IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA

IN THE LAGOS JUDICIAL DIVISION

HOLDEN AT LAGOS

BEFORE HIS LORDSHIP HON. JUSTICE B. B. KANYIP

DATE: FEBRUARY 4, 2014 SUIT NO. NICN/LA/120/2013

BETWEEN

Aero Contractors Co. of Nigeria Limited - Claimant

AND

1. National Association of Aircrafts Pilots

and Engineers (NAAPE)

1. Air Transport Services Senior Staff

Association of Nigeria (ATSSSAN)

1. National Union of Air Transport

Employees (NUATE) - Defendants

REPRESENTATION

Tokunbo Wahab, and with him is Kolawole Oluwadare, for the claimant.

A. T. Laleye, and with him are Bassey Attoe and Maxwell Eze, for the defendants.

JUDGMENT

The claimant had taken an originating summons dated and filed on 5th March 2013 against the defendants praying for the determination of the following questions –

1. Whether the actions of downing tools, embarking on sudden strike, barricading, blocking and obstructing the entrance of the claimant company’s business premises by the defendants and its members on 15th February 2013 is in violation of the section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004.
2. Whether the provisions of section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004 applies to the defendants and its members.
3. Whether the defendants and its members who are employees of Aero Contractor Company of Nigeria Limited are providing “essential services” within the meaning of section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004.
4. Whether the threats and ultimatum of 21 days given by the defendants to embark on a strike action and to picket, barricade, block and obstruct access of entry and exit to the claimant company’s business premises on 13th March 2013 is in violation of section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004.

The claimant then prayed for the following reliefs –

1. A declaration that the provisions of section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004 applies to the defendants and its members.
2. A declaration that the actions of downing tools, barricading, blocking and obstructing the entrance of the claimant company’s business premises and sudden strike embarked on by the 2nd and 3rd defendants and its members without declaring a dispute on 15th February 2013 is in violation of the section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004 and therefore unlawful, wrongful and an unlawful interference with the claimant’s trade and economic interests.
3. A declaration that the threats and ultimatum of 21 days given by the defendants to embark on a strike action and to picket, barricade, block and obstruct access of entry and exit to the claimant company’s business premises on 13th March 2013 is in violation of section 31(6)(a) of the Trade Unions Act Cap. T14, Laws of the Federation of Nigeria 2004 (as amended by the Trade Unions Amendment Act 2005) and section 48(l)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004 and therefore unlawful.
4. An order of perpetual injunction restraining the defendants and its members, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from embarking on a strike, downing tools, blocking, barricading and obstructing the entry and exit of the business premises of the claimant companies herein and or the adjoining high ways or carrying on any manner of conduct of whatever nature or type in any manner for the purpose of or with the effect of disrupting the claimant’s conduct of their businesses or interfering with the claimant’s performance of its contractual obligations to third parties being an “essential service” as defined by section 48(1)(b) of the Trade Disputes Act Cap. T8 Laws of the Federation of Nigeria 2004 and sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 Laws of the Federation of Nigeria 2004.
5. An award of the sum of N20,000,000 (Twenty Million Naira) to the claimant being exemplary and aggravated damages against all the defendants for its unlawful conducts against the claimant.

In support of the originating summons are the affidavit in support, accompanying exhibits (Exhibits 1 – 11) and the written address.

The defendants entered appearance by filing memorandum of appearance separately. The 2nd defendant’s memorandum of appearance is dated 18th March 2013 but file on 19th March 2013, that of the 1st defendant is dated 18th March 2013 but filed on 20th March 2013, and that of the 3rd defendant is dated and filed on 4th April 2013. The 1st defendant filed on 20th March 2013 a counter-affidavit with supporting exhibits and a written address dated 20th March 2013; while the 2nd and 3rd defendants jointly filed on 4th April 2013 a 42-paragraphed counter-affidavit with 8 exhibits and a written address dated 4th April 2013. All these processes were respectively adopted by counsel to the parties.

In arguing its case, the claimant noted that it is from the National Industrial Court (NIC) Act 2006 that this Court derives its powers. Furthermore, that by the Practice Direction of 1st July 2012, this Court, by virtue of Order 3 Rule 5(a)(1) of the NIC Rules 2007 has power to determine rights of any person (party) interested in any law, agreement or enactment. That in the instant case, the questions of law as per section 31(6)(a) of the Trade Unions Act (TUA) Cap. T14 LFN 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the Trade Disputes Act (TDA) Cap. T8 LFN 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, Cap. T9 LFN 2004 are to be determined by the Court. The question is to determine the legality or otherwise of the strike action, downing of tools by the defendants who are workers in the essential services category in the aviation industry. It is also to determine the legality of the proposed strike action by the defendants from 13th March 2013.

The claimant referred the Court to section 31(6)(a) of the TUA 2004, which provides that –

No person, trade union or employer shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless –

(a) the person, trade union or employer is not engaged in the provision of essential services.

Also referred to the Court are sections 31(9) of the TUA LFN 2004 and 48(1)(b) of the TDA 2004, which provide that for the purposes of the Act, “essential services” shall be as defined in the First Schedule to the TDA 2004. In the First Schedule to the TDA, “essential services” is defined as –

2. Any service established, provided or maintained by the Government of the Federation or State, by a local government council, or any municipal or statutory authority, or by private enterprise –

(a) for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail, sea, river or air.

The claimant continued that for emphasis, and to dispel all doubts as to the definition of “essential services” and its applicability, the above definition of “essential services” was repeated verbatim in sections 1, 7(1)(b)(iii) of the Trade Disputes (Essential Services) Act 2004. To the claimant, it is important to note that section 8(2) of the Trade Disputes (Essential Services) Act 2004 has *suspended* sections 41 and 42 of the TDA 2004 which had hitherto provided for the procedure and mode for how workers in the essential services category can proceed on strike.

The claimant then submitted that the interpretation of the above provisions of law is very clear and very straight forward. No convoluted canon of interpretation need be used to construe these laws. That the wordings of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004, including the definition of “essential service” should be given their simple grammatical meanings within the context of the Act. The claimant referred the Court to *Atikpekpe v. Joe & ors* [1999] 6 NWLR (Pt. 607) 428 at 437 where the Court reaffirmed the well-established principle of law that –

In the construction of statute when the words are clear and unambiguous, the ordinary natural meaning of the words used should be applied. The words should be accorded their literary meaning without any interpretation and without recourse to external aid.

Also referred to the Court are *Nwanzie v. Idris* [1993] 3 NWLR (Pt. 279) 1 and *Ojokolobo v. Alamu & 7 ors* [1987] 3 NWLR (Pt. 1) 377. That in applying the literal meaning to the provisions of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004, the Court should resolve the 1st and 2nd questions of law above in favour of the claimant.

To the claimant, it is clear from the above facts and the provisions of law that this Court has the power to determine questions of whether the defendants are engaged in essential services as stated in section 31(6)(a) of the TUA 2004. That it is clearly beyond contest that the claimant engages in the business of aviation which involves the carriage and transportation of goods and people by air. It is also a fact that the nature of the claimant’s business in the aviation industry is such that a strike action by the defendant workers will grossly paralyse the business activities of the claimant. That, according to the claimant, is the purport of the provisions of section 31(6)(a) of the TUA 2004 which has envisaged a situation of breakdown of law and order and huge economic losses if employees rendering such essential services as listed in the First Schedule to the TDA are allowed to embark on strike action inordinately and without due process.

The claimant went on that the purport of the legislation was succinctly stated in *National Union of Electricity Employees & anor v. Bureau of Public Enterprises* [2010] 7 NWLR (Pt. 1194) 538. At page 574 D – C, Chukwuma-Eneh, JSC stated the necessity of the Trade Disputes (Essential Services) Act restricting the constitutional right of workers in essential services to strike thus –

The fundamental right guaranteed under section 40 as well as other rights under sections 37, 38, 39 and 41 of the 1999 Constitution, has to be read subject to what is reasonable within a democratic society. That is to say, the appellants’ right under section 40, amongst other fundamental rights under the 1999 Constitution, are not absolute. They have to be exercised to the limits of the ambit of section 45 of the 1999 Constitution. As can be seen, the curtailment of the appellants’ rights under section 40 is direct and clear provisions of the 1999 Constitution itself and therefore it has to abide the consistency test. Thus, by a combined reading of the provisions of sections 40 and 45 of the 1999 Constitution, the provisions of the Trade Disputes (Essential Services) Act is a piece of legislation reasonably justifiable in a democratic society and made to protect the interest of public safety and order and therefore not inconsistent with section 40 of the 1999 Constitution.

That the Supreme Court per *Chukwuma-Eneh* JSC at page 575 C – F went further to pronounce on the need to timeously checkmate industrial actions that can cripple the economy of a nation. He said –

Coming to the instant matter, the 1st defendant/appellant is more or less the sole provider of electricity power, a crucial essential service to the whole nation. The chaos and total confusion, talk less of economic damage that would be inflicted on the people and the nation as a whole should the 1st defendant/appellant as the sole provider of electricity power proceed on an industrial action/strike could only be imagined. Such an action, if not check-mated timeously would bring the entire nation to its economic knees and stand still. To allow that stage of catastrophe to be reached would, with respect, amount to unpardonable naivety. It is in that light that Trade Disputes (Essential Services) Act had to be promulgated to empower the President to proscribe any Trade Union or Association whose members have embarked on threatening industrial unrests/strike action that would otherwise tend to and this disrupt the running of any essential services mentioned in the said Act.

For the definition of what amounts to a trade dispute, the claimant referred the Court to *CAC v. Amalgamated Union of Public Corporations, Civil Service Technical and Recreational Service Employers* [1978 – 2006] Digest of the National Industrial Court Cases page 454 at 460 Para. 4 and *NURTW v. Ogbodo* [1998] 2 NWLR (Pt. 537) 189 at 197 G – H.

The claimant continued that the series of illegal actions taken by the defendants are chronicled in the affidavit in support of the originating summons. That the devastating effects of the defendants’ actions on 15th January 2013 are clearly enumerated in paragraphs 38 to 52 of the affidavit in support of this originating summons. That it is pertinent to state that the claimant is yet to recover from the devastating multiplier effect of the strike. This clearly establishes why the claimant’s present action is necessary and of utmost importance. A strike action by the defendants will greatly jeopardize the claimant’s business and the multiplier effect is beyond imaginable proportions. The cost to the claimant is contained in paragraph 48 of the affidavit in support of this application. Thus, the Court should resolve the 3rd and 4th questions of law in this case in favour of the claimant.

The claimant went on that it brought this action for the determination of the liabilities of the parties under the TUA to prevent the reoccurrence of such a breakdown of law and order and irrecoverable economic losses. That it is important to note that the 21-day ultimatum given by the defendants expired on the 13th March 2013. That the claimant lost revenue running to hundreds of millions of Naira on 15th February to the singular act of the 2nd and 3rd defendants. Presently, the claimant is in danger of losing hundreds of millions of Naira as a result of the threat of the defendants. The claimant then submitted that in the clear interpretation of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004, airline services are under the essential services category, urging the Court to so hold.

The claimant also submitted that the only conclusion that can be drawn by the Court from the facts presented by the claimant in the affidavit in support of the originating summons is that of a situation that requires the determination of questions of law under the TUA and the TDA vis-à-vis the responsibilities and liabilities of the claimant and the defendants there under. In the exercise of its duty, that the Court is to be mindful of doing substantial justice between the parties. That the defendants are workers rendering essential services and as such cannot embark on such strike or industrial action without fulfilling the conditions stated in the TUA, the TDA and the Trade Dispute (Essential Service) Act, urging the Court to so hold.

In conclusion, the claimant urged the Court to resolve the four (4) issues of law in this case in favour of the claimant by holding as follows –

(i) That the actions of downing tools, embarking on sudden strike, barricading, blocking and obstructing the entrance of the claimant company’s business premises by the defendants and its members on 15th February 2013 is in violation of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004.

(ii) That the provisions of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(l)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004 apply to the defendants and their members.

(iii) That the defendants and their members who are employees of Aero Contractor Company of Nigeria Limited are providing “essential services” within the meaning of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004.

(iv) That the threats and ultimatum of 21 days given by the defendants to embark on a strike action and to picket, barricade, block and obstruct access of entry and exit to the claimant company’s business premises on l3th March 2013 is in violation of section 31(6)(a) of the TUA 2004 as amended by the Trade Unions (Amendment) Act 2005 and section 48(1)(b) of the TDA 2004, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act 2004.

The claimant then prayed the Court to grant all the reliefs sought by the claimant against the defendants in this suit.

I indicated that the 1st defendant reacted to the case of the claimant separately from the 2nd and 3rd defendants who did theirs jointly. However, the written address of the 1st defendant is virtually the same with that of the 2nd and 3rd defendants. Since they all raised the same issues and made same submissions on the issues, I shall collectively treat the written addresses of the defendants as one and the same.

The defendants raised two issues for the determination of the Court, namely –

1. Whether this suit is one which ought to be commenced by an originating summons.
2. If the answer to the above is in the affirmative, whether the claimant provides essential services within the meaning of section 31(6)(a) of the TUA 2004.

Regarding issue 1 i.e. whether this suit is one which ought to be commenced by an originating summons, the defendants had raised this issue by way of preliminary objection at the Court’s sitting of June 11, 2013. This Court in that regard held as follows –

...the main question sought to be determined is whether the defendants are involved in essential services in order to determine whether or not they can embark on an industrial action. The facts deposed to in all the supporting affidavits on both sides of the parties, even if they are contestable facts, will have little bearing in the determination of this key question of law,

In the circumstance, I do not think that the objection of the defendants have any merit. It is accordingly dismissed.

It is surprising that counsel to the defendants is again raising the issue as the present issue 1. This attempt to smuggle and re-litigate the issue is unprofessional and so I will not even indulge the defendants with reiterating their arguments on it, not to talk of expressing another opinion on it beyond agreeing with the claimant that it is not the filing of a counter-affidavit to oppose the claims in an originating summons that makes such proceedings to be contentious or to result in substantial disputed facts. The issue and arguments in that regard are accordingly dismissed.

On issue 2 i.e. whether the claimant provides essential services within the meaning of section 31(6)(a) of the TUA 2004, the defendants referred the Court to the words of Lord Denning who said in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481 at 498 –

The literal method is now completely out of date. It has been replaced by the “purposive approach”...In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision.

That the claimant in its written address argued extensively on the interpretation of section 31(6)(a) of the TUA 2004, and what essential services are. That an interpretation of section 31(6)(a) of the TUA 2004, in the line argued by the claimant, will lead to an absurdity. That the 1st defendant in its counter-affidavit, particularly paragraph 6, showed that the business of the claimant is no different from any other company carrying on the business of transportation of persons and goods by air, sea and road. To the defendants, for the Court to apply the literal rule in the interpretation of section 31(6)(a) of the TUA 2004, it is to tantamount for this Court to declare that all persons connected with transportation of persons, goods or livestock by road, rail, sea, river or air are providing essential services regardless of the fact that such persons are carrying out private enterprise, with no value to the State, save the taxes they pay, like any other citizen in the country; and that this will lead to chaos, which cannot be said to be the intention of the legislature in drafting section 31(6)(a) of the TUA 2004.

The defendants went on that in the interpretation of statutes the Courts in this country have always been guided by the golden rule of statutory interpretation. Under the rule, a court is required to interpret the words of the statute by attaching to all such words their literal, ordinary and natural meaning except where such an interpretation will defeat the purpose of the legislation or engender mischief or manifest absurdity, referring to *Amaechi v. INEC* 33 NSCQR 332 at 423. That the reason for this approach is that although the legislators use the words which they feel capture their intention, it is impossible to foresee the numerous sets of facts which may arise, citing *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481 at 498 where Lord Denning had this to say –

Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were....

The defendants also referred the Court to the Supreme Court decision in *Nafiu Rabiu v. State* [1981] 2 NCLR 293 at 326 per Udo Udoma, JSC.

The defendants then submitted that what the claimant is asking the court to do is to make an order which clearly defeats the very obvious ends of section 31(6)(a) of the TUA 2004, and declare the likes of the Nigerian Union of Road Transport Workers, the Okada Riders Association, Keke Riders Association, Taxi Drivers Union, providers of ferry services across the Lagos lagoons, NUPENG, PENGASSAN, the Shippers Council, the Fulani herdsmen and the like, as providers of essential services who cannot strike or embark on trade dispute because they are all persons *connected with* transportation of persons, goods or livestock by road, rail, sea, river or air.

The defendants went on that in support of the claimant’s amazing assertions, the claimant relied heavily on the Supreme Court authority of *National Union of Electricity Employees & anor v. Bureau of Public Enterprises* [2010] 7 NWLR (Pt. 1194) 538. That a cursory look at the decision of the Court will reveal immediately that the circumstances of that case and this suit are at extreme opposite ends, and are not on all fours at all. That the Supreme Court rightly held in that case, that electricity was essential to the whole nation, and a disruption of that service was damaging economically to the nation, and could not be allowed. In the Instant case, the claimant is a private enterprise, carrying on business for its sole benefit and profit. The success or failure of the claimant herein has no bearing on the economy whatsoever, save the negative balances that have become the main stay of the claimant’s books.

Furthermore, that “this Court has the requisite jurisdiction to apply such rules, and interpret the Law in a manner that is consistent with international best practices where labour issues are involved and in a manner that is inconsistent with the Principles of International Law”, referring to section 254C of the 1999 Constitution, as amended, and *Kaycee Nig. Limited v. Prompt & Shipping Corporation* [1964] All NLR 343. The defendants then asked where else the Court can look to determine whether the literal interpretation of section 31(6)(a) of the TUA 2004 conforms with international best practices in labour and international law on the subject other than the International Labour Organization (ILO) Conventions to which Nigeria is a signatory. They went on to refer the Court to the 87th and 98th ILO conventions, which according to the defendants recognize and protect the right to strike as an integral part of the freedom to associate and collectively bargain.

The defendants proceeded to referred to certain literature regarding the ILO jurisprudence on the subject matter but in a manner that was less than coherent in terms of their citations. The defendants simply grouped them as “Articles” and made it look like it was referring to portions of the ILO Conventions on the matter; even here, it is not clear which of the Conventions the defendants was referring to. On the whole, the defendants’ counsel did not seem to appreciate that there is a difference between provisions of the ILO Conventions themselves and the explanations of ILO Committees on the relevant subject matter. The reference to “Article 244 of the ILO Convention” at page 14 of the written address of the defendants, for instance, is blank as to which Convention; and the reference to “*digest 2006*” at pages 13 and 14 of the written address does not for instance indicate the Digest of what.

The defendants referred the Court to Articles 520, 521, 522 and 523 of presumably the “*digest 2006*” as follows –

Article 520 provides thus “while the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interest”.

Article 521 “The Committee has always and recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests”.

Article 522 “the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests”.

Article 523 “the right to strike is intrinsic corollary to the right to organize protected by Convention No 87 (*digest 2006*)”.

The defendants went on to posit that the Freedom of Association Committee of the Governing Board of the ILO has also stated clearly the criteria required for the prohibition of a strike in certain areas of service. That according to the Committee, a prohibition of a strike in essential services may be considered acceptable where there is a clear and imminent threat against the life, personal safety or health of the whole or part of the population, as the following decisions of the Committee point out –

581. “to determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population”.

582. “What is meant by essential services in the strict sense of the term depends to large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”.

585. The following may be considered to be essential services –

Construction, automobiles, manufacturing, agricultural activities, the supply and distribution of foodstuffs, the mint, the government printing service and the state alcohol, salt and tobacco monopolies, the education sector, mineral water bottling company (*digest 2006*).

Finally, that the Freedom of Association Committee of the Governing Body of ILO attached specific importance to the protection of rights of international airlines’ workers as follows –

Article 244 of the ILO Convention provides thus –

The prohibition of trade union activities in international airlines constitutes a serious violation of freedom of Association (*digest 2006*).

To the defendants, since the Civil Aviation industry cannot be considered as essential service and a strike in that industry may not lead to an emergency of a clear and imminent threat to the life, personal safety or health of the whole or part of the population, prohibition of strike in civil aviation industry means a severe violation of the right to associate and to collectively bargain and, therefore, contradicts the 87th and 98th Convention of the ILO, which recognize the following as essential services –

1. The Hospital sector
2. Electricity sector
3. Water supply services
4. The telephone services
5. The police and the armed forces
6. The fire-fighting services
7. Public or private prison services
8. The provision of food to pupils of school age and the cleaning of schools
9. Air traffic control (*digest 2006*)

The defendants continued that the Freedom of Association Committee of the Governing body of ILO clearly notes that the transportation industry (and the civil aviation as a sub-industry of the transportation industry) and specifically, services provided by airlines shall not be considered within the scope of the essential services (except the air-traffic control services).

The defendants went on that Article 587 of the ILO Convention provides thus –

The following do not constitute essential services in the strict sense of the term: radio and television, the petroleum sector, ports, banking, computer services for the collection of excise duties and taxes, department stores and pleasure parks, the metal and mining sector, transportation generally, airline pilots, production, transportation and distribution of fuel, railway services, metropolitan transport, postal services, refuse collection services, refrigeration enterprises, hotel services.

To the defendants, as pointed out earlier, section 254C(1)(f) of the 1999 Constitution, as amended, provides as follows –

"Notwithstanding the provisions of sections 251, 257 and 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters.

That this provision of the Constitution is further strengthened by section 7(6) of the National Industrial Court Act 2006 which provides thus –

The Court shall, in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact.

That in view of the above constitutional and statutory provision, as well as the ILO Convention, the defendants are not in the business of essential services, Therefore, the defendants are entitled to enforce their constitutional right of freedom of association guaranteed under section 40 of the 1999 Constitution, as amended; hence, the defendants are entitled to strike or carry out any industrial action.

In conclusion, the defendants urged the Court to disregard the claimant’s claims in their entirety and dismiss same with substantial cost to the defendants.

The claimant in points of law separately in terms of the separate written addresses of first the 1st defendant and then that of the 2nd and 3rd defendants. Since the issues raised by the defendants are the same, I shall treat the reaction on points of law of the claimant in similar terms.

The claimant started off by reacting to the issue raised by the defendants as to the inappropriateness of commencing this action by way of originating summons given that there are contentious facts in the matter that require resolution and so ill-suited for an action commenced vide originating summons. Since I have discountenanced the submissions of the defendants in that regard, there is no point flogging the issue by reiterating the reply of the claimant in that regard.

In reacting to issue 2 framed by the defendants, the claimant submitted that in the interpretation of statutes, provisions of a statute that are clear and unambiguous are to be construed and applied as they are, as there is nothing for the Court to interpret. Anything more than this exposes the Court to the risk of making law, referring to *Olofu v. Otodo* [2010] 18 NWLR (Pt. 1225) 545 at 577 C – D and *Oyegun v. Nzeribe* [2010] 7 NWLR (Pt. 1194) 577 at 594G on the primacy of the literal rule of interpretation of statutes.

The claimant went on to reargue its case on the facts and to repeat its submissions in the main written address, all in the name of a reply on points of law. For instance, the claimant repeated its arguments regarding the meaning of “essential services” under both statutory and judicial authorities in the country. I shall discountenance all of that and simply concentrate on what was actually a reply on points of law.

The claimant submitted that in accordance with the spirit and purpose of the law, the Courts have consistently held that workers in the essential services cannot embark on strike action, referring to the decision of this Court in *The Hon. AG, Enugu State v. National Association of Government General & anor* unreported Suit No: NIC/EN/16/2010 delivered at the Enugu Judicial Division of the Court on 20th June 2011, where the Court had to determine whether the provisions of section 31(6)(a) of the TUA 2004 applied to the defendant associations. That the Court interpreted the provisions of section 31(9)(b) of the TUA 2004 and the First Schedule of the TDA to mean that workers engaged in any of the services mentioned therein cannot embark on any strike action. That the Court expounded on the definition of services that can be categorized as essential services thus –

Clearly, what is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country; likewise, there can be no doubt that a non-essential service may become essential if as strike lasts beyond a certain time or exceeds a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.

That by this decision, the Court can expand the scope of what amounts to essential services as dictated by the prevailing circumstances in each country; Nigeria in this instant. Thus, while the Court cannot limit the meaning, purport and application of essential service as clearly provided for by law, that is, sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act, this Court as enjoined by section 7(6) of the National Industrial Court Act 2006 can widen the scope of what amounts to essential service in accordance with international best practices.

To the claimant, it is important to note that the provisions of Trade Disputes (Essential Services) Act 2004 and the First Schedule to the Trade Disputes (Essential Services) Act 2004 cover *private enterprise*, which the claimant is.

Furthermore, that it is pertinent to note that section 8(2) of the Trade Disputes (Essential Services) Act 2004 suspended sections 41 and 42 of the TDA 2004. That the elaborate procedure for embarking on a strike action by workers rendering essential services is provided for in sections 4, 6, 18, 41 and 42 of the TDA. To the claimant, the suspended sections 41 and 42 of the TDA provided for fifteen days notice to be given by workers in the essential services category before proceeding on strike action. Hitherto, before the enactment of the Trade Disputes (Essential Services) Act, the position under sections 18, 4 and 6 of the TDA was that such workers in the essential services category have to report a dispute to the Minister of Labour upon which the Minister of Labour will declare a dispute and take steps to amicably resolve such a dispute, failing which the matter will be referred to the National Industrial Court under section 18 of the TDA.

The claimant then submitted that the reality of the circumstances of the prevalent Nigerian socio­economic environment and the need to forestall a breakdown of infrastructure and services necessitated the enactment of the Trade Disputes (Essential Services) Act. More particularly, section 18(2) of the Trade Disputes (Essential Services) Act and the suspension of the notices before a strike action by workers rendering essential services. This, to the claimant, is in line with the rationale behind the Supreme Court decision in *NUEE v. BPE* (*supra*). The intention of the legislature was also clearly defined in that case and thus needs no further adumbration.

As it is, that the Trade Disputes (Essential Services) Act is the current law regulating strike action by workers rendering essential services and the law expressly outlaw any such strike action. That the Trade Disputes (Essential Services) Act applies to this case, and thus the defendants as trade unions rendering essential service in the aviation industry cannot embark on a strike action, urging the Court to so hold. Moreover, that the law is clear and unambiguous. The intention of the legislature is apparent and incontestable. As established by law in instances such as this case where the provision of the law is well defined, the claimant urged the Court to apply the literal interpretation of the Trade Disputes (Essential Services) Act, particularly sections 1, 7(1)(b)(iii) and 8(2) of the Trade Disputes (Essential Services) Act. The claimant referred the Court to *Nwanzie v. Idris* [1993] 3 NWLR (Pt. 279) 1 and *Ojokolobo v. Alamu & 7 ors* [1987] 3 NWLR (Pt .1) 377 regarding the interpretation of unambiguous statutes.

The claimant went on that contrary to the argument of the defendants, the multiplier effect of the success or failure of the claimant on the national economy of a country like Nigeria will be undeniable, to say the least. That the facts of the income accruable to the claimant per day are contained in the affidavit in support of the originating summons dated 5th March 2013 before the Court. The contribution of a huge business enterprise like the claimant’s to the gross domestic product of the nation is in no small measure. At any rate, that the argument of fact in for instance paragraphs 4.2 of the 2nd and 3rd defendants’ written address dated 4th April 2013 goes to no issue as the law is firmly settled that address of counsel no matter how brilliantly written cannot substitute for evidence in any way or manner. The arguments therein contained were nowhere adduced in their counter-affidavit and thus cannot constitute evidence at all, citing *A.G., Lagos State v. C.U.C Ltd* [2002] 14 NWLR (Pt. 786) 105 at 131 and *Aro v. Aro* [2000] 3 NWLR (Pt. 649) 433 at 457.

In response to argument of the defendants in respect of the provisions of ILO Conventions, the claimant submitted that this Court cannot apply the ILO Conventions to this case. That even though Nigeria may be a signatory to the Convention, the position of the law on applicability of international treaties is that such treaty cannot have the force of law in Nigeria unless such treaty has been enacted into law by the National Assembly, citing *Nnaji v. NFA* [2010] 11 NWLR (Pt. 1206) 438 at 454 H – A. That in the case of *Abacha v. Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 at 247, the Supreme Court per Ejiwunmi, JSC stated that –

It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly. This position is generally in accord with the practice in other countries.

In conclusion, the claimant urged the Court to determine the questions of law contained in the claimant’s originating summons dated 5th March 2013 in favour of the claimant in this action.

I heard learned counsel in the matter and considered all the processes and submissions advanced. I had earlier disposed of the defendants’ challenge to the competence of this suit in terms of having to commence this case by way of an originating summons holding in the process that the suit is competent and so the Court has jurisdiction to hear and determine it. The key issue, therefore, calling for the determination of this Court is whether members of the defendant unions can threaten and/or embark on an industrial action. In order to decide this issue, there is the issue whether the defendants are engaged in essential services, in which case they cannot threaten or embark on any industrial action. While the case of the claimant is that the defendants are engaged in essential services and so cannot threaten and/or embark on any industrial action, the case of the defendants is that they are not so engaged in any essential service and so they retain their right to threaten and/or embark on any industrial action.

Before addressing the merit of the issue before the Court, I need resolve an issue raised by the claimant as to the application of ILO Conventions and jurisprudence in this Court. The defendants, making submissions in that regard, had called on this Court to take cognisance of the relevant ILO Conventions 87 and 98 and their accompanying jurisprudence. In its reply on points of law, therefore, the claimant submitted that this Court cannot apply the said ILO Conventions and jurisprudence to this case. To the claimant, Nigeria may be a signatory to ILO Conventions, the law in Nigeria on the applicability of international treaties is that such treaties cannot have the force of law unless they have been enacted into law by the National Assembly, citing *Nnaji v. NFA* [2010] 11 NWLR (Pt. 1206) 438 at 454 H – A and *Abacha v. Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 at 247.

I must first of all state that the causes of action in *Nnaji v. NFA* and *Abacha v. Fawehinmi* all arose before the coming into effect of the Third Alteration to the 1999 Constitution. So the cases do not cover the issues raised by the Third Alteration to the 1999 Constitution. It is section 12 of the 1999 Constitution, as amended, dealing with implementation of treaties that *Nnaji v. NFA* and *Abacha v. Fawehinmi* interpreted and applied. The said section 12 provides –

(1)  No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

(2)  The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3)  A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The thing with section 12 of the 1999 Constitution, as amended, is that a treaty as such shall not have the force of law in Nigeria unless such treaty has been enacted into law by the National Assembly and that law has been ratified by a majority of all Houses of Assembly in the country.

Now section 254C of the 1999 Constitution, as inserted by the Constitution (Third Alteration) Act 2010, deals with the jurisdiction of this Court. Its relevant provisions for present purposes are subsections (1)(f) and (h), and (2), which provide as follows –

(1) Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:–

(f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;

(h) relating to, connected with or pertaining to the application or interpretation of international labour standards;

(2) Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified to labour, employment, workplace, industrial relations or matters connected therewith.

There are two ways of approaching the issue at hand. The first is the question whether the Constitution (Third Alteration) Act 2010, which inserted section 254C(1)(f) and (h) and especially (2) is not the domestication demanded by 12 of the 1999 Constitution itself. I think it is. The Constitution (Third Alteration) Act 2010 amended the 1999 Constitution. Before it was passed and assented to by the President of the country, it was sent to all the “Houses of Assembly in the Federation” and was ratified by majority of the Houses of Assembly, hence the alteration of the 1999 Constitution itself. This effectively means that the requirements of section 12 of the 1999 Constitution were and have been met when section 254C(1)(f) and (h) and (2) was enacted as per the Constitution (Third Alteration) Act 2010.

Even if the first approach were not to be the case, the second approach at treating the issue is that both subsections (1) and (2) of section 254C of the 1999 Constitution, as amended, commence with the word “Notwithstanding”. In subsection (1) it is “Notwithstanding the provisions of sections 251, 257, 272 *and anything contained in this Constitution*…” and in subsection (2), it is “Notwithstanding anything to the contrary in this Constitution….” Section 12 qualifies as both “anything contained in this Constitution” in subsection (1) and “anything to the contrary in this Constitution” of subsection (2). The use of the word ‘notwithstanding’ in any statutory instrument has been judicially considered by the Supreme Court. In *Peter Obi v. INEC & ors* [2007] 11 NWLR (Pt. 1046) 565 at 636 – 634 per Aderemi, JSC, the Supreme Court cited *NDIC v. Okem Ltd and anor* [2004] 10 NWLR (Pt. 880) 107 at 182/182 with approval where it held as follows –

When the term “notwithstanding” is used in a section of a statute it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself.

In like manner the use of the word ‘notwithstanding’ in section 254C(1)(f) and (h) and (2) of the 1999 Constitution, as amended, is meant to exclude the impending effect of section 12 or any other section of the 1999 Constitution. It follows that as used in section 254C(1)(f) and (h) and (2) of the 1999 Constitution, as amended, no provision of the Constitution shall be capable of undermining the said section 254C(1)(f) and (h) and (2); and I so find and hold.

So, whichever of the two approaches is adopted (or even if both approaches are adopted), I have no hesitation whatsoever in finding and holding that this Court has the jurisdiction and power to apply “any international convention, treaty or protocol of which Nigeria has ratified”; and ILO Conventions 87 and 98 and the ILO jurisprudence that goes with them can be so applied in view of their ratification by Nigeria. A look at the website of the ILO available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103259> will show that Nigeria on 17th October 1960 ratified both the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and both Conventions are in force in terms of Nigeria’s membership of the ILO. The argument of the claimant in the instant case that this Court cannot apply the said ILO Conventions and the jurisprudence that goes with them is consequently untenable and so is hereby rejected and hence discountenanced.

I now move to the merit of the issue before the Court i.e. whether the defendants are engaged in essential services and as such cannot threaten or embark on any industrial action. The parties are agreed that the defendants are registered trade unions with branches in the claimant company. By item 6 of Part B to the Third Schedule to the TUA 2004, the jurisdictional scope of the 3rd defendant, the National Union of Air Transport Employees (NUATE), is “all workers in commercial airlines, airport authority, civil aviation authority and travel agencies except those in professional and administrative cadres”. The 2nd defendant, the Air Transport Services Senior Staff Association of Nigeria (ATSSSAN), is provided for under item 39 of Part C to the Third Schedule to the TUA 2004; and on the principle of the desirability of having corresponding senior staff and employers’ associations to the re-structured trade unions of Parts A and B to the Third Schedule to the TUA 2004, ATSSSAN is the corresponding senior staff association to NUATE. See *Air Transport Services Senior Staff Association of Nigeria (ATSSSAN) v. Senior Staff Association of Statutory Corporations and Government Owned Companies (SSASCGOC)* unreported Suit No. NIC/8/2005 the judgment of which was delivered on June 27, 2007. This Court, in *ATSSSAN v. SSASCGOC*, went on to note that ATSSSAN’s constitution dealing with membership provides that “membership shall be open to any eligible Senior Staff employed in Airline, Airport Authority, Air Courier Services, *Air Traffic Controllers*, Air Cargo, Aviation Manufacturing/Assembly factory and Allied Services other than Aircraft pilots and Engineers”. The 1st defendant, the National Association of Aircraft Pilots and Engineers (NAAPE), is provided for under item 1 of Part C to the Third Schedule to the TUA 2004, hence the exclusion of aircraft pilots and engineers (the only members of NAAPE) from the membership of ATSSSAN. It should also be noted that in excluding workers “in professional and administrative cadres” (this category of workers are almost invariably senior staff) from membership of NUATE, the coast is made clear for the creation of ATSSSAN and NAAPE as we have them under Part C of the Third Schedule to the TUA 2004. Are these categories of workers engaged in essential services and so do not have the right to threaten or embark on any industrial action? This remains the question.

Before considering this issue, I need to resolve the question whether the defendants even embarked on or threatened a strike action. In paragraph 16 of the affidavit in support of the originating summons, the claimant deposed that on 15th February 2013, the 2nd and the 3rd defendants downed tools and went on strike taking the laws in their hands. This fact of strike is variously described by the claimant in its depositions in paragraphs 17 – 25 of the affidavit in support. Additionally paragraphs 27, 48 and 50 of the affidavit in support make deposition as to Exhibits 3 and 4 attached to the affidavit in support. Exhibit 3 is a joint letter from ATSSSAN and NUATE to the Managing Director/CEO of the claimant. It is dated 18th February 2013 and titled “Demand for the removal of Temitope Fagbemi, Director HR & Corporate Services”. After explaining their grouse, the 2nd and 3rd defendants concluded in the last paragraph of the letter as follows –

Your Management is hereby given twenty one days within which to seek for a replacement as your failure to do this, may commence uncertain developments.

Exhibit 4 is a letter from NAAPE to the Managing Director/Chief Executive Officer of the claimant. It is dated February 18, 2013 and is titled “Unbearable Conditions in Aero – 21 Days Ultimatum”. After addressing their grievances, which included complaints on Temitope Fagbemi, the 1st defendant gave the claimant 21 days effective from the date of the letter to ameliorate their grievances. The letter concluded as follows –

Should the Management of Aero fail to do the needful as requested above, then NAAPE would choose a course of action it deems fit to ameliorate the issues.

The 2nd and the 3rd defendants in reaction, and in paragraphs 15, 21, 30 (of page 4 – there is another paragraph 30 at page 5), 31, 37 and 39 of their counter-affidavit, denied embarking or threatening any strike action against the claimant. Instead that it was the claimant’s car drivers and cleaners to third party companies that went on strike. See paragraph 14 of their counter-affidavit. However in paragraphs 6 – 10, 12 and 13, the 2nd and 3rd defendants went on to catalogue a number of its grievances that were pending against the claimant.

The question which presently arises is which, between the affidavits of the claimant and the 2nd and 3rd defendants, is more believable. In the first place I must point out that paragraphs 23 and 28 of the counter-affidavit of the 2nd and 3rd defendants in asserting that “local branches are non-juristic persons, as only national bodies of the Respondents is recognised and have authority and powers under the law, to carry out negotiations for and on behalf of the local branches” is false and does not reflect the stance taken by this Court in severally holding that local or unit branches have the capacity to sue and be sued as such. In any case, such a deposition, being a legal argument, is offensive to section 115(2) of the Evidence Act 2011. Equally offensive of section 115(2) of the Evidence Act 2011 is paragraph 41(i) – (vii) of the counter-affidavit. The averments therein are conclusions and legal arguments. Being defective in this manner, the counter-affidavit is defective and so cannot be sustainable.

Even if the counter-affidavit were not this defective, the combination of the cataloguing of grievances in the counter-affidavit, the irrationality of averring that those who went on strike are merely drivers and cleaners who were outsourced by the claimant yet the 2nd and 3rd defendants were willing to and did fight their cause (note that there is no averment whatsoever that these drivers and cleaners are not or have ceased to be members of especially the 3rd defendants since mere eligibility is the yardstick for determining membership of the 3rd defendant), and Exhibit 3 all point to the fact that the 2nd and 3rd defendants threatened to go on strike and did embark on one. When the 2nd and 3rd defendants wrote to the claimant and threatened that “Your Management is hereby given twenty one days within which to seek for a replacement as your failure to do this, may commence uncertain developments”, what did the 2nd and 3rd defendants mean? In paragraph 37 of their counter-affidavit, the 2nd and 3rd defendants averred that thereby they “did not state that the Respondents shall embark on strike or industrial action at the expiration of the deadline”. They, however, did not state what the deadline was meant for. So, to my mind, there is no doubt whatsoever that what was threatened was an industrial action. If the point is that the threatened act was commencing a legal action, this cannot come within the ambit of “uncertain developments”. What was threatened can only mean an industrial action; and I so find and hold. As regards, the 2nd and 3rd defendants, therefore, I hold and find that they threatened and did embark on a strike action against the claimant.

Regarding the 1st defendant, there is no averment by the claimant that it went on any strike. The only averment is paragraph 27 wherein all the defendants made demands against the claimant and then gave 21 days ultimatum to the claimant to meet the said demands. The claimant then referred to Exhibits 3 and 4. I indicated earlier that Exhibit 4 concluded with the assertion that “should the Management of Aero fail to do the needful as requested above, then NAAPE would choose a course of action it deems fit to ameliorate the issues”. The claimant interpreted this to be a threatened industrial action. Incidentally, the 1st defendant in its counter-affidavit did not deny paragraph 27 of the affidavit in support of the originating summons. So the said paragraph 27 must be taken as admitted by the 1st defendant. I agree with the claimant that Exhibit 4 in giving the 21-day ultimatum to the claimant is one that threatened an industrial action; and I so find and hold.

Having found that the 2nd and 3rd defendants threatened and did embarked on an industrial action, and that the 1st defendant only threatened an industrial action, what remains to be resolved is whether members of the defendants are engaged in essential services, in which case they cannot go on any industrial action; and the strike they embarked on or threatened was accordingly unlawful. In arguing its case, the claimant relied on a number of statutory provisions which call for interpretation and application.

The first provision referred to and relied upon by the claimant is section 31(6)(a) of the TUA 2004, as amended by the 2005 Amendment. The said section 31(6)(a) provides that no person, trade union or employer shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless the person, trade union or employer is not engaged in the provision of essential services. Section 48(1) of the TDA 2004 then defines “essential service” to mean any service mentioned in the First Schedule to this Act. The First Schedule to the TDA list out the services that qualify as essential services. The relevant provision for present purposes is paragraph 2(c) wherein any service established, provided or maintained by the Government of the Federation or a State, by a local government council, or any municipal or statutory authority, or by private enterprise for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail, sea, river or air qualifies as an essential service. This provision is similar to that in section 7(1)(b)(iii) of the Trade Disputes (Essential Services) Act 2004. Since the Trade Disputes (Essential Services) Act 2004 is “an Act to empower the President to proscribe any trade union or association the members of which are employed in any essential service if such union or association has been engaged in industrial unrest or acts calculated to disrupt the smooth running of any essential service”, and this fact is provided for in section 1 of same Act, and given that the case at hand is not one for the proscription of any or all of the defendants, the provisions of the Trade Disputes (Essential Services) Act 2004 are really not necessary for the determination of the instant case.

Now, all of these provisions of the TUA, TDA and the Trade Disputes (Essential Services) Act were all enacted before the promulgation of the Third Alteration to the 1999 Constitution. I indicated earlier that by section 254C(1)(f) and (h) and (2) of the 1999 Constitution, as amended, this Court is mandated to apply international best practice and treaties, conventions and protocols ratified by Nigeria. See also section 7(6) of the NIC Act 2006. What this means is that in adjudicating labour/employment disputes, this Court is mandated to apply international best practice and treaties, conventions and protocols ratified by Nigeria. How has the ILO for instance treated the concept of essential services? In the first place, by the ILO publication, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (1996), Fourth (revised) edition at paragraph 131 at page 29, “the right to strike and to organize union meetings are essential aspects of trade union rights”. In *The Hon. Attorney-General of Enugu State v. National Association of Government General Medical and Dental Practitioners (NAGGMDP)* unreported Suit No. NIC.EN/16/2010 the judgment of which was delivered on June 20, 2011, this Court noted that the concept of essential services has not been espoused under our labour jurisprudence beyond the statutory provisions on it. This Court then went on to cite with approval the work of the trio of Bernard Gernigon, Alberto Odero and Horacio Guido titled, “ILO Principles Concerning the Right to Strike” in (1998) 4 *International Law Review*, vol. 137 at pages 441 – 481. Regarding the concept of essential services, which the trio treated fully at pages 450 – 453, they had this to say –

Over time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited). In 1983, the Committee of Experts defined such services as those “the interruption of which would endanger life, personal safety or health of the whole or part of the population”….

Clearly, what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country”; likewise, there can be no doubt that a “non-essential service may become essential if a strike lasts beyond a certain time or exceeds beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”….

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; *air traffic control*.

In contrast, the Committee has considered that, in general, the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain…:

Radio and television; construction; the petroleum sector; automobile manufacturing; ports (loading and unloading); *aircraft repairs*; banking; agricultural activities; computer services for the collection of excise duties and taxes; the supply and distribution of foodstuffs; department stores; the Mint; pleasure parks; the government printing service; the metal sector; the state alcohol, salt and tobacco monopolies; the mining sector; the education sector; *transport generally*; metropolitan transport; refrigeration enterprises; postal services; hotel services.

…………………………………

Obviously, the Committee on Freedom of Association’s list of non-essential services is not exhaustive.

Attention should in all events be drawn to the fact that, in examining a complaint which did not involve an essential service, the Committee maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition…

Applying these principles to the facts of the instant case, only members of the defendant unions engaged in *air traffic control* come within the ambit of those engaged in an essential service. Even those engaged in aircraft repairs and transport generally (as is the case of air transport) do not qualify as engaged in essential services. Evidence was not led before this Court as to who amongst the members of the defendant unions are in air traffic control, the only category of members of the defendant unions that are classified as being in essential service. All other workers in the aviation sector and hence members of the defendant unions do not so qualify and so have and can exercise their union right to strike; and I so find and hold. The argument of the claimant as to the devastating multiplier effect of the strike on it goes to no issue since “the possible long-term serious consequences for the national economy of a strike [does] not justify its prohibition”. Even when the claimant cited the Supreme Court decision in *Union of Electricity Employees & anor v. Bureau of Public Enterprises*, the claimant failed to appreciate that electricity services qualify as essential services in the strict sense under both ILO and Nigerian labour jurisprudence.

On the whole, therefore, and to the extent that members of the defendants are not engaged in air traffic control, I must answer the four questions framed by the claimant for the determination of this Court in the negative. In consequence, the claimant has not made out any case for the grant of the reliefs prayed for and so is not entitled to any of them. The action of the claimant accordingly lacks merit and so is hereby dismissed.

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

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Hon. Justice B. B. Kanyip