IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY, THE 5TH DAY OF FEBRUARY, 2024
BEFORE HIS LORDSHIP, THE HONOURABLE JUSTICE I. E. EKWO
JUDGE

SUIT NO.: FHC/ABJ/CS/1480/2023

BETWEEN:

1. IHS (NIGERIA) LIMITED
2. INT TOWERS LIMITED } ..... **PLAINTIFFS**

AND

THE NIGERIAN MIDSTREAM & DOWNSTREAM PETROLEUM REGULATORY AUTHORITY..... DEFENDANT

JUDGEMENT

The Originating Summons in this case is brought pursuant to S. 36 (1) of the 1999 Constitution (as amended), Order 3 (6) and (9) of the Federal High Court (Civil Procedure) Rules, 2019 (hereinafter referred to as FHCCPR 2019) and under the inherent jurisdiction of this Court for the determination of the following questions:

1. *Whether the Plaintiffs as importers with express permit of the Defendant and not licensees who engage in the bulk sale of petroleum products under section 174 (1) (g) of the Petroleum Industry Act, 2021 (PIA) are bound by the provisions of the Midstream & Downstream Petroleum Operation Regulations, 2023 ("Operation Regulations") issued by the Defendant, which seek to inter-alia regulate holders of licenses under the PIA who engage in the sale of petroleum product (especially given the clear provision*

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of the Import Permits issued by the Defendant that is subject to the terms of Appendices A and B attached to the Import Permit)?

2. *Whether the definition of "sold in Nigeria" in Regulations 48 of the Operation Regulations (as a whole), is not void - to the extent of its inconsistency or overreach of the provisions of Sections 47 (2) (c) and 52 (7) (a) PIA?*

   Or in the alternative,

3. *Whether paragraph C of the definition of "sold in Nigeria" in Regulation 48 of the Operation Regulations is not void:*

   3.1 *to the extent that it purports to extend the definition of the phrase "sold in Nigeria", beyond the clear intent of Sections 47 (2) (c) and 52 (7) (a) PIA, and to cover activities which do not amount to sale of petroleum products in Nigeria within the meaning of Sections 47 (2) (c) and 52 (7) (a)?*

   Or in the alternative.

   3.2 *to the extent that it purports to have a wider scope than the enabling statute, (or add to, or change), by way of additional conditions and expansion of terms in Sections 47 (2) (c), 52 (7) (a) & 52 (9) of the PIA?*

4. *Whether either of Sections 47 (2) (c) & 52 (7) (a) PIA contain charging provisions in the manner in which levies are permitted by statute to be assessed and collected?*

5. *Whether Regulation 13 of the Operations Regulations is not void - to the extent that it purports to impose a payment obligation that*

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is not clearly and unambiguously charged or imposed by the provisions of Sections 47 (2) (c) & 52 (7) (a) PIA?

6. *Whether having regards to the provisions of (Part V of the PIA, in particular) Sections 205 – 208 of the PIA, or the Operation Regulations, or the Petroleum (Transportation and Shipment) Regulations, 2023 ("PTS Regulations"), the Defendant has not acted ultra vires its statutory power by asking or demanding from the Plaintiffs, non-trading persons or licensees, or their agents: (a) the sale or purchase prices of petroleum products the Plaintiffs consume for their business outside downstream petroleum industry; or (b) the destinations of vehicles transporting the Plaintiffs' petroleum products for consumption in their business, outside the downstream petroleum industry; or (c) contracts entered into by an end user of petroleum products with its non-downstream petroleum partners or clients, for non-downstream petroleum activities?*

7. *Whether having regards to the provisions of Section 208 of the PIA, the Defendant has not indulged in self-help remedy contrary to the Constitution and its enabling law by disabling or threatening to disable, in any manner whatsoever, the loading of petroleum products from non-trading, personal, storage facilities - on account of the inability or refusal of a non-trading and pure storage depot licensee, or owner, to publish its petroleum prices as requested by the Defendant?*

Or in the alternative,

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8. *Whether it is not an abuse of administrative powers, or outside legislative intent of the PIA, to disable, in any manner whatsoever, the loading of petroleum products from a non-trading personal sole use bulk storage facility - on account of failure to publish ex-depot prices?*

9. *Whether the PIA in any way, (and in particular by Sections 33, 113, 126 & 175 thereof), permit the Defendant by virtue of the PTS Regulations to regulate domestic, non-trading, end-user personal consumption of petroleum products outside midstream and downstream petroleum operations or downstream petroleum operations within the meaning of the terms in Section 318 of the PIA?*

10. *Whether the acts of the Defendant complained of herein do not constitute infringement of the Constitutional right of the Plaintiffs against compulsory acquisition of personal property guaranteed by Section 44 of the 1999 Constitution (as amended)?*

11. *Whether Regulations 3 & 4 (1) of the PTS Regulations apply to the loading of petroleum products from personal sole use bulk storage facilities for personal consumption?*

12. *Whether Regulation 5 (g) of the Operation Regulations is not invalid for being outside the scope of matters provided in the PIA, or for being ultra vires, or unreasonable, or absurd, or wrongful or excessive – having regard to its requirement that the manager of a licensee must provide an operational office and accommodation for the personnel of the Defendant?*

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13. *Whether the provisions of Regulations 3 and 4 (1) of the PTS Regulations are invalid for being ultra vires in imposing impractical, unreasonable, irrelevant, and unauthorized conditions on the loading and offloading of products from a non-trading-sole domestic use of the said products?*

The Plaintiffs seek the following reliefs:

1. A Declaration that the Plaintiffs not being licensees under the PIA are not subject to the Defendant's regulations issued to regulate licensees issued pursuant to the PIA.
2. A Declaration that the definition of "sold in Nigeria" in Regulation 48 of the Operation Regulations (as a whole), is void - to the extent of its inconsistency or overreach of the provisions of Sections 47 (2) (c) and 52 (7) (a) PIA.

   In the alternative
3. A Declaration that paragraph C of the definition of "sold in Nigeria" in Regulation 48 of the Operation Regulations is void – to the extent:
   - 3.1. that it extends the meaning of "sold in Nigeria" in Sections 47 (2) (c), 52 (7) (a) & 52 (9) PIA to the activities in the downstream petroleum industry that do not entail sale oof petroleum products in Nigeria within the meaning of Section 47 (2) & 52 (7) (a) PIA; or
   - 3.2. that it has a wider scope than its enabling statute, or overreaches, (and is inconsistent with), the clear intention of the legislature in Sections 47 (2) (c); 52 (7) (a) & 52 (9) PIA, or for purporting to create additional terms or

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conditions, add to, and expand the provisions of those sections.

4. A Declaration that Sections 47 (2); 52 (7) and 52 (9) of the PIA do not include charging provisions.

5. A Declaration that Regulation 13 of the Operations Regulations is void - to the extent that it purports to impose a payment obligation that is not clearly unambiguously charged or imposed by the provisions of Sections 47 (2) (c) & 52 (7) (a) PIA.

6. A Declaration that the Defendant exceeded its statutory authority and acted ultra vires in contravention of sections 47 (2) (c) and 52 (7) (a) of the PIA, by demanding that the Plaintiffs remit the Authority Fund Levy and the Midstream and Downstream Gas Infrastructure Fund Levy pursuant to Sections 47 (1) (2) (c) and 52 (1) (7) (a) of the PIA.

7. A Declaration that the Defendant acted ultra vires its statutory power as delineated in the Operations Regulations and the PTS Regulations, by asking or demanding from the Plaintiffs, non-trading persons or licensees, or their agents: (a) the sale or purchase prices of petroleum products the Plaintiffs consume for their business outside downstream petroleum industry; or (b) the destinations of vehicles transporting the Plaintiffs' petroleum products for consumption in their business, outside the downstream petroleum industry; or (c) contracts entered into by an end user of petroleum products with its non-downstream petroleum partners or clients, for non-downstream petroleum activities.

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8. A Declaration that the Defendant indulged in self-help remedy contrary to the Constitution and its enabling law by disabling or threatening to disable, in any manner whatsoever, the loading of petroleum products from non-trading, personal, storage facilities – on account of the inability of the Plaintiffs to provide the Defendant with petroleum prices.

Or in the alternative,

9. A Declaration that the Defendant abused its administrative powers or acted outside the powers conferred on it by the PIA, by threatening to disable, in any manner whatsoever, the loading of petroleum products from the Plaintiffs' personal sole use bulk storage facilities–on account of failure to publish ex-depot prices.

10. A Declaration that the PIA (and in particular by Sections 33, 113, 126 & 175 thereof), does not permit the Defendant by virtue of the PTS Regulations to regulate the Plaintiffs, who are domestic, on-trading, end-user personal consumption of petroleum products, outside midstream and downstream petroleum operations or downstream petroleum operations within the meaning of the terms in Section 318 of the PIA.

11. A Declaration that the actions of the Defendant against the Plaintiffs constitute infringement of the Constitutional right of the Plaintiffs against compulsory acquisition of personal property guaranteed by Section 44 of the 1999 Constitution (as amended).

12. A Declaration that Regulations 3 & 4 (1) of the PTS Regulations does not apply to the loading of petroleum products from personal sole use bulk storage facilities for personal consumption.

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13. An Order striking down Regulation 5 (g) of the Operation Regulations for being unreasonable and outside the scope of the provisions of the PIA.

14. An Order striking down Regulations 3 and 4 (1) of the PTS Regulations for being inconsistent with the legislative intent of PIA and the purpose and application of provisions of the PTS Regulations.

15. An Order restraining the Defendant either acting by itself or through any official or officer of the Defendant, or any agent or privy, or any governmental agency or law enforcement agency, or any person by whatever designation, from further demanding from the Plaintiffs 0.5% of the wholesale price of its petroleum products and/or natural gas, or any amount at all as contribution to the Authority Fund and/or Midstream and Downstream infrastructure Gas Fund under the PIA (or in any form whatsoever).

16. An Order restraining the Defendant either acting by itself or through any official or officer of the Defendant, or any agent or privy, or any governmental agency, or any person by whatever designation, from henceforth disrupting or threatening to disrupt or prevent the Plaintiffs from loading its petroleum products from their various depots on account on non-payment of 0.5% of the wholesale price of its petroleum products and/or natural gas or any other sum whatsoever, as contribution to the Authority Fund and Midstream and Downstream Infrastructure Gas Fund under the PIA (or in any form whatsoever).

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17. An Order restraining the Defendant either acting by itself or through any official or officer of the Defendant, or any agent or privy, or any governmental agency or law enforcement agency, or any person by whatever designation, from disrupting or preventing the Plaintiffs from loading their petroleum products from their various depots on account of failure to provide petroleum prices by Chisco Limited.

18. An Order restraining the Defendant either acting by itself or through any official or officer of the Defendant, or any agent or privy, or any governmental agency or law enforcement agency, or any person by whatever designation, from further directing the Plaintiffs to obtain a 'Category A' license for storage of petroleum products at their sites including but not limited to their offices, walk-in-centers, base sites and stations etc.

19. An Order restraining the Defendant from further demanding from the Plaintiffs the destinations of the Plaintiffs' trucks loading petroleum products from the Plaintiffs' tank farms.

20. Cost of this action.

It is averred in support that the Plaintiffs are affiliate companies providing telecommunications infrastructure service to telecommunications companies and licensed by the Nigerian Communications Commission (hereinafter referred to as NCC). The Defendant is a regulator of the Midstream and Downstream sectors of the petroleum industry as established under the Petroleum Industry Act, 2021 (hereinafter referred to as PIA 2021), with powers to enforce the provisions of the law as it relates to the downstream petroleum industry and also make regulations in that regard (Exh. IHS 1). The 1st and 2nd Plaintiffs, together with

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IHS Towers Nigeria Limited (hereinafter referred to as ITNL) and Global Independent Connect Limited are owned by and are subsidiaries of the Holding Company, IHS Holding Limited. The subsidiaries entered into a Cost Sharing Agreement to draw from the same source of resources for their operations, and share office space and facilities as well as their cost of management, also, the Plaintiffs in order to support each other entered into a Throughput Support Agreement (Exhs. IHS 2 and IHS 3). The Plaintiffs and ITNL with 16,372 Base Transceiver Stations (BTS) hold 41.6% share of the Nigerian telecommunication tower market infrastructure which BTS form the core platform for widespread telecommunication service networks across Nigeria, and as such, require near 100% consistency in power supply to achieve and safeguard the Federation's economic and security requirements. The IHS entities rely on Automotive Gas Oil (hereinafter referred to as AGO) as the main source of power supply for their BTS and other site locations, across Nigeria. The AGO requirement of the IHS entities require direct importation by the Plaintiffs. The Plaintiffs, as required, obtained their respective Petroleum Products Import Permit from the Defendant to import petroleum products into Nigeria, and they procured their AGO by importing same directly from foreign suppliers abroad, shipped to Togo and then transhipped to Nigeria (Exhs. IHS 4, IHS 5 and IHS 6). The Plaintiffs do not deal in, trade, sell or buy AGO, except to consume the AGO bought abroad at their BTSs, to procure miniscule amounts of AGO from wholesalers within Nigeria solely for their use at their BTSs on rare occasions and/or to meet occasional shortage in their stock. The Plaintiffs store their AGO in tank farms before transportation to their respective BTS across Nigeria; the 1st Plaintiff entered into a Throughput and Service Agreement with Chisco Limited for exclusive use of its tank farm in Apapa, Lagos, while the 2nd Plaintiff owns its storage tank facility in

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Koko, Delta State, for which storage licenses were issued by the Defendant (Exhs. IHS 7, IHS 8 and IHS 9). On 8th June, 2023, the Defendant sent an email to license holders for bulk storage facilities in the Apapa axis in Lagos where Chisco Tank Farm is located stating the new loading program format - must be endorsed by both the Depot Manager and the Defendant's officials together with the ex-depot price indicated on the loading programme (Exh. IHS 10). On the same date, the 1st Plaintiff submitted its loading programme for approval but the Defendant's officials refused on the basis that the programme did not contain ex-depot prices to which the 1st Plaintiff explained that it does not sell AGO but uses it to support its operations at the BTS, and so, does not have ex-depot prices. An officer of the 1st Plaintiff, one Chukwuka Odili, then sent an email to the IHS team informing them of the Defendant's officials' refusal to approve the loading programme (Exh. IHS 11). The loading programme was eventually signed off after about three hours. Again, on 9th June, 2023, officers of the Defendant refused to sign the 1st Plaintiff's loading programme from the Chisco Tank Farm and which suspension lasted till 13th June, 2023. The Defendant also refused to approve the 2nd Plaintiff's loading programme at the Koko Tank Farm from 23rd June, 2023, to 24th June, 2023, and only approved after many discussions. With a view to resolving the issue, the Plaintiffs engaged the Defendant on several occasions through physical meetings and letters. Also, the Association of Licensed Telecoms Operators of Nigeria (hereinafter referred to as ALTON) on 21st June, 2023, wrote a letter to the Defendant explaining the kind of business its members who are infrastructure companies carry on (Exh. IHS 12). Thereafter, the Plaintiffs held a meeting with the Defendant on 3rd July, 2023, where the Defendant maintained that the Plaintiffs were liable to pay two levies, Authority Fund Levy and MDGI Fund Levy, pursuant to the Petroleum

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Industry Act, 2021. The Plaintiffs argued that they are not entitled to the levies since they only use AGO for their operations and not for sale and as such do not have an ex-depot price to indicate on the loading programme. It was agreed, without conceding to the issue of levies, that as long as further engagements go on, the Plaintiffs could continue their operations without any hindrance but must submit details of the landing cost of the AGO. Following the resolution at the meeting, the Plaintiffs wrote a letter to the Defendant stating their landing cost, storage cost and restating that they are not liable to pay levies. The Defendant has now made new demands to include the destination of all trucks in their landing programme as well as the contracts they have with users of their BTS. The Defendant has consistently demanded for the levies in discussions over the phone. This prompted the Plaintiffs to commence an action at the Abuja Division of the Federal High Court in Suit No: FHC/ABJ/CS/1029/2023 – *IHS Nigeria Ltd. & Anor. v The Nigerian Midstream & Downstream Petroleum Regulatory Authority*, to determine the validity of the demand to remit levies. The suit came up for Judgment on 25th September, 2023, but was struck out for the Plaintiffs' omission to serve pre-action notice on the Defendant (Exh. IHS 13). The Plaintiffs in compliance with the decision of the Court have now issued and served pre-action notice on the Defendant (Exh. IHS 14). On 26th July, 2023, while the suit was pending before the Court, the Defendant served demand notices on 1st and 2nd Plaintiffs, respectively, to remit the Authority (1%) and MDGI Fund (0.5%) Levies (Exhs. IHS 15 and IHS 16). Again, the Defendant issued another demand notice to the 2nd Plaintiff, while a debit note was issued to the 1st Plaintiff on 6th October, 2023 (Exhs. IHS 17 and IHS 18). Then, on 26th September, 2023, the Defendant wrote reminder letters to the 1st and 2nd Plaintiffs, respectively (Exhs. IHS 19 and IHS 20). In order to ensure the uninterrupted conduct of their

business operations, the Plaintiffs were compelled to remit part of the statutory levies demanded by the Defendant (Exhs. IHS 21 and IHS 22). That it is in the interest of justice to grant the reliefs as sought in the Originating Summons.

The case of the Defendant is that the Plaintiffs are two distinct and independent companies. The Defendant amongst others, holds the crucial responsibility of formulating regulations governing various aspects of the petroleum industry, along with other midstream and downstream operations and is also entrusted with regulating activities concerning transportation, shipment etc, of petroleum liquids and related substances within Nigeria. Furthermore, the Defendant is also empowered to issue permits and licenses in respect of midstream and downstream petroleum operations, to establish and oversee a wholesale market facilitating the consistent supply of petroleum products to customers and the authority to grant license for the importation of petroleum products to companies. In response to paras. 5 – 10, regardless of any Cost Sharing or Throughput Support Agreements, the Plaintiffs are two different entities duly licensed to engage in downstream petroleum products operations. Both Plaintiffs hold import permits only applicable to midstream operations, while the 2nd Plaintiff holds a petroleum depot license. In response to paras. 9, 10 and 11, there is nothing placed before the Court in support of the Plaintiffs' assertion that they own BTSs, but that the Plaintiffs only manage BTS on behalf of third-party users and are put to the strictest proof. In response to para. 12, the words, 'permits' and 'license' are used interchangeably and mean the same thing and so, holders of import permits are licensed to import petroleum products and are wholesale petroleum liquids suppliers by the tenor of the Act. The Plaintiffs as wholesale petroleum liquids suppliers are equally wholesale customers when they load products from each other or load from products they initially imported.

In response to paras. 13 – 15, the Plaintiffs are engaged in separate and distinct aspects of petroleum liquids operation. In further response to paras. 15.1 and 15.2, the Defendant denies issuing any storage license to any of the Plaintiffs or their affiliates. The license issued to the 2nd Plaintiff and also Chisco Ltd which is used by the 1st Plaintiff are petroleum depot licenses, simpliciter, not storage licenses, and so does not permit the licensees to deploy stored products for their own use, but to sell (Exh. A). It is not true that the Plaintiffs do not deal in, trade, sell or buy AGO. The 1st Plaintiff as a wholesale petroleum liquids supplier having transferred custody of its imported petroleum products to a storage facility has sold or is deemed to have sold the products to the storage facility as a wholesale customer. Specifically, when the 1st Plaintiff transfers its imported AGO into the storage facility of Chisco Ltd, it does so as a wholesale supplier, while Chisco Ltd receives the product as a wholesale customer which deems such transaction as a sale and subject to be levied, likewise, the 2nd Plaintiff's petroleum depot in Koko. The Plaintiffs sell petroleum products to telcos by including the costs of petroleum products amongst other related cost heads. Telcos requested a 40% increase in call, SMS, and data costs due to escalating operational expenses in the country, which decision was driven by a 35% surge in operating expenses due to heightened energy costs (Exhs. A2). All Telecommunication entities are mandated to secure storage licence for any base station with over 500 litres of petroleum products in line with the definition of a wholesale customer, of which the 2nd Plaintiff has one (Exhs. A3, A4 and A5). The Plaintiffs by dealing with petroleum products in a commercial manner with a third party, qualify for levy. The Plaintiffs are required to conduct these activities transparently and by so doing are obligated to submit transaction details to the Defendant. By their own admission in paragraphs 15.3 and 16, the Plaintiffs have failed to comply with

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the stipulations of the law and consequently, are in breach of the enabling law. In response to paragraphs 17 – 24, the actions of the Defendant were in line with its mandate. The Defendant demanded that the Plaintiffs, as wholesale customers, pay the mandatory statutory levies and as a result, the temporary suspension of the activities of the Plaintiffs was because of their non-compliance. In response to para. 24, the letter purportedly written by ALTON to the Defendant does not change the fact that the Plaintiffs are considered suppliers or sellers of petroleum products. In response to para. 27, the Defendant did not concede that the Plaintiffs were not liable to pay the levies nor were they permitted to continue operations illegally. In response to paras. 31 – 37, the demand notices and reminders were issued in line with the statutory functions of the Defendant. In response to para. 38, the term 'sold in Nigeria' has been adequately defined by the Operations Regulations. The Defendant has the authority to enforce levy provisions under the law and has not imposed tax obligations on the Plaintiffs outside statutory provisions.

I have taken note of the averments in the Plaintiffs' Further Affidavit in response to the Defendant's Counter Affidavit deposed to on 8th December, 2023. I will make reference thereto when appropriate.

The submission in the Written Address of the Plaintiffs is predicated on the questions formulated for determination in the Originating process.

It is submitted on issue 1, that the Plaintiffs who do not sell petroleum products in Nigeria nor hold a wholesale petroleum liquids supply license and are not bound by the Petroleum Operations Guidelines and as such, the statutory requirement of licensees to publish the price of petroleum products sold in Nigeria is also not applicable to the Plaintiffs; reference is made to Ss 174 (1), 197 (1)-(3) and 208 of the PIA, 2021. The Defendant's demand for the Plaintiffs

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to state ex-depot prices of AGO on their daily loading programme is contrary to the settled principle of law that, the law does not command the doing of the impossible; reliance is placed on *Airtel Networks Ltd. v. Plus Ltd.* (2020) 15 NWLR (Pt. 1747) 235 at 293. More so, the insistent demand of the Defendant is an action in bad faith; reliance is placed on *Celtel (Nig.) Ltd. v. Econet Wireless Ltd.* (2011) 3 NWLR (Pt. 1233) 156 at 169, and *Musical Copyright Society Nigeria (Ltd/Gte) v. Copyright Society of Nigeria (Ltd/Gte) & 2 Ors.* (2018) LPELR-46353 (SC). The Court is urged to resolve this issue in the favour of the Plaintiffs.

The submission on issue 2 is that the purported attempt by the Defendant to define the term "sold in Nigeria" in Regulation 48 of the Operations Regulation is void as it contravenes the principle that a subsidiary legislation cannot override, overreach, supersede or contradict the enabling statute and also because the Defendant lacks the authority to widen or expand any provision of the PIA 2021; reliance is placed on *Osadebey v. A.-G., Bendel State* (1991) 1 NWLR (Pt. 169) 525 at 598. It is an attempt by the Defendant to cast the net wider than anticipated by the drafters of the PIA in a bid to subject the Plaintiffs to levies which must be rejected by the Court; reliance is placed on *Olanrewaju v. Oyeyemi* (2001) 2 NWLR (Pt. 697) 229 at 255. The Court is urged to declare the provisions of para. C in Regulation 48 of the Operations Regulations void to the extent that it is inconsistent with the PIA 2021.

The submission on issue 3 is that the PIA 2021 does not contain charging provisions in the manner in which levies are permitted by statute to be assessed and collected; reference is made to Ss. 47 (2) (c) and 52 (7) (a) thereof. It is trite law in the interpretation of statutes that expropriatory statutes are construed strictly, that is, construed *fortissimo contra proferentes,* against the authority but in favour of the citizen. Therefore, in the imposition of tax, there is

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no room for speculation as tax cannot be charged on a subject where the law does not precisely state who has the obligation to pay said tax; reliance is placed on *A.-G., Bendel State v. P.L.A Aideyan* (1989) 4 NWLR (Pt. 118) 648 at 675-676, *Nangibo v. Okafor & Ors.* (2003) LPELR-1938 (SC), *Abuubakar & Ors. v. Yar'Adua & Ors.* (2008) LPELR-51 (SC), and *Best Children International Schools Ltd. v. FIRS* (2018) LPELR-46727 (CA). The Court is urged to resolve this issue in favour of the Plaintiffs.

It is submitted on issue 4 that the Defendant upon noting the silence of the PIA 2021 on the entity to be charged introduced Regulation 13 of the Operations Regulations, which said Regulation purports to create a tax obligation on the wholesale customer. The Plaintiffs submit that being a subsidiary legislation, the attempt made in Regulation 13 to create an obligation not created by the enabling statute is void; reliance is placed on *Access Bank Plc. v. Ogboja* (2022) 1 NWLR (Pt. 1812) 547 at 576, *Shell (Nig.) Exploration and Production Co. Ltd. v. NOSDRA* (2021) LPELR-53068 (CA), and *Eti-Osa LG v. Jegede & Anor.* (2007) LPELR-8464 (CA). The Court is urged to resolve issue 4 in the affirmative.

The submission on issue 5 is that S. 208 of the PIA 2021 does not empower or enable the Defendant to restrain or bar the loading or evacuation of the Plaintiffs' petroleum products from the depot. Thus, the disruption of the Plaintiffs' business in the absence of necessary statutory basis by the Defendant, is unlawful; reliance is placed on *Abubakar v. Abu & Anor* (2016) LPELR-40261 (CA).

It is submitted on issue 6 that the Defendant lacks the power to demand the publication of prices and enforce compliance with S. 208 of the PIA 2021 as the same does not extend to the Plaintiffs who do not engage in the sale of petroleum products in Nigeria. Therefore, the Defendant's refusal to approve the

Plaintiffs' loading schedule from their depot is unlawful. The law is settled that it is the duty of a statutory body, such as the Defendant, to operate within the ambit of the law and not exceed or abuse its powers; reliance is placed on *Amasike v. Registrar-General Corporate Affairs Commission* (2010) 13 NWLR (Pt. 1211) 399.

On issue 7, the Plaintiffs submitted that the Defendant cannot rely on the PTS Regulations 2023 to extend its regulatory powers to the Plaintiffs who do not sell petroleum products, transport or distribute petroleum products and that any part of the PTS Regulations which purports to apply to the Plaintiffs, who are outside the scope of the Regulation and the PIA 2021, is void, to the extent that it purports to apply to a non-trader of petroleum product; reliance is placed on *Famfa Oil Ltd. v. A.-G., Federation & Anor.* (2007) LPELR-9023 (CA), and *Orubu v. INEC* (1988) 5 NWLR (Pt. 94) 323.

It is submitted on issue 8 that Regulations 3 and 4 (1) of the PTS Regulations 2023 do not apply to activities of persons loading petroleum products from their bulk storage facilities, for personal consumption as that is contrary to the intendment of the principal Act, the PIA 2021.

The Defendant on the other hand, has submitted three questions for determination to wit:

1. *Does the PIA grant the Defendant power to regulate and collect statutory levies from wholesale customers of petroleum products sold in Nigeria, and if so, do the operations of the Plaintiffs as they have described by themselves qualify as sale and distribution of the petroleum products in Nigeria to expose them to the said statutory levies of the Defendant?*

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2. *Does the definition in paragraph C of the term "Sold in Nigeria" found in Section 48 of the Midstream and Downstream Petroleum Operations Regulations 2023 stretch the scope of that term beyond what was contemplated by Sections 47 (2) and 52 (7) of the PIA?*
3. *Notwithstanding that the Plaintiffs hold only Import Permits and Petroleum Depot Licenses of the Defendant, are the directives and consequential enforcement acts of the Defendant in requiring the Plaintiffs among other things to furnish it with information relating to price, destination and end-user sales details of petroleum products handled by the Plaintiffs unreasonable and impractical or unconstitutional in all the circumstances of this case and as a corollary to this, are Regulations 3 and 4 of the Petroleum (Transportation and Shipment) Regulations 2023 made ultra vires the PIA?*

The submission on issue 1 is that the PIA grants the Defendant power to regulate, charge and collect statutory levies from wholesale customers of petroleum products sold in Nigeria; reference is made to Ss. 29 (1) and (2), 33, 125 (3), 174 (3), 47 (1) (2) (C) and 52 of the PIA, 2021. There is no ambiguity about the nature or rate of statutory levies or who should make such payment and so, the Plaintiffs' contention that the PIA 2021 lacks charging provisions is misconceived; reference is made to Ss. 47 (1) (2) (C), 52 (7) of the PIA 2021, and reliance is placed on *Olubunmo & Ors. v. Governor, Ekiti State & Ors.* (2013) LPELR-20405 (CA), and *Agwuna v. A.-G, Federation & Anor.* (1995) LPELR-258 (SC). The Operations Regulations were formulated in complete accordance with the mandate of the Defendant and cannot be held to be *ultra vires* the PIA 2021; reference is made to S. 12 of the Interpretation Act, and reliance is placed on

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Damisa v. U.B.A. Plc. (2005) 9 NWLR (Pt. 931) 526. The Plaintiffs fall under the classification of wholesale customers as their operations qualify as sale distribution of petroleum products; reference is made to Regulation 48 of the Operations Regulation, and Ss. 318, 317 (9) and (10), 206 and 302 (3) of the PIA, 2021.

The submission on issue 2 is that nothing in the definition of "sold in Nigeria" in the Regulation stretches the intention expressed in the PIA 2021, so it applies to the Plaintiffs fairly in all circumstances of this case; reference is made to Ss. 47 (2) and 52 (7) of the PIA 2021. The intention of the legislator is clear. It is the practice that in interpreting a statute, an interpretation that will lead to absurdity should be avoided; reliance is placed on *Ibrahim v. Barde* (1996) 9 NWLR (Pt. 474) 513 at 577, *Dickson v. Sylva & Ors.* (2017) 8 NWLR (Pt. 1567) 167 and *Bello v. Irimiya* (2021) LPELR-55077 (CA). The Court is urged to hold that there is nothing in the Operations Regulations which deviates from the express provisions of the PIA 2021.

The submission on issue 3 is that the Plaintiffs have complained of the Defendant's refusal to approve loading without stating that it withheld said approval because of their non-compliance with the law. It is a settled principle of law that he who comes to equity must come with clean hands. The Plaintiffs have failed woefully to discharge the burden of placing all relevant evidence before the Court. Also, it is trite that the right to liberty is not absolute, to the extent that a person's liberty can be temporarily restrained; reference is made to S. 35 (1) (c) of the 1999 Constitution (as amended), and reliance is placed on *Emeka Ekwunugo v. FRN & Anor.* (2001) 6 NWLR (Pt. 708) 171 at 185. Furthermore, the PTS Regulations 2023 being a subsidiary legislation derives its efficacy from the principal legislation to which it is therefore, secondary and

complimentary; reference is made to Ss. 12 and 18 Interpretation Act, and reliance is placed on *Omatseye v. FRN* (2017) LPELR-42719 (CA) and *Adeboye Amusa v. The State* (2003) LPELR-474 (SC).

This suit is principally about to the interpretation of Ss. 33, 47 (2) (c), 52 (1), (7) (a) and (9), and 174 (1) (i) of the PIA 2021 and Regulations 5 (g), 13 and 48 of the Midstream & Downstream Petroleum Operation Regulations, 2023 (hereinafter referred to as MDPOR 2023) and Regulations 3 and 4 (1) of the Petroleum (Transportation and Shipment) Regulations, 2023 (hereinafter referred to as PTS Regulations 2023) which provision are as follows:

Ss. 33, 47 (2) (c), 52 (1), (7) (a) and (9), 174 (1) of the PIA 2021:

S. 33 Subject to section 216 of this Act, the Authority may make regulations-

(a) concerning the processing, refining, transmission, distribution, supply, sale and storage of petroleum and petroleum products as well as other midstream and downstream petroleum operations;

(b) establishing those midstream and downstream petroleum operations to be subject to a licence or permit from the Authority;

(c) establishing the application criteria and procedure for licences and permits for midstream and downstream petroleum operations;

(d) establishing the procedure for review and approval of licence and permit applications for midstream and downstream petroleum operations;

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(e) establishing the duration and condition and licences and permits for midstream and downstream petroleum operations;

(f) concerning those licences and permits already in effect prior to the date of any regulations issued by the authority for midstream and downstream petroleum operations;

(g) establishing the conditions and procedures for the transfer, surrender, suspension or revocation of licences and permits for midstream and downstream petroleum operations;

(h) establishing the procedure for the modification of licences and permits for midstream and downstream petroleum operations;

(i) establishing the penalties and enforcement mechanisms in respect of breaches of the regulations issued by the Authority;

(j) monitoring processes for midstream and downstream petroleum operations;

(k) concerning the construction and operation of and third-party access to, infrastructure for midstream and downstream petroleum operations;

(l) concerning the production, transportation, and sale of petrochemicals and lubricants;

(m) concerning the national strategic stock;

(n) establishing tariffs for midstream and downstream petroleum operations;

(o) concerning domestic natural gas supply and demand;

(p) concerning natural gas trading and export;

(q) ensuring the continuity and security of the supply of natural gas, crude oil, and petroleum products to customers;

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(r) concerning rights of way and pertaining to surface rights;

(s) relating to the retail, sale and distribution of petroleum products;

(t) concerning dispute resolution and customer protection;

(u) regulating pricing regimes for midstream and downstream petroleum operations;

(v) establishing fees payable to the Authority subject to section 3 (1) (i) of this Act;

(w) concerning competition and anti-competitive behaviour;

(x) establishing public and non-public registries in respect of licences, permits and authorisations issued by the Authority, to be maintained by the Authority; and

(v) any other matters as may be determined by the Authority under this Act which includes imposition of gas flare penalty arising from midstream operations which shall be for the credit of the Midstream and Downstream Gas Infrastructure Fund, and shall be utilised for midstream and downstream gas infrastructure investment within the Host Community of a designated facility.

S. 47 (2) The source of the Authority Fund shall be –

(a) .....

(b) .....

(c) 0.5% of the wholesale price or petroleum products sold in Nigeria. which shall be collected from wholesale customers;

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S. 52 (1) There is established the Midstream and Downstream Gas Infrastructure Fund subject to appropriation by the National Assembly, which shall be-

(a) a body corporate with perpetual succession and a common seal and

(b) reside in the Authority as prescribed in accordance with this Act.

.....

(7) The source of the Midstream and Downstream Gas Infrastructure Fund shall be-

(a) 0.5% of the wholesale price of petroleum products and natural gas sold in Nigeria which shall be collected from wholesale customers and such levy shall be in addition to the levy provided for under section 47 (2) (c);

(9) The levy under section 52 (7) (a) of this Act shall become due within 21 days of the sale of petroleum products and natural gas sold in Nigeria, and the Authority shall, after consultation with the Council, make regulations for-

(a) administration procedures; and

(b) penalties for-

(i) late payment of the levy.

(ii) non-payment of the levy, or

(iii) submission of false information in respect of the levy.

S. 174 (1) The Authority may in consultation with licensees and other stakeholders with respect to midstream petroleum liquids operations, develop a network code governing the terms of

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access into facilities and infrastructure used in midstream petroleum liquids operations.

Regulations 5 (g), 13 and 48 of the MDPOR 2023:

Reg. 5 (g) A manager appointed under these Regulations shall —

.....

(g) provide operational office and accommodation for the personnel of the Authority as the Authority may direct.

Reg. 13 (1) There shall be a payment of 0.5% of wholesale price of petroleum products sold in Nigeria to the Authority, which shall be collected from wholesale customers for —

(a) imported petroleum products sold in Nigeria; and

(b) petroleum products processed and sold in Nigeria.

(2) There shall be a payment of 0.5% of wholesale price of petroleum products and natural gas sold in Nigeria to the Midstream and Downstream Gas Infrastructure Fund which shall be paid by wholesale customers for —

(a) imported petroleum products and natural gas sold in Nigeria; and

(b) petroleum products and natural gas processed and sold in Nigeria.

(3) Following the issuance of certificate of quantity or reconciliation of products sold in Nigeria. the Authority shall issue a debit note for the payment stipulated in sub regulations (1) and (2) of this regulation.

(4) Payments stipulated in sub regulations (1) and (2) of this regulation shall be made within 21 days of issuance of the debit

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note by the Authority, and the Authority shall ensure collection at wholesale points.

(5) Where the sum referred to in sub regulations (1) and (2) of this regulation is not paid within 21 days of the issuance of debit note, a sum equal to 10% of the amount unpaid shall be added for each or part of the month after the date on which payment ought to have been made.

(6) The Authority may, in addition to the penalty specified in sub regulation (5) of this regulation, suspend the operations of the facility into which the product was processed, discharged, or stored until the payment is made.

(7) Notwithstanding the provisions of sub regulation (6) of this regulation, for subsequent transactions, the Authority shall require the producer of petroleum products and natural gas or the importer to pay the levy before allowing evacuation or vessel discharge.

Reg. 48 "*Sold in Nigeria*" means where a petroleum product or natural gas —

(a) is sold free on board in Nigeria or its territorial waters;

(b) is loaded or offloaded for sale within a wholesale point in Nigeria; or

(c) transaction emanates, occurs or is concluded in Nigeria or within its territorial waters;

Regulations 3 and 4 (1) of the PTS Regulations, 2023:

Reg. 3 (1) A person who intends to carry out shipment or export of natural gas or its derivatives, crude oil or its derivatives, condensate,

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petroleum liquids, petroleum products, or any other form of petroleum liquids, shall not later than five working days before the expected time of arrival of the vessel, submit to the Authority an Advance Lifting Schedule in the form prescribed by the Authority.

(2) The Advance Lifting Schedule shall be endorsed by two designated representatives of the person carrying out the shipment or export and shall contain, the —

(a) type, source and producer of natural gas or its derivatives, crude oil or its derivatives, condensate, petroleum liquids. petroleum products, or any other form of petroleum liquids to be lifted or exported.

(b) statement on volume, valid export permit, details of the exporter, destination, the terminal or location from which the natural gas or its derivatives, crude oil or its derivatives, condensate, petroleum liquids, petroleum products, or any other form of petroleum liquids to be lifted;

(c) evidence of measurement, method of measurement and laycan of lifting of the natural gas or its derivatives, crude oil or its derivatives, condensate, petroleum liquids, petroleum products, or any other form of petroleum liquids to be lifted or exported;

(d) estimated time of arrival of the ship or vessel;

(e) valid Wholesale Natural Gas Supply Licence or Petroleum Liquids Supply Licence;

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(f) details of the buyer; and

(g) details of the agent of the ship or cargo owner.

(3) The Authority may, upon review of Advance Lifting Schedule, issue a notice to the person who submitted the Advance Lifting Schedule, specifying the default in the information submitted and give the person twenty-four hours within which to rectify and re-submit the information.

4 (1) Natural gas or its derivatives, crude oil or its derivatives, condensate, petroleum liquids, petroleum products, or any other form of petroleum liquids shall not be lifted from or within Nigeria without a Lifting Identification Number issued by the Authority.

Other provisions brought to bear on this action by the Plaintiffs are Ss. 113, 126, 175, 197, 205, 206, 207, 208, 302, 317, 318 of the PIA 2021 as follows:

S. 113 (1) The Authority shall make regulations and guidelines for the grant or renewal of licence for midstream and downstream petroleum operations.

(2) The Authority shall in consultation with the Commission ensure the implementation of the domestic crude oil supply obligation and domestic gas delivery obligation.

(3) The Authority shall ensure third party access to facilities and pipelines for midstream and downstream petroleum operations where such facilities and pipelines are operated for the own account of the licensee and shall ensure open access where

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the facilities and pipelines are operated by the licensee on an open access basis.

(4) The Authority shall encourage third party investment in facilities and pipelines for midstream and downstream petroleum operations.

(5) The Authority may make regulations on tariffs, which shall be consistent with the tariff methodology set out in this Act.

(6) The Authority may make such other regulations consistent with the regulatory functions of the Authority under section 32 of this Act.

S. 126 In addition to any matter provided under section 113 of this Act, the Authority may issue regulations with respect to midstream and downstream gas operations, which shall include-

(a) the establishment and operation of a wholesale natural gas market scheme to ensure continuity of supply of natural gas to customers, which will apply to the owners and operators of gas transportation pipelines, shippers of natural gas, holders of natural gas storage and distribution licences and gas retailers; and

(b) matters ancillary to or consequential on the activities set out in paragraph (a).

S. 175 In addition to any matter provided under section 113 of this Act, the Authority may issue regulations with respect to midstream and downstream petroleum liquids operations, which shall include—

(a) the establishment and operation of a wholesale market to ensure the continuity of supply of petroleum products to

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customers, that will apply to the owners and operators of crude oil refineries, transportation pipelines and other facilities or vessels for the bulk transportation of petroleum liquids, bulk storage facilities for petroleum liquids and terminals and outlets for retail trading of petroleum products; and

(b) matters ancillary to or consequential on the activities set out in paragraph (a).

S. 197 (1) Subject to sections 111 and 174 of this Act, the Authority may upon approval of an application and payment of prescribed fees, grant and issue a qualified person a wholesale petroleum liquids supply licence.

(2) A company that is a lessee producing crude oil or condensates or both or is a holder of a crude oil refining licence is a qualified person for the purpose of subsection (1) and shall be entitled to apply for and be issued a wholesale petroleum liquids supply licence by the Authority.

(3) A wholesale petroleum liquids supply licence authorises the supplier to sell and deliver petroleum liquids to bulk customers in Nigeria or for export.

S. 205 (1) Subject to the provisions of this section, wholesale and retail prices of petroleum products shall be based on unrestricted free market pricing conditions.

(2) Where the Authority determines that a particular licenced activity is a monopoly service or a service by an excessively dominant supplier, the Authority shall have the power to regulate the tariffs and prices charged by the respective

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licensee in respect of the activities in a manner consistent with the Authority's duties under this Act and with the pricing principles set out in section 207 of this Act.

S. 206 (1) The holder of a wholesale petroleum liquids supply licence and a whole sale customer shall, subject to the provisions of this Chapter, negotiate the wholesale prices directly between the parties on an arm's length basis, provided that the transfer price shall be transparent and reflect the transfer price between the parties.

(2) The Authority shall have power to monitor bulk sale of petroleum products and may publish market-based prices in order to ensure that the transactions are undertaken in a manner that transfer pricing between the supplier and the wholesale customer are undertaken at a transparent arm's length basis.

(3) The supplier shall, within 14 days of the consummation of a transaction relating to the bulk sale of petroleum products, provide the Authority with information relating to the transaction including, where applicable, the cost incurred by the supplier in the production or supply of the product and other information relevant to the price at which the product is sold.

(4) A supplier who knowingly provides information, which is false or misleading with respect to the information required in subsection (3) is liable to a fine stipulated by the Authority in regulations.

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S. 207 Where under section 205 (2) of this Act, the Authority regulates the tariffs and prices of a licensee, the Authority shall allow the seller to recover reasonably and prudently incurred costs, including a reasonable return on the capital invested in the business.

S 208 Licensees shall publish prices as required by the Authority in a manner that ensures that the customers are able to identify and calculate the extent of charges for which they will become liable.

S. 302 (3) Subject to sections 142 (2) and 197 (2) of this Act, a person intending to be involved in more than one stream, that is upstream, midstream or downstream petroleum operations shall register and use a separate company for each stream of petroleum operations under this Act provided that, for companies with petroleum mining leases selected under section 93 (6) (b) and (7) (b) of this Act, no stamp duties and capital gains tax shall be levied by Government on such segregation.

S. 317 (1) .....

(9) Pursuant to subsection (8), licence to import any product shortfalls may be assigned to companies with active local refining licences or proven track records of international crude oil and petroleum products trading.

(10) Import volume to be allocated between participants shall be based on criteria to be set by the Authority taking into account the respective refining output in the preceding quarter, share of active wholesale customers competitive pricing and prudent supply, storage and distribution track

S. 318 Interpretation

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When the Court is called upon to interpret a statute such as the PIA 2021, MDPOR 2023 and the PTS Regulations 2023, the Court must abide by the cardinal principles of interpretation which has been laid down for ages; see *Braithwaite v. S.T.B. (Nig.) Ltd.* (2012) 9 NWLR (Pt. 1305) 304 at 319-320 where it was stated that:

> "It is a cardinal principle of interpretation of statutes that where the provisions or words of a statutes or document are clear and unambiguous, the courts are enjoined to give them their ordinary grammatical meaning. In other words, such words should be given their literal interpretation unless it would lead to absurdity or is inconsistent with other provisions of the statute as a whole. It is trite that a court of law should stop where the statute stops in the exercise of its interpretative jurisdiction. See *Federal Republic of Nigeria v. Osahon* (2006) 5 NWLR (Pt. 973) 361; *Unipetrol Nigeria Plc v. E.S.B.I.R.* (2006) 8 NWLR (Pt. 983) 624; *Attorney-General of Bayelsa State v. Attorney-General of Rivers State* (2006) 18 NWLR (Pt. 1012) 596."

See also *Nigeria Ports Authority Plc v. Lotus Plastics Ltd. & Anor* (2005) 19 NWLR (Pt. 959) 158, *Ojokolobo v Alamu* (1987) 3 NWLR (Pt. 61) 377 at 402, *James v. INEC* (2015)12 NWLR (Pt. 1474) 538 at 588, and *Abacha v. FRN* (2014) LPELR-22014 (SC) P. 48 (paras. A-D). Therefore, in the interpretation of statutes, it is the intention of the lawmaker that the Court must seek to ascertain; see Saraki v. F.R.N. (2016) 3 NWLR (Pt. 1500) 531 at 620, thus, when interpreting the provisions of a statute, the Court must not ascribe meanings to clear, plain and unambiguous provisions in order to make such provisions conform to the Court's view of their meaning or what they ought to be; see *A.-G,. Federation v. Guardian Newspaper Ltd.* (1999) 9 NWLR (Pt. 618) 187 at 264.

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On the other hand, the general principles guiding interpretation of instruments (such as regulations made pursuant to statutory provisions) is that where the words of any instrument are free from ambiguity in themselves, and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is to be construed according to the strict, plain and the common meaning of the words themselves; see *Ibro Hotel Ltd. v. Hotel Service Ltd.* (2001) 8 NWLR (Pt. 714) 174; see also *Union Bank of Nigeria v. Ozigi* (1994) 3 NWLR (Pt. 333) 385. The object of interpretation of any written instrument is to discover the intention of its writer, the written declaration of whose mind it is always considered to be; see *Ademola v. Shodipo* (1989) 5 NWLR (Pt. 121) 329

When the Court is called upon to consider whether the provision of a statutory instrument is in conflict with the provision of the statute pursuant to which it is made, the Court will still consider the clear, plain and unambiguous provisions thereof and examine the possibility of its inconsistency with the provisions of the statute upon which it is made. The reason for this is that the provision of statutory instrument must be in strict conformity with the provision of the statute by virtue of which it is made, otherwise, it can be declared null and void to the extent of its inconsistency. There is no contention that the MDPOR 2023 is made pursuant to Ss. 33, 125 (3) and 174 (3) of the PIA 2021, and the PTS Regulations 2023 is made pursuant to Ss. 32 (a), (c) (ii) and (iii), 33 and 113 (6) of the PIA 2021 by virtue of which both Regulations can be termed as statutory instruments of the PIA 2021. There is need to state at this point that the essence of statutory regulations is that they set out a framework within which activities can be carried out pursuant to the provisions of the statute

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under which they are made. They also set out the guidelines or rules which ensure that activities under the statute are conducted within tolerable boundaries so that the intention of the legislature for making the statute is not defeated. In essence, statutory regulations provide the avenue by which the benefit of the law is seen, observed and derived by regulators, stakeholders and even those directly or remotely affected by the law. So, the material question to consider in determining whether or not a regulation is inconsistent with the provisions of the statute will be to examine if the regulation has attempted to vary or indeed has varied the provisions of the statute to the extent of making contrary or non-compatible provisions.

The grouse of the Plaintiffs is that on 8th June, 2023, the Defendant sent an email to license holders for bulk storage facilities in the Apapa axis in Lagos where Chisco Tank Farm is located stating the new loading program format - must be endorsed by both the Depot Manager and the Defendant's officials together with the ex-depot price indicated on the loading programme (Exh. IHS 10). This prompted the 1st Plaintiff to submit its loading programme for approval but the Defendant's officials refused on the basis that the programme did not contain ex-depot prices to which the 1st Plaintiff explained that it does not sell AGO but uses it to support its operations at the BTS, and so, does not have ex-depot prices. The Defendant's officials' refusal to approve the loading programme (Exh. IHS 11) but was eventually signed off after about three hours. On 9th June, 2023, officers of the Defendant refused to sign the 1st Plaintiff's loading programme from the Chisco Tank Farm and which suspension lasted till 13th June, 2023. The Defendant also refused to approve the 2nd Plaintiff's loading programme at the Koko Tank Farm from 23rd June, 2023, to 24th June, 2023, and only approved after many discussions. The Defendant maintained that the

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Plaintiffs were liable to pay two levies, Authority Fund Levy and MDGI Fund Levy, pursuant to the PIA 2021. It is the Plaintiffs' contention that they are not liable to the levies since they only use AGO for their operations and not for sale and as such do not have an ex-depot price to indicate on the loading programme. After a meeting with the Defendant, the Plaintiffs wrote a letter to the Defendant stating their landing cost, storage cost and restating that they are not liable to pay levies. The Defendant has now made new demands to include the destination of all trucks in their landing programme as well as the contracts they have with users of their BTS. The Plaintiffs in compliance with the decision of the Court have now issued and served pre-action notice on the Defendant (Exh. IHS 14). On 26th July, 2023, the Defendant served demand notices on 1st and 2nd Plaintiffs, respectively, to remit to the Authority (1%) and MDGI Fund (0.5%) Levies (Exhs. IHS 15 and IHS 16). Again, the Defendant issued another demand notice to the 2nd Plaintiff, while a debit note was issued to the 1st Plaintiff on 6th October, 2023 (Exhs. IHS 17 and IHS 18). Then, on 26th September, 2023, the Defendant wrote reminder letters to the 1st and 2nd Plaintiffs, respectively (Exhs. IHS 19 and IHS 20). In order to ensure the uninterrupted conduct of their business operations, the Plaintiffs were compelled to remit part of the statutory levies demanded by the Defendant (Exhs. IHS 21 and HIS 22). Simply put, the Plaintiffs' contention is that they are not liable to the demands by the Defendant in Exh. IHS 10, 11, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

The Defendant says that both Plaintiffs hold import permits only applicable to midstream operations, while the 2nd Plaintiff holds a petroleum depot license. The words, 'permit' and 'licence' are used interchangeably and mean the same thing and so, holders of import permits are licensed to import petroleum products and are wholesale petroleum liquids suppliers by the tenor of the Act. The

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Plaintiffs as wholesale petroleum liquids suppliers are equally wholesale customers when they load products from each other or load from products they initially imported. The Plaintiffs are engaged in separate and distinct aspects of petroleum liquids operation. The license issued to the 2nd Plaintiff and also Chisco Ltd which is used by the 1st Plaintiff are petroleum depot licenses, simpliciter, not storage licenses, and so does not permit the licensees to deploy stored products for their own use, but to sell (Exh. A). The 1st Plaintiff as a wholesale petroleum liquids supplier having transferred custody of its imported petroleum products to a storage facility has sold or is deemed to have sold the products to the storage facility as a wholesale customer. Specifically, when the 1st Plaintiff transfers its imported AGO into the storage facility of Chisco Ltd, it does so as a wholesale supplier, while Chisco Ltd receives the product as a wholesale customer which deems such transaction as a sale and subject to be levied, likewise, the 2nd Plaintiff's petroleum depot in Koko. The Plaintiffs sell petroleum products to telcos by including the costs of petroleum products amongst other related cost heads. Telcos requested a 40% increase in call, SMS, and data costs due to escalating operational expenses in the country, which decision was driven by a 35% surge in operating expenses due to heightened energy costs (Exhs. A2). All Telecommunication entities are mandated to secure storage licence for any base station with over 500 litres of petroleum products in line with the definition of a wholesale customer, of which the 2nd Plaintiff has one (Exhs. A3, A4 and A5). The Plaintiffs by dealing with petroleum products in a commercial manner with a third party, qualify for levy. The Plaintiffs are required to conduct these activities transparently and by so doing are obligated to submit transaction details to the Defendant. By their own admission, the Plaintiffs have failed to comply with the stipulations of the law and consequently, are in breach of the

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enabling law. The actions of the Defendant were in line with its mandate. The Defendant demanded that the Plaintiffs, as wholesale customers, pay the mandatory statutory levies and as a result, the temporary suspension of the activities of the Plaintiffs was because of their non-compliance. The demand notices and reminders were issued in line with the statutory functions of the Defendant. The term 'sold in Nigeria' has been adequately defined by the Operations Regulations. The Defendant has the authority to enforce levy provisions under the law and has not imposed tax obligations on the Plaintiffs outside statutory provisions.

What the Defendant demanded of the Plaintiffs are ex-depot price in order to approve their loading programme, and two levies, that is, 1% Authority Fund Levy and 0.5% MDGI Fund Levy going by Exhs. IHS 15 and IHS 16 which the Plaintiffs are objecting to. The Defendant has averred that the Plaintiffs by dealing with petroleum products in a commercial manner with a third party, qualify for levy, and that the Plaintiffs are required to conduct these activities transparently and by so doing are obligated to submit transaction details to the Defendant. It is the Defendant's averment that by their own admission, the Plaintiffs have failed to comply with the stipulations of the law and consequently, are in breach of the enabling law, and that the actions of the Defendant were in line with its mandate. The Defendant demanded that the Plaintiffs, as wholesale customers, pay the mandatory statutory levies and as a result, the temporary suspension of the activities of the Plaintiffs was because of their non-compliance.

Going by the statutory provisions in this case, S. 33 of the PIA 2021 allows the Defendant to make regulations on a wide range of matters concerning the processing, refining, transmission, distribution, supply, sale and storage of petroleum and petroleum products as well as other midstream and downstream

petroleum operations and establishing those midstream and downstream petroleum operations to be subject to a licence or permit from the Defendant, and monitoring processes for midstream and downstream petroleum operations. The Defendant is authorised by law to make regulations concerning the construction and operation of and third-party access to, infrastructure for midstream and downstream petroleum operations, the production, transportation, and sale of petrochemicals and lubricants, tariffs for midstream and downstream petroleum operations, and fees payable to the Authority subject to S. 3 (1) (i) of the PIA 2021. It is to be noted that S. 125 (3) of the PIA 2021 pursuant to which the MDPOR 2023 is made, gives the Defendant an omnibus power with the respect to regulation prescribing additional activities to be undertaken only on the basis of a licence or permit and the Defendant shall have power to issue licences or permits for the activities in accordance with the PIA 2021. By S. 174 (3) of the PIA 2021, the Defendant is given power with the respect to administration of the midstream and downstream petroleum liquids operation to make regulation prescribing additional activities to be undertaken only on the basis of a licence or permit and the Defendant shall have power to issue licences or permits for the activities in accordance with the PIA 2021. The Plaintiffs have admitted that they are importers with express permit of the Defendant applicable to midstream operations but are not licensees who engage in the bulk sale of petroleum products under S. 174 (1) (g) of the PIA 2021. The Plaintiffs ought to have read the whole of S. 174 of the PIA 2021 particularly subsection (3) thereof which gives the Defendant power to make regulation on administration of the midstream and downstream petroleum liquids operation, and prescribes additional activities to be undertaken only on the basis of a licence or permit. The submission of the Plaintiffs in this regard does not hold water.

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The next contention of the Plaintiffs is that the definition of "sold in Nigeria" in Regulation 48 of the MDPOR 2023 (as a whole), is void to the extent of its inconsistency or overreach of the provisions of Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021. It is S. 47 (2) (c) of the PIA 2021 that makes provision for the Defendant to maintain a fund into which money accruing to it shall be paid and one of the sources of such fund is 0.5% of the wholesale of petroleum products sold in Nigeria, which shall be collected from wholesale customers. On the other hand, S. 52 (7) (a) of the PIA 2021 makes provision for source of the Midstream and Downstream Gas Infrastructure Fund which includes 0.5% of the wholesale price of petroleum and natural gas sold in Nigeria, which shall be collected from wholesale customers and such levy shall be in addition to the levy provided for under S. 47 (2) (c) of the PIA 2021. Upon studying the provision of Regulation 48 of the MDPOR 2023, I find that the definition of the phrase 'sold in Nigeria' thereof provides three situations where it can be so applied that is, where a petroleum product or natural gas is sold free on board in Nigeria or its territorial waters; or is loaded or offloaded for sale within a wholesale point in Nigeria; or transaction emanates, occurs, or is concluded in Nigeria or within its territorial waters. It is necessary to state that the PIA 2021 does not proffer a definition of the phrase 'sold in Nigeria' as to establish any area of inconsistency or overreaching of the provisions of Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021. In fact, I do not see any of the definitions of 'sold in Nigeria' in Regulation 48 of the MDPOR 2023 that is inconsistent or overreaching the provisions of Ss. 47 (2) (c) and 52 (7) (a) PIA 2021, rather, Regulation 48 of the MDPOR 2023 amplifies the provisions of Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021 and makes the provisions more understandable. Another issue raised by the Plaintiffs is that Regulation 13 of the MDPOR 2023 is void to the extent that it purports to impose

a payment obligation that is not clearly and unambiguously charged or imposed by the provisions of Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021. A keen perusal of Regulation 13 (1) of the MDPOR 2023 will reveal that it makes provisions for payment to the Defendant of 0.5% of the wholesale price of petroleum products sold in Nigeria which shall be collected from wholesale customers for imported petroleum products sold in Nigeria, and petroleum products processed and sold in Nigeria for the Midstream and Downstream Gas Infrastructure Fund. It is Regulation 13 (2) of the MDPOR 2023 that makes provision for payment of 0.5% of wholesale price of petroleum products and natural gas sold in Nigeria to the Midstream and Downstream Gas Infrastructure Fund. I am unable to see the area of conflict between the provisions of Regulation 13 of the of the MDPOR 2023 and Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021. I find that there is a nexus which does not amount to inconsistency between Regulation 13 of the MDPOR 2023 and Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021 as to cause the former to be voided.

Now, concerning the PTS Regulations 2023, I have stated before that it is made pursuant to Ss. 33, 113 (6) and 175 of the PIA 2021. The Plaintiffs have canvassed that having regards to the provisions of Part V of the PIA 2021, in particular, Ss. 205, 206, 207 and 208 of the PIA 2021, the Defendant by making the PTS Regulations 2023, has acted *ultra vires* its powers by asking or demanding from the Plaintiffs, non-trading persons or licensees, or their agents: (a) the sale or purchase prices of petroleum products the Plaintiffs consume for their business outside downstream petroleum industry; or (b) the destinations of vehicles transporting the Plaintiffs' petroleum products for consumption in their business, outside the downstream petroleum industry; or (c) contracts entered into by an end user of petroleum products with its non-downstream

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petroleum partners or clients, for non-downstream petroleum activities. The Plaintiffs who have admitted that they are importers with express permit of the Defendant applicable to midstream operations cannot turn around and in the same breath seek to nullify the provisions of either MDPOR 2023 or PTS Regulations 2023 which regulate the business pursuant to which the Defendant issued permits to them. The provision of S. 318 of the PIA 2021 which is the definition section of the PIA 2021 does not draw any definitive line between phrase 'permit' and 'licence'. This means the two phrases can be used interchangeably and I so hold.

I find that the loading programme for which the Defendant requested the Plaintiffs to give ex-depot price thereof comes within the provision of S. 33 of the PIA 2021 which authorises the Defendant to make regulation concerning monitoring processes for midstream and downstream petroleum operations which the AGO loaded by the Plaintiffs from the facility of Chisco Ltd is one.

On the payment of 1% Authority Fund Levy and 0.5% MDGI Fund Levy going by Exhs. IHS 15 and IHS 16 of the Plaintiffs, the provision of S. 33 of the PIA 2021 allows the Defendant to make regulation on tariffs for midstream and downstream petroleum operations, and fees payable to the Authority subject to S. 3 (1) (i) of the PIA 2021.

It is imperative to state now that any person who applies and obtains 'licence' or 'permit' for any of the activities provided for in the PIA 2021 and the regulations thereof is deemed to have read and agreed to the terms of such 'licence' or 'permit' before proceeding to obtain such for the midstream and downstream petroleum liquids operation in Nigeria and before proceeding to commence business pursuant to such 'licence' or 'permit'. Upon obtaining such 'licence' or 'permit' and proceeding to carry on business of the midstream and

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downstream petroleum liquids operation in Nigeria, it is deemed that such person has consented to the terms thereof. Such person cannot upon having carried on business pursuant to such 'licence' or 'permit' be permitted to turn back and question the validity of the obligations that come with the 'licence' or 'permit' under the law. In other words, the Plaintiffs having bound themselves to the terms and conditions of the licence and permits which they obtained from the Defendant and carried on business thereunder, cannot now, turn around to question same just because time has come for compliance.

For the avoidance of doubt, the respective levies provided by Ss. 47 (2) (c) and 52 (7) (a) of the PIA 2021 are neither punitive nor criminal sanctions which are payable upon conviction for any offence pursuant to the provisions of the PIA 2021. They are rather statutory and obligatory contributions to be made to the Midstream and Downstream Gas Infrastructure Fund established by S. 52 of the PIA 2021. The essence of the fund is for the development of infrastructure in the midstream gas operations and such fund is subject to the appropriation of the National Assembly. The levies are distinguishable and separable from taxes and penalties provided for in the PIA 2021 for infractions and offences therein stated. Therefore, to question the levies is to question the essence of Midstream and Downstream Gas Infrastructure Fund and the sensibility and wisdom of the legislature for establishing same.

This Court has considered all the provisions of the law and the statutory instruments brought to bear in this case.

It is on the bases above that I answer the questions formulated by the Plaintiffs on the Originating Summons as follows:

1. Question 1 in the affirmative.
2. Question 2 in the negative.

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3. Question 3 in the negative.
4. Question 4 in the affirmative.
5. Question 5 in the negative.
6. Question 6 in the negative.
7. Question 7 in the negative.
8. Question 8 in the affirmative.
9. Question 9 in the affirmative.
10. Question 10 in the affirmative.
11. Question 11 in the affirmative.
12. Question 12 in the negative, and
13. Question 13 in the negative.

I find in the end that this case lacks merit and ought to be dismissed.

I make an Order dismissing it.

This is the Order of this Court.

I. E. Ekwo
Judge
05/02/2024

Ogunmuyiwa Balogun, Esq., (with Hillary Ojeke, Esq.) for the Plaintiffs.

Dr. Emeka Akabogu, (with P. O. Aniukwu, Esq.) for the Defendant.

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