THE 2004 LAGOS STATE (CIVIL PROCEDURE) RULES AND THE NIGERIAN LAW OF EVIDENCE: SOME MATTERS ARISING.*

INTRODUCTION

Nigeria, like most commonwealth countries that derive their legal systems from the English common law operate an adversarial system of justice. A concomitant of this is the strict confinement of the role of judges, especially in civil litigation, to that of unbiased umpires.[1] Subject to the rules of procedure, judges are to interfer as little as possible in the way and manner parties conduct or adduce evidence in their cases. In Onibudo v Akibu,[2] the Supreme Court stated:

> **"the duty of a court is to decide between the parties on the basis of what has been demonstrated, tested, canvassed and argued in court. It is not the duty of a court to do cloistered justice by making an enquiry into the case outside court even if such enquiry is limited to examination of document which were in evidence,…"**

Both the English Civil Procedure Rules[3] as well as the various Civil Procedure

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[1] See Okonji v. Njokanma (1999) 12 SCNJ 259 at 273 per Achike J.S.C.

[2] (1982) 7 S.C. 60 at

[3] See for instance The Supreme Court Practice (The White Book) 1999.

Rules in Nigeria[4] have always been premised on the adversarial philosophy of non involvement of the judges. However, the application of such rules has only produced grave and depressing consequences.[5] They have only served to encourage undue delay and excessive composition in the administration of justice, especially in view of the pressure on the modern justice system.
As graphically stated by Professor Osinbajo[6]

> **"Another policy defect in the application of existing procedural rules is the excessive adherence of judges to the tenets of adversarial litigation. In a bid to lunar both sides at every stage and to refrain from decending into the arena, judges rountinency indulge counsel, many of whom exploit the system to delay or frustrate proceedings"**

In a survey conducted in Lagos State in 2001, it was shown that the average life span of a civil case from initiation to judgement at the High Court of the state was six years.[7] Cases have been known to span far more years,[8] with many cases abandoned without proceeding to judgement after several years in court.[9]

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[4] See The Lagos State (Civil Procedure Rules 1994; Federal Capital Territory High Court (Civil Procedure) Rules, 2004; High Court Of Oyo State (Civil Procedure) Rules, 1998. (Uniform Rules).

[5] See Yinka Fashakin, The New High Court Of Lagos State (Civil Procedure) Rules 2004- An Appraisal: The Advocate Vol. 2 p 4.

[6] See Prof. Yemi Osinbajo, in the foreword to Proposal for the Reform of the High Court of Lagos State (Civil Procedure) Rules p.V.

[7] Ibid.

[8] See for instance Ariori v Elemo (1983) 1 SCNLR 1.

[9] Yemi Osinbajo op. cit.

There is clearly a need for change of approach and the Lagos State has blazed the trail in this regard by enacting the Lagos State High Court (Civil Procedure) Rules, 2004 (hereafter referred to as "the 2004 Lagos Rules"), the objective of which, as stated in its Order 1 r. 1(2), is the "achievement of just, efficient and speedy dispensation of justice"

The overall policy thrust of the 2004 Rules is to provide for "rules which curtail the excesses of counsel and give judges a firmer control of proceedings in their courts".[10] This follows the approach of the English Civil Procedure Rules 1998 which served as a major working tool for the Architects of the 2004 Lagos Rules. Explaining the philosophy behind Order 1 r.1 of the 1998 English Rules (which is impari materia with order 1 r.1(2) of the Lagos 2004 Rules) Sir Richard Scott V- C (one of its drafters) said:

> **"Above all, civil litigations is now to be conducted in accordance with the overriding objective set out in CPR Part 1. The overriding objective requires the court 'to deal with cases justly'. This is the antithesis of confining the court to referencing a contest. The court's exercise of its powers must be directed to the decision that must be in due course be reached. It should be a just decision. Of course, justice must, under the CPR, be**

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[10] Ibid

proportionate. The search is not necessarily for absolute justice. What is directed by the court to be done in preparation for the trial must be proportional to which is at stake in the case. But the whole emphasis of CPR Part 1 is on the pro-active role of the court in with cases justly"[11] (underlining supplied for emphasis).

In a bid to give judges firmer control over the proceedings in their courts and to provide for a faster dispensation of justice, certain radical provisions have been made in the 2004 Lagos Rules which necessarily impact upon other aspects of our law, particularly the law of evidence which together with the rules of civil procedure constitute the main tools of our civil litigation.

It seems to me necessary to examine some of the provisions of the Rules vis a vis the existing law of evidence. This is in view of the fact that evidence is a federal matter in respect of which only the Federal Legislature can enact laws being one of the matters listed in the exclusive legislative list of the constitution.[12] No state has the competence to legislate on such matters and any

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11 See Sir Richard Scott V- C (as he then was) in the KPMG Lectures, May 15th 2000. (Quoted in Bullen and Leak and Jacob, Precedent of Pleadings, 15th Edition: London, Sweet and Maxwell, 2004. p. 1

12 See Section 4 (2) and (3) and Item 23 on the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria (1999) (hereafter referred to as "the 1999 Constitution").

provision in the Rules which derogate from or is in conflict with any established rule of evidence must be null and void.[13] .

We shall therefore try to examine some of these provisions in the Rules with a view to assessing their validity against the background of the existing law of evidence.

DEPOSITIONS AND AFFIDAVITS MADE BY ILLITERATE PERSONS

According to Order 1 r.2(2) of the 2004 Lagos Rules:

> **"(2) where in this Rules depositions and affidavit are required to be made, if the deponent does not understand the English language such deposition or affidavit shall be made in a language he understands and shall be accompanied by interpretation thereof in English language."**

Affidavit has been defined by Black's Law Dictionary as a "voluntary declaration of facts written down and sworn to by the declarant before an

[13] See Section 45, 1999 Constitution. See also A –G Abia State & Ors v A-G Federation (2002) 3 SC 106 at 186.

officer authorised to administer oath such as a notary public".[14] It has also been defined as a statement of fact which the maker or deponent swears to be true to the best of his knowledge, information or belief.[15] According to Nwadialo,[16] when it is used in proceedings, the affidavit is taken as evidence of the facts deposed to. Also, deposition has been defined by the same Black's Law Dictionary[17] as "the written record of a witness out of court testimony." It seems to be settled that affidavits and depositions are matters of evidence and therefore come within the exclusive competence of the Federal Legislature. In line with this, the Evidence Act[18] has made ample provisions regarding affidavit and how it is to be made. Of particular interest for our present purpose is section 90 which provides as follows:

> **"90 The following provisions shall be observed by persons before whom affidavits are taken –**
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> **…**
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> **(f) the affidavit when sworn shall be signed by the witness or if he cannot write, marked by him with his mark, in the presence of**

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[14] Black's Law Dictionary, 18th Edition: London, Thompson, 2004.

[15] See Jossien Holdings Ltd v Lonamead (1995) 1 SCNJ 133 p. 141

[16] F. Nwadialo, Modern Nigerian Law of Evidence 2nd Edition: Lagos, ULP 1999 p. 533

[17] Supra at p. 472.

[18] Cap E14 Laws of the Federation of Nigeria, 2004.

the person before whom it is taken;

(g)(i) the shall be written without interlineations, alteration or immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the person before whom it is taken; …

(iv) where the deponent is illiterate or blind, it shall state the fact, and that the affidavit warned over (or translated into his own language in the case of a witness not having sufficient knowledge of English), and that the witness appeared to understand it;

(v) where the deponent makes a mark instead of signing, the first shall state that fact, and that the mark was made in the presence of the person before whom it is taken;…"

It is apparent from the above provision that an affidavit deposed to by a person who does not understand English language must still be in English language. All that is required is that the jurat must show that the affidavit had been read and interpreted to the deponent who must have appeared to understand same before signing or marking the affidavit in the presence of the person before whom the affidavit is taken i.e. commissioner for oath or notary public.

The rational for this is not far fetched. This is because the language of the courts to which the Evidence Act applies (and the Lagos State High Court is definitely one of them) is the English language. When any evidence or document in a language other than English is required in court, it must be interpreted into English language and it is only the English version that the court must taken cognisance of. The Supreme Court per Iguh J S C stated in Ojengbede v Esan[19] that:

> **"There can be no doubt that the official language of superior court of record in Nigeria is English and that if documents written in any language other than English are to be tendered and properly used in evidence, they must be duly translated into English either by a competent witness called by the party to the proceedings who needs them to prove his case or by the official interpreter of the court. A judge cannot on his own engage in the translation or interpretation of a document written in a language other than English since he is preceded from performing the role of a witness and an arbiter at the same time in the same proceeding. See <u>Damina v The State</u> (1995) 8 NWLR (Pt.415) 513 at 539-540. It is not in dispute that the learned trial judge before whom Exhibit J was tendered is Yoruba and must have made use**

[19] (2001) 12 S.C. (pt. II) 1 at 16

of his private and personal knowledge of the language to translate the said Exhibit J. This exercise, however, he was not entitled in law to engage in. I am therefore in total agreement with the court below that as Exhibit J was not written in the language of the court and there being no translation of it into English in the course of the proceedings, the learned trial judge was in definite error to have taken any notice of it in his judgement"

It had earlier been held in Akereja v Oloba[20] that a document in a language other than English cannot be exhibited to an affidavit and that only a copy translated into English and duly certified as such can be exhibited to an affidavit.

The making and contents[21] of affidavit and depositions are matters of evidence which fall within the exclusive legislature competence of the Federal Government. No State can validly legislate on the subject. Any State Law, including rules of court, on the subject must be ultra-vires. Therefore, the provision of Order 1 r. 2(1) of the 2004 Lagos Rules relating to how affidavit

[20] [1986]2 NWLR (pt.22) 257.

[21] As opposed to the purpose for which and how it may be aside in the court. See Order 33 rr.1, 4 & 6, 2004 Lagos Rules.

and depositions are to be made and what language they must contain is ultra vires.

Even, assuming that the rule in question has been made by the State as a matter of practice and procedure within the purview of S 274 of the 1999 Constitution (which makes it a concument matter), it is still null and void for being inconsistent with the express provision of the Evidence Act quoted above, which is a federal legislation validly made on the same subject.[22]

Assuming further that the rule is not inconsistent with the Evidence Act, it must still be caught by the doctrine of covering the field and must thereafter remain inoperative and unenforceable in view of the provision of the Evidence Act on the same subject. As explained by Eso J.S.C. in A-G Ogun State v A-G Federation[23]:

> **"where a matter legislated upon is in the concurrent list and the Federal Government had enacted a legislation in respect thereof, where legislation enacted by the state is inconsistent with the legislation of the Federal Government, it is indeed void and of no**

[22] See footnote 12 above.

[23] (1982) 13 NSCC 1 at 35

effect for inconsistency. Where, however, the legislation enacted by the state is the same as the one enacted by the Federal Government , where the two legislations are in pari materia, I respectfully take the view that the state legislation is inoperative for the period the Federal legislation is in force. I will not say void. If, for any reason the Federal legislation is repealed, it is my humble view that the state legislation, which is in abeyance is revived and becomes operative until there is another Federal legislation that covers the field"

In A-G Abia State and Ors v. A-G Federation,[24] Uwais C.J.N. adopted the above statement of the law and said further:

"I agree that where the doctrine of covering the field applied, it is not necessary that there should be inconsistency between the Act of the National Assembly and the Laws passed by a House of Assembly. The fact that the National Assembly has enacted a law on the subject is enough for such law to prevail over the law passed by a State House of Assembly but where there is inconsistency, the State Law is void to the extent of the inconsistency"

[24] Supra at 151

We humbly submit that, as the law stands, no court in Nigeria can insist that an affidavit by a person who does not understand English be made in a language other than English. As long as the necessary jurat indicating that the content of the affidavit has been interpreted to the deponent and the other provisions of the Evidence Act regarding the making of an affidavit have been complied with, the courts are bound to accept such affidavit and cannot ask for any other version of the affidavit on the ground that the deponent does not understand English.

EXAMINATION OF WITNESSES AT THE TRIAL

One of the most radical provisions made by the 2004 Rules for the purpose of reducing the time spent on trial of cases is contained in Order 32 r.1 (1) & (3) which provide as follows:

> **"(1) Subject to these rules and to any enactment relating to evidence any fact required to be proved at the trial of any action shall be proved by written deposition and oral examination of witnesses in open court …**
>
> **(3) The oral examination of a witness during his evidence in chief shall be limited to confirming his written deposition and tendering in evidence all disputed document or other exhibits referred to in the deposition."**

Apparently, the purpose of this rule is to substantially replace examination in chief of a witness by his written deposition which must have been filed in court and served on the other party thereby reducing the time that would ordinarily have been spent on normal examination in chief.

Deposition has been defined by Black Law Dictionary[25] as "the written record of a witness's out of court testimony". It is a way of taking and recording oral evidence of a witness on oath to be used later in court proceeding.

A written deposition clearly qualifies as evidence and its contents must satisfy all the requirements of the Evidence Act relating to oral and affidavit evidence. For instance, it must not contain hearsay or irrelevant evidence and a witness cannot give his opinion as evidence in the deposition. Being a matter of evidence, a State cannot legislate as to what a deposition should contain. That is a matter for the Federal Legislature.

On the other hand, we humbly submit, that the way or manner by which the written deposition is brought into court and made part of the evidence before the court is a matter of procedure which, as we have submitted elsewhere above, is within the legislative competence of the state. The provision of the

[25] Supra at p.472

Rules that the written deposition shall become the evidence in chief of the witness by adopting or confirming it is a matter of procedure.

Section 184 of the Evidence Act relating to the taking of evidence of a witness through deposition only applies to first class chiefs. Also, section 78 of the Act which permit the proving of facts at the trial by affidavit is limited to specific facts and subject to special order of the Court granted for that purpose.

There is no provision in the Act regarding the general power of the Courts to take oral evidence of a witness through written deposition. However, there is also no provision in the Act that all oral evidence must be in open court. All that is required by section 180 of the Act is that subject to certain exceptions, **"all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oath Act".** Once the oral evidence of a witness is on oath, whether it must be given in open court or whether it may be through the written deposition, is a point on which there is no provision in the Act or any general Federal legislation.

Since there is no Federal legislation on the point, we humbly submit that the provision of the 2004 Lagos Rules regarding the taking of part of oral evidence of a witness through written deposition is validly made and remains in force. It is a matter of procedure within the legislative competence of a State and there is

no Federal legislation on the point so that the doctrine of covering the field cannot arise.

PRODUCTION OF AGREED DOCUMENTS FROM THE BAR

Another provision in the 2004 Lagos Rules which is aimed at expediting trial proceedings is the provision of Order 32 r. 1(1) which provides that:

> **"(2) All agreed documents or other exhibits shall be tendered from the Bar or by the party where he is not represented by a legal practitioner"**

The purpose of this rule, apparently, is to avoid wasting of time in the process of tendering of documents that are already agreed by the parties by calling witnesses and leading them in evidence for the purpose of tendering the documents through them.

The Evidence Act[26] makes ample provisions for how contents of documents may be proved in evidence, how to prove due execution, presumptions of relating to documents and how to secure the production of documents in court. However, the Act is completely silent on how the documents are to be tendered in the course of trial. The general practice is to tender documents through

[26] See Part V and sections 192, 193, 219 and 220 of the Act.

witnesses except where a document is an official gazette or certified copy of a public document which may be tendered from the Bar.[27]

It is our humble submission that, though a document or contents of a document is clearly evidence, how the document is tendered or placed before the judge is a matter of procedure in respect of which the State can legislate under section 274 of the 1999 Constitution. Since there is no Federal enactment on this point, the provision of Order 32 r.1(2) is valid and effective.

However, a note of caution must be sounded. The fact that a document is agreed by the parties does not make the document automatically admissible. The court must still determine the admissibility of all documentary evidence.[28] This is important because there are certain documents which are absolutely not admissible and the fact that a party has not objected or has consented to their admissibility cannot render them admissible. Where such a documents is admitted for whatever reason and acted upon by the trial court, it will be

[27] See Ogbunyiya v Obi Okudo (1979) 6 – 9 SC 32 at 43 in relation to tendering of official gazette from the Bar and Agagu v Dawodu [1990] 7 NWLR (Pt 160) 671, Okiki v Jagun [2000] 5 NWLR (Pt 655) 19; Anatogu v Iweka [1995] 9 NWLR (Pt 415) 547 in respect of tendering of certified copies from the Bar.

[28] See Olukade v Alade (1976) 2 S.C. 183 at 187-188 per Idigbe J.S.C.; Umar v. Bayero University, Kano (1988) 7 S.C. (pt.II) 1

expunged on appeal and if its admissibility has occasioned a miscarriage of justice the judgement of the trial court may be set aside.[29]

The whole purpose of speedy trial will be defeated where documents are hastily admitted simply because they are agreed only for such documents to be expunged on appeal and the judgement set aside. This is clearly possible where a party has not been represented by counsel at the trial or even, where he claims mistake of counsel who appeared for him at the trial.

POWER OF COURT TO LIMIT EVIDENCE

Some provisions have been made in the 2004 Lagos Rules for the purpose of giving the judges firmer control over the conduct of cases and the time spent on trial proceedings by giving them some power over control of evidence at the trial. Some of these provisions have always been contained in the 1994 Rules but it is believed that they are likely to be more effective within the general context of the new Rules. In fact, some of them have been modified in line with the new Rules to make them more effective and far reaching in their application. Some of the provisions are considered hereafter, albeit briefly.

[29] For further details, see F. Nwadilo op.cit pp 543-562; Olukade v Alade (1976) 2SC 183; Alashe v Olori Ilu (1964) 1 All NLR 390; Minister of Lands W/N v Azikwe (1969) 1 All NLR 490.

According to Order 32 r.2, 2004 Rules, a judge may order or direct that evidence of any particular fact be given at the trial in such manner as may be specified by the order or direction. It may be by statement on oath or by the production of certain documents. This empowers the court to determine, based on the facts of each case, the most effective and fastest manner by which a particular fact may be proved and to order that evidence of the fact be given in that manner. However, it is submitted, that the court in making such an order must always take into account all the circumstances and justice of the case. For instance, the court must always take into account the difficulty and cost that may be involved in complying with such an order or direction.

Order 32 r.3 provides that a judge may order that the number of expert witnesses that may be called at the trial be limited as specified by the order. Also Order 32 r. 4 provides that unless a judge, for special reason, otherwise orders, no document shall be receivable in evidence at the trial of an action unless it has been filed along with the pleadings of the parties and Order 30 r.10 provides that a party who desires to call any witness whose deposition on oath has not been filed along with his pleading must apply for leave to call such a witness and the application must be accompanied by the deposition on oath of such witness.

While Order 32 r. 3 of the 2004 Rules is almost an identical reproduction of Order 34 r. 4 of the 1994 Rules, Order 30 r.10 of the 2004 Rules quoted above understandably has no counterpart in the 1994 Rules. It is a concomitant of the requirement of front loading. As for Order 32 r.4 referred to above, it is an improvement on the Order 34 r. 5 of the 1994 Rules which only applied to "plans, photographs or model". The provision now applies to all documentary evidence.

Another provision is Order 30 r. 11 which provides that a party must close his case when he has concluded his evidence. This may be done orally by either party and where the Judge considers that either party has failed to conclude his case within a reasonable time, he may close the case of that party suo motu. This is a succinct reproduction of the windy provision of Order 33 r. 16 of the 1994 Rules.

One of the major cause of delay in civil litigation is the lackadaisical attitude of litigants in calling their witnesses or tendering their documents, especially when they realise that they do not have a good case. Instead of submitting to judgement or explore avenue for settlement of the case out of court, they continue to ask for endless adjournments of the case to enable them call this or that witness or to produce this or that document none of which may exist and even where they exist may not be material to the case. The courts have always

felt obliged to grant such adjournment so as not to be accused of denying any of the parties a right to fair hearing.

With the above provisions, especially within the general context of the 2004 Rules, the courts now have enough weapon to discourage or even prevent litigants from undue waste of time at the trial. If put to effective use, these provisions are capable of radically reducing the time required for trial of cases.

However, a note of warning must be sounded that the courts must be flexible in their application of these provisions. The application of the rules must be directed towards the attainment of speedy justice having regard to all the circumstances of the case. For instance, the court should not hesitate to close the case of a party who obviously has no further material evidence to adduce and is keeping the case open because he realises that he has a bad case. Neither should the court hesitate to refuse the introduction of a document which, or a witness whose, deposition has not formed part of the front loaded case of a party where it is clear that they are not material to the merit of the case.

On the other hand, a court should readily permit the introduction of such evidence where the justice of the case demands. For instance, where a party cannot readily lay his hand on a piece of evidence and he has to go to court to beat limitation period, the court should not hesitate to allow him introduce the

evidence when it becomes available. Also, where the failure of a party to proceed with his case is due to genuine difficulty as where a material witness suddenly becomes hospitalised, the court should not hesitate to grant necessary adjournment. In such a case, closing the case of the party may amount to denial of fair hearing.[30]

We must point out that the various provisions of 2004 Rules considered under this heading have nothing to do with the contents or the substance of evidence which, we humbly submit, is a matter of evidence within the exclusive legislative competence of the Federal Legislature. Rather, they are concerned with the manner of or procedure for bringing evidence before the court, which, we submit, is a matter of practice and procedure within the legislative competence of the State vide S.274 of the 1999 Constitution. In so far as there is no Federal enactment on the points covered by the provisions, the doctrine of covering the field as explained above cannot apply. Those provisions are, therefore, valid and effective.

[30] Alsthom v Saraki

CONCLUSION

There is no gainsaying the fact that the 2004 Lagos Rules represent a commendable attempt by Lagos State to shake off the lethargy of perennial congestion of the Courts and undue delay in civil litigation in the State. Some of the provisions of the Rules, if put to effective use are capable of drastically reducing the congestion in the Courts and minimise the delay in conduct of cases before the Courts. It is hoped that the other state will take a cue from this attempt by Lagos State.

However, there are certain provisions in the Rules which directly or indirectly relate to issues of evidence. Some of these can be regarded as mere matters of practice and procedure within the legislative competence of the State and are therefore valid and effective. On the other hand, there are some that touch on the substance of evidence and therefore falls within the exclusive legislative competence of the Federal Government. They are ultra vires the State and are therefore, null and void.

For instance, the provision of the Rules relating to the incorporation of written deposition as part of the evidence of a witness at the trial, tendering of agreed documents from the Bar as well as the power of the court to limit evidence, are matters of practice and procedure which are validly and effectively contained in the Rules. The same cannot be said of the provisions relating to the making of

deposition or affidavit by a witness who does not understand English in a language which he understands only to be accompanied by an interpreted version of such affidavit or deposition.

The problem here is not unconnected with the wholesale importation of some of the provisions in the English Civil Procedure Rules which are not subject to the same Constitutional limitation which our Federal structure necessarily entails. For instance, being a unitary system, there is no distinction between the power to make law for evidence and the power to make rules for procedure in

England.[31] In Nigeria, evidence is exclusively reserved for the Federal Legislature while the States may legislate on matters procedure.[32]

We only hope that in the nearest future, the appellate Courts will have the opportunity to pronounce on the validity or effectiveness of some of these provisions in the 2002 Rules.

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[31] See for instance, The Supreme Court Rules, 1999 (The White Book)

[32] See sections 4(2) & (3) and 274, 1999 Constitution.

31. See for instance, The Supreme Court Rules, 1999 (The White Book)

32. See sections 4(2) & (3) and 274, 1999 Constitution.