”***

Earlier in the Judgment, the Court underscored the importance of Practice Directions in election petition proceedings thus:

***“What is novel about the Practice Direction is that it is promulgated with the sole aim of hearing, determining and attaining justice in election matters with ease, certainty and dispatch. That is the reason for the pre-hearing session and scheduling embodied in Section 3 and need to streamline the number of witnesses and to allow parties to admit or exclude documents by consent in Section 4(8) amongst other directions embodied in the booklet. An (sic) Election Tribunal and Court Practice Directions 2007 therefore is an assembly of directions given by an appropriate authority. In (sic) this instance, the President of the Court of Appeal stating the way and manner a particular rule of court in the hearing of an election matter shall be observed, obeyed and complied with. They are instrument in aid of the practice in court. In election matters there is need to have a practice direction so as to ease congestion in the hearing of the matters first and foremost and also because an election matter is sui generic (sic) not seen as a civil proceedings in an ordinary sense or criminal proceedings....***

***Practice Directions are promulgated to bring election petitions out of procedural clogs that cause delay in the disposition of the substantive dispute<sup>98</sup>***

In **TONY AYEBUSUWA VS INEC & 15 ORS**, the Ibadan Division which adopted strict application of the provisions of the Practice Directions, underpinned the imperatives of strict application of procedural rules in election matters thus:

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<sup>98</sup> Supra at pages 43 – 44 of the Lead Judgment.

***“At this stage it is noteworthy that, it has been hammered over and over again by the Courts that time is of essence in determining election petitions quickly, if not for the interest of the parties, for the electorate who would want to know who their representatives are. In terms of time and funding it is also expensive to have election petitions pending indefinitely. Therefore anything that causes procedural hitches or delays in the disposition of the real issues in the substantive matter for which the parties are before the Tribunal or Court, the rules governing the procedure are issued in mandatory forms and are expected to be complied with. Disobedience or non-compliance, whatever the case may be, will not enjoy the discretion or sympathy of any Tribunal or Court.”<sup>99</sup>***

The Practice Directions 2007, as imperfect as it may now have been found to be, remains a reform instrument per excellence in navigating the ship of election petition adjudication in Nigeria to safe and peaceful waters. Since it makes no sense to throw away the baby with the bath-water the Practice Directions should remain a good lead document to sanitize the adjudication system especially in the area of speedy resolution of petitions. Let the imperfections be thrown up for debate with a view to improving on them. It should normally be an ongoing process. The judicial application of the provisions should be reform materials.

The problem of legitimacy and low ranking can be solved by amendment of the Electoral Act 2006 to expressly give the President of the Court of Appeal power to make Rules like other heads of Courts have under the 1999 Constitution. It was perhaps upon realizing that the National Assembly had reserved the power to make rules to itself that the President of the Court of Appeal opted to issue Practice Directions. The action has raised controversies ranging from the issue of authority to issue the Practice Directions in the first place to the weight of the Practice Directions in view of the Rules made by the National Assembly.

**Quaere:**

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<sup>99</sup> Supra at pages 25 - 26

- **Should the National Assembly make Rules of Procedure for the Election Petition Tribunals in view of the Doctrine of Separation of Powers upon which the 1999 Constitution built Nigeria's tripod superstructure of governments?**

**Note that:**

- **The doctrine of horizontal separation of powers does not allow the Legislature to make rules of procedure for the Judiciary, just as the Judiciary or the Executive cannot make Standing Rules for the Legislature.**

### 3.0 CONCLUDING SUMMARY

1. It is generally accepted that the Practice Directions 2007 is a good piece of reform legislation with good aims and objective direly needed in the election petition adjudication regime
2. It is generally believed that the President of the Court of Appeal lacks the power under the 1999 Constitution and the Electoral Act 2006 to issue the Practice Directions 2007
3. The decision of the Supreme Court on the issue of legitimacy of the Practice Directions 2007 in **OKEREKE VS YAR'ADUA** does not exhaustively address the issue of legitimacy since it relates only to the power of the President of the Court of Appeal to issue Practice Directions for the Presidential Election Tribunal and not the National Assembly Election Tribunal and the Governorship and Legislative Houses Election Tribunal.
4. The decisions of the Court of Appeal that the President of the Court has implied power to issue the Practice Directions as convener of the Election Petition Tribunals have not assuaged the largely populated contrary school of thought
5. The Practice Directions succeeded to some extent in expediting the proceedings at the Tribunal level in places where the Tribunals strictly applied them
6. The divisions of the Court of Appeal are sharply divided on the application of important provisions of the Practice Directions
7. Most of the novel provisions in the Practice Directions 2007 failed the judicial test of validity and practicability, in their present state and form
8. It was argued that the requirement of the Practice Directions that the Respondent's Reply shall be frontloaded with documentary evidence placed the burden on INEC to show voting

9. This argument was rejected by several divisions of the Court of Appeal, but apparently accepted by at least the Port Harcourt Division in the Bayelsa Governorship appeal between the Action Congress and the PDP.
10. The provision requiring parties to apply for issuance of pre-hearing notice does not allow for extension of time
11. Where parties fail to apply for pre-hearing notice, the Tribunal shall dismiss the petition as “abandoned petition”
12. The Court of Appeal delivered conflicting decisions on these points. Some divisions held that time could always be extended in the interest of substantial justice, while some preferred to apply the letters of the Practice Directions 2007.
13. Had the Court of Appeal upheld the strict application of the innovative provisions in the Practice Directions 2007, adjudications on the next elections would have been phenomenal, taking Election Tribunals average of three months to resolve a petition and another two months for the Court of Appeal
14. The Practice Directions 2007 is largely a victim of procedural conservatism exhibited by judicial personnel of rightist inclination
15. Notwithstanding the difficult times faced by the Practice Directions passing judicial test, it remains a veritable instrument for continued reform in the area of election disputes adjudication.

#### 4.0 RECOMMENDATIONS

Drawing from identified problems in this work it is proposed as follows:

1. The need for an exhaustive set of rules on election petitions to address the short comings in the election petition process in Nigeria.
2. Amendment of the 1999 Constitution to give the President of the Court of Appeal power to make rules of procedure for the Election Tribunals
3. Amendment of the Electoral Act 2006 to:
  - (a) abrogate the First Schedule which is a legislative encroachment in the exclusive domain of the Judicial Arm.
  - (b) place custody of election results and other documentary evidence in the custody of the State Chief Judge instead of INEC, the 'Respondent-in-Chief' to election petitions
  - (c) reduce the legal burden of proof on the petitioner by requiring INEC and returned candidate to prove facts peculiarly within their knowledge, e.g.
    - (i) legal burden proof of allegation of no-election or non-voting should be on INEC, when alleged and supported by discharge of evidential burden
    - (ii) legal burden of proof of corrupt practice should be on the candidate when alleged and supported by discharge of evidential burden
4. An Administrative increase in the Election Petition Tribunals panels according to need to aid speed in highly litigious places.
5. Increased advocacy and training on change of judicial philosophical orientation and approach to election cases particularly on application of rules of procedure

## **ELECTION TRIBUNAL AND COURT PRACTICE DIRECTIONS, 2007**

Commencement 3<sup>rd</sup> April, 2007

In the exercise of the powers conferred on me by section 285(3) of the constitution of the Federal Republic of Nigeria 1999, Paragraph 50 of the first schedule to the Electoral Act 2006 and by virtue of all other powers enabling me in the behalf, I Umaru Abdullahi CON, President Court of Appeal, hereby issue the following Practice Directions.

These Practice Directions shall apply to the Presidential Governors, National Assembly and States Assembly Election.

### **1. Mode of Filing a Petition.**

(1) All petition to be presented before the Tribunal or Court shall be accompanied by

(a) List of all the witnesses that the petitioner intends to call in proof of the petitions

(b) Written statements on oath of the witnesses and

(c) Copies or list of every document to be relied on at the hearing of the petition.

(2). A petition which fails to comply with sub-paragraph (1) of this paragraph shall not be accepted for filling by the secretary.

### **2. Respondent's Reply:**

The respondent's Reply shall be statement in summary form and shall be supported by copies of documentary evidence, list of witnesses and the written statement on oath.

### **3. Pre-Hearing Session and Scheduling**

(1) Within 7 days after the filling and service of the Petitioner's Reply on the Respondent or 7 days after the filling and service of the Respondent's Reply, whichever is the case, the Petitioner shall apply for the issuance of pre-hearing notice as in form TF 007.

(a) Disposal of all matters which can be dealt with on interlocutory application;

(b) Giving such directions as to the future course of the petition as appear best adapted to secure its just, expedition and economical disposal in view of the urgency of election petitions;

(c) Giving directions on order of witnesses to be called and such documents to be tendered by each party to prove their cases having in view the need to expeditious disposal of the petitions;

(d) Fixing clear dates for hearing of the petitions.

(3) The Respondent may bring the application in accordance with sub-paragraph (1) above where the petitioner fails to do so, or by motion which shall be served on the petitioner and returnable in 3 clear days, apply for an order to dismiss the petition.

(4) Whereby the Petitioner and the Respondent fail to bring and application under this paragraph, the Tribunal or Court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained.

(5) Dismissal of a petition pursuant to sub-paragraphs (3) and (4) above is final and accordingly the Tribunal or Court shall be functus officio.

(6) At the pre-hearing session, the Tribunal or Court shall enter a scheduling order for.

(a) Joining other parties to the petition

(b) Amending petition or reply or any other processes

(c) Filing and adoption of Written Addresses on all interlocutory applications;

(d) Additional pre-hearing sessions

(e) Order of witnesses and tendering of document that will be necessary for the expeditious disposal of the petition;

(f) Any other matters that will promote the quick disposal of the petition in the circumstances.

(7) At the pre-hearing session, the Tribunal or Court shall consider and take appropriate action in respect of the following as may be necessary or desirable.

(a) Amendment and further and better particulars;

(b) The admissions facts, documents and other evidence by consent of the parties

(c) Formulation and settlement of issues for trial,

- (d) Hearing and determination of objections on point of law,
- (e) Control and scheduling of discovery, inspection and production of documents;
- (f) narrowing the field of dispute between certain types of witnesses especially the commission's staff and witnesses that officiated at the election, by their participation at pre-hearing session or in any other matter;
- (g) Giving orders or directives for hearing of cross-petitions or any particular issues in the petition or for consolidation with other petitions;
- (h) Determining the form and substances of the pre-hearing order;
- (i) Such other matters as may facilitate the just and speedy disposal of the petition bearing in mind the urgency of election petitions.

(8) At the pre-hearing session, the Tribunal or Court shall ensure that hearing is not delayed by the number of witnesses and objections to documents to be tendered and shall pursuant to sub-paragraphs (2)(b), (2)(e), (7)(b) and (7)(e) above:

- (a) Allow parties to admit or exclude documents by consent;
- (b) Direct parties to streamline the number of witnesses to those whose testimonies are relevant and indispensable.

(9) The pre-hearing session or series of pre-hearing sessions with respect to any petition shall be completed within 30 days of its commencement, and the parties and their Legal Practitioners shall co-operated with the Tribunal or Court in working within this time table. As far as practical, pre-hearing sessions shall be held from day to day or adjourned only for purposes of compliance with pre-hearing session, unless extended by the Chairman or the Presiding Justice.

(10) After a pre-hearing session or series of pre-hearing sessions the Tribunal or Court shall issue a Report. This Report shall guide the subsequent course of the proceeding unless modified by the Tribunal or Court.

(11) If a party or his Legal Practitioners fails to attend the pre-hearing session or obey a scheduling or pre-hearing order or is substantially unprepared to participate in the session or fails to participate in good faith, the Tribunal or Court shall:

- (a) In the case of the petitioner dismiss the petition;

(b) In the case of the respondent enter judgment against him.

(12) Any judgment given under sub-paragraph (11) above may be set aside upon an application made within 7 days of the judgment (which shall not be extended) with an order as to costs of a sum not less than N20, 000. The application shall be accompanied by an undertaking to participate effectively in the pre-hearing session jointly signed by the applicant and the Legal Practitioner representing him.

(13) The Tribunal or Court shall direct the pre-hearing session with due regard to its purpose and agenda as provided under this paragraph and shall require parties or their legal practitioner to co-operate with it effectively in dealing with the session's agenda.

#### **4. Evidence at Hearing**

(1) Subject to any statutory provision or any provision of these Paragraphs relating to evidence, any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses in open court.

(2) Documents which parties consented to at the pre-hearing session or other exhibits shall be tendered from the Bar or by the party where he is not represented by a Legal Practitioner.

(3) There shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the deposition.

(4) Real evidence shall be tendered at the hearing.

(5) The Tribunal or Court may, at or before the hearing of a petition order or direct that evidence of any particular fact be given at the hearing in such manner as may be specified by the order or direction.

(6) The power conferred by sub-paragraph 5 of this paragraph extends in particular to ordering or directing that evidence of any particular fact be given at trial.

(a) By statement on oath of information or belief; or

(b) By the production of document or entries in books; or

- (c) By copies of documents or entries in books; or
- (d) In the case of a fact which is of common knowledge either generally or in a particular district by the production of a specified newspaper which contains a statement of that fact.

(7) The Tribunal or Court may, at or before the hearing of a petition order or direct that the number of witnesses who may be called at the hearing be limited as specified by the order or directions.

(8) Save with leave of Tribunal or Court after an applicant has shown exceptional circumstances, no document, plan, photographs or model shall be received in evidence at the hearing of a petition unless it has been filed along with the petition or replied in accordance with these Directions.

(9) Such leave may be granted with costs save where in the circumstance the Tribunal or Court considers it otherwise.

#### **5. Hearing a Petition:**

(1) When a petition comes up for hearing and neither party appears the Tribunal or Court shall, unless there are good reasons to the contrary, strike out the petition, and no application shall be brought or entertained to re-list it.

(2) When a petition comes up for hearing, if the petitioner appears and the respondent does not appear, the respondent shall be entitled to final judgment dismissing the petition.

(3) When a petition comes up for hearing, if the respondent appears and the petitioner does not appear, the respondent shall be entitled to final judgment dismissing the petition.

(4) The party on whom the burden of proof lies by the nature of the issues or questions between the parties shall begin.

(5) Documentary evidence shall be put in and may be read or taken as read by consent.

(6) A party shall close his case when he has concluded his evidence. Either the petitioner or respondent may make oral application to have the case closed.

(7) Notwithstanding the provision of sub-paragraph (6) above, the Tribunal or Court may suo-motu where it considers that either party fails to conclude its case within a reasonable time, close that party's case.

(8) The Secretary shall take charge of every document or objects put in as exhibit during the hearing of a petition and shall mark or label every exhibit with a letter or letters indication the party by whom the exhibit is put in (or where more convenient the witness by whom the exhibit is proved) and with a number, so that all the exhibits put in by a party (or proved by a witness) are numbered in one consecutive series.

(9) The secretary shall cause a list of all the exhibits in the petition to be made, which when completed shall form part of the record of the proceedings.

(10) For the purpose of the above sub-paragraph a bundle of document may be treated and counted as one exhibit

(11) When the party beginning has concluded his evidence, if the other party does not intend to call evidence the party beginning shall within 10 days after close of evidence file a written address. Upon being served with the written address the other party shall within 7 days file his own written address.

(13) Upon being served with other party's written address the party beginning shall with 7 days file his written address.

(14) The party who files the first address shall have a right of reply on points of law only. The reply shall be filed within 5 days after service of the other party's address.

## **6. Motions and Applications**

(1) No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of Tribunal or Court.

(2) Where by these Directions any application is authorized to be made to Tribunal or Court, such application shall be made by motion which may be supported by affidavit and shall state under what rule or law the application is brought and shall be served on the respondent.

(3) Every such application shall be accompanied by a written address in support of the relief sought.

(4) Where the respondent to the motion intend to oppose the application, he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter affidavit with his reply.

(5) The applicant may on being served with the written address of the respondent file and serve an address in reply on point of law within 3 days of being served. Where a counter affidavit is served on the applicant he may file further affidavit with his reply.

These Directions may be cited as Election Tribunal and Court Practice Directions 2007.

Made at Abuja this 29<sup>th</sup> day of March, 2007

**UMARU ABDULLAHI. CON**  
President, Court of Appeal