

**LIMITATION PROVISIONS AND THEIR APPLICABILITY TO ACTIONS BASED
ON CONTRACT: A REVIEW OF THE LAW***

Abstract

Statutes of Limitation stipulate the time limit within which an action may be instituted in Court after the occurrence of the cause of action. When an action is instituted outside the timeframe specified by the Statute, the right of action is deemed to have become statute-barred and the Court would be divested of the requisite jurisdiction to entertain the matter. When a statutory provision limits the timeframe within which an action may be instituted against a public body, the Courts differ on the application of such a provision to cases founded on contract. Some decisions have adopted a narrow scope and have interpreted these provisions as inapplicable to actions based on contracts while others have adopted a much wider position to accommodate contractual claims. This article provides a historical analysis of the Courts' application of limitation provisions to cases founded on contract. The article highlights the lack of uniformity in the cases which have interpreted various limitation provisions and the consequential uncertainty of the law as a result. The article also expresses the writer's opinions on the applicability of limitation provisions to actions founded on contracts.

Keywords: Statues of Limitation, Public Officers (Protection) Act

1. Introduction

There are two conflicting set of decisions on the applicability of a statutory provisions that limit the time within which an action may be instituted against a public body in cases which are founded on contract. One set of decisions adopts a narrow approach by excluding the application of limitation provisions to cases founded on contract altogether, without any recourse to the nature of the contract. The other set of decisions adopts a wider approach by applying limitation provisions to cases founded on contract if the contract forming the subject matter of the action falls within the acts covered by the limitation provision. Understanding both sets of decisions is valuable for all participants in the legal system. When uncertainty exists about which set of decisions is applicable to the facts of a case, advocates who want to make the strongest possible argument ought to have both sets of decisions in mind. So, too, should judges who are called upon to apply, and in some instances to create, the rules of the limitation system in deciding particular cases. Finally, legislators designing or modifying limitation Laws need to consider these conflicting decisions to ensure that their legislative choices are sensible ones.

2. A Review of the Cases

One of the earliest cases which extensively dealt with the scope of limitation provisions is the case of Nigerian Broadcasting Corporation v Bankole.¹ In this case, the respondent instituted an action challenging his dismissal from the service of the Nigerian Broadcasting Corporation. In its defence, the Nigerian Broadcasting Corporation pleaded that the action was statute-barred under the Nigerian Broadcasting Corporation Act, s 61(1). The Nigerian Broadcasting Corporation Act, s 61(1) provides that:

No suit against the Corporation or any servant of the Corporation for any act done in pursuance or execution or intended execution of any Ordinance or Law, or of any public duty or authority, or in respect of any alleged neglect or default in execution of such Ordinance or Law, duty or authority, shall lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within 12 months next after the ceasing thereto.

The Nigerian Broadcasting Corporation's defence of statutory limitation of action was considered and rejected by the trial Court. The trial Court held that the Nigerian Broadcasting Corporation Act, s61(1) contemplates the position where the Corporation on the authority of an Act does an act which causes injury to a person or his property but does not apply to a case where the Corporation is exercising its right based on common law or contract. The trial Court held that, an action for wrongful dismissal, being a breach of contract does not come within the provision of the Nigerian Broadcasting Corporation Act, s61(1). Dissatisfied with the judgment of the trial Court, the appellant appealed to the Supreme Court. The Supreme Court, per Madarikan, J.S.C. (delivering the judgment of the Court) held that:

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¹ (1972) NSCC (VOL. 7) 220; (1972) ANLR (VOL. 1) 331

We are in no doubt that the learned trial judge was in error in taking the view that section 61(1) is restricted to acts causing 'injury or trespass to a person or his property', and does not apply to cases where the corporation is exercising 'right based on common law or on a contract.' Upon a proper interpretation of section 61(1), we fail to see how it could be said that the section draws such distinction. In our view, the wording of the section is clear and unequivocal. It applies to:- 'an act done in pursuance or execution or intended execution of any Ordinance or Law, or of any public duty or authority, or in respect of any alleged neglect or default in execution of such Ordinance or Law, duty or authority,' and affords protection to all acts done in the circumstances contemplated by that section.

The Court adopted the dicta of Crossman J. in the English case Of *Compton v West Ham County Borough Council*² wherein section 1 of the United Kingdom's Public bodies (Protection) Act, 1893 (The Public bodies (Protection) Act, 1893, s1 is in *pari materia* with Nigerian Broadcasting Corporation Act, s61(1)) was considered. The Supreme Court extensively quoted the judgment as follows:-

Counsel for the defendant council says that the keeping back from the plaintiff of the half of his salary which was kept back was an act done in pursuance or execution or intended execution of an Act of Parliament, and that, the action not having been commenced within six months next after the act so done, the action does not lie. Counsel for the plaintiff says that the Act does not apply because the action is for breach of contract, and he relies upon *Clarke v. Lewisham Borough Council* (4) and *Sharlington v. Fulham Guardians* (5).

The statement in Halsbury's Law of England, Hailsham Edn., Vol. 26, page 294, para. 612, in the article on 'Public bodies and Public Officers', and in the section which is concerned with the execution of a statute, duty or authority, dealing with the Public bodies (Protection) Act, 1893, is as follows:-

'The performance, or breach, of a contract which a public body has the power, but not the duty, to make, is not within the protection of the Public bodies (Protection) Act.' (*Underline mine*)

I think that is a correct statement of the law, and I think that it also would be correct to take in an inverted form, and to say that the breach of a contract which a public body has the duty to make is within the protection of the Act. However, that does not make it at once possible to see how that applies to the present case, because the question is, what was the act done here in respect of which this action is brought? I think that it is only a breach of contract which a public body has the power, but not the duty, to make which is not within the Act. I think that this appears from *Bradford Corpn. v. Myers* (6) and *McManus v. Bowes* (7).

I find it difficult, really, to construe the authorities, and to arrive at the law applicable to this case from them. I think that a breach of a contract which a public body is by statute bound to make does come within the Public bodies (Protection) Act, 1893, and, as the defendant council were, by the Public bodies Order, 1930, Art. 142(1), bound to make the appointment of the plaintiff, I hold that an action for breach of the terms of that appointment is an action within section 1 of the Act of 1893.

Applying the foregoing to the facts of the case, Justice Madarikan held that:

In the instant case, it seems to us that by the combined effect of section 53 of the Nigeria Broadcasting Corporation Act, by virtue of which the defendant/corporation appointed its staff, and the regulations made under section 55(1) for the dismissal of staff, the plaintiff's contract of employment was one which the defendant/corporation was bound to make under the Act, and as the present action alleges breach of that contract, the defendant/corporation is entitled to the protection offered by section 61(1) of the Nigeria Broadcasting Corporation Act. It follows that the defendant's plea that the action was statute barred under section 61(1) ought to have been upheld by the learned trial judge.

In essence, the Supreme Court held that pursuant to section 53 and 55(1) of the Act,³ the Nigerian Broadcasting Corporation had the duty to appoint and dismiss staff in accordance with its regulations. Therefore, the termination of the respondent's employment fell within Nigerian Broadcasting Corporation Act, s61(1). The issue came up

² (1939) 3 ALL E.R. 193

³ Nigerian Broadcasting Corporation Act

again before the Supreme Court in *Nigeria Ports Authority v Construzioni General Farsura Cagefar Spa & Anor.*⁴ In this case, the parties entered into a contract for the construction of the second Apapa Wharf extension. The Nigeria Ports Authority instituted an action against the construction company contracted to carry out the works for a claim for money due under the contract. The 1st respondent filed a counter-claim to the action. At the hearing of the substantive suit, the Nigeria Ports Authority sought to amend its pleadings in order to plead the statutory provision of the Ports Act 1958, s97 in its defence to the 1st respondent's counter-claim. The relevant portion of the Ports Act 1958, s97, as quoted by the Court in the report, is reproduced verbatim as follows:

(1)When any suit is commenced against the Authority or any servant of the Authority for any act done in pursuance or execution, or intended execution of any Ordinance or Law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such Ordinance, Law, duty or authority, such suit...

(2)No suit shall be commenced against the Authority until one month at least after written notice of intention to commence the same shall have been served upon the Authority by the intending plaintiff or his agent...

The trial Court refused the Nigeria Ports Authority's application to amend its pleadings, dismissed the Nigeria Ports Authority's claim, and granted the 1st respondent's counter-claim. Irked by the decision, the Nigeria Ports Authority appealed to the Supreme Court.

At the Supreme Court, the Nigeria Ports Authority criticised the observations made by the trial Court to the effect that:

1. The Ports Act 1958, s97 does not apply to the filing of a counterclaim where the suit itself is brought by the very Authority for whose protection the section was enacted; and
2. Ports Act, 1958 s97 does not deal with actions relating to contract.

On the first point, the Supreme Court held that the initiation of proceedings by a statutory body enjoying the kind of statutory privilege which is conferred on the appellant under the Ports Act 1958, s97 has the effect of precluding such a body from invoking the statutory privilege in respect of any counter-claim directly connected to the principal claim. In other words, by instituting the action against the respondents, the Nigeria Ports Authority had waived its right to the statutory protection which it enjoyed under the Ports Act 1958, s97.

On the second point, the Supreme Court held, at page 955 of the report, as follows:

We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether s.97 of the Ports Act applies to cases of contract.

We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract. (*Underline mine*)

As can be gleaned from the above, the Supreme Court held that the Ports Act 1958, s97, and all similar enactments, were not intended by the legislature to apply to cases founded on contract. The Court held that as the claim and counterclaim were founded on contract, Ports Act 1958, s97 was inapplicable to the suit. As would be seen later in this article, numerous decisions have relied on the decision in *N.P.A. v Construzioni*⁵ in holding that limitation provisions do not apply to cases based on contract. However, from the facts of the case and the portion of the Ports Act 1958, s97 considered by the Supreme Court, the case dealt with the competence of the 1st respondent's counter-claim due to the purported failure of the 1st respondent to serve a pre-action notice on the appellant in a suit which the appellant instituted. That was the major issue in contention. Regardless, the Court went on to hold that the Ports Act 1958, s97 does not apply to cases of contract. Furthermore, it is worth noting the following statement which was made by the Court: 'We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract'.

⁴ (1974) 1 A.N.L.R. (PT. 2) 945

⁵ *ibid*

In contrast to the above statement, the point was settled two years earlier in the case of *N.B.C. v. Bankole*;⁶ A case which was also based on contract. The Court did not advert its mind to the decision in *N.B.C. v. Bankole*⁷ nor attempt to distinguish its facts. Regardless, although the Court decided that the statutory privilege granted to the Nigeria Ports Authority under Ports Act 1958, s97 does not apply to cases of contract, the Court acknowledged that the provision applies to everything done or omitted or neglected to be done under powers granted by the Ports Act 1958. Unfortunately, as the issue was not raised by the parties, the Court did not resolve whether contracting for the extension of the second Apapa Wharf was an act done, or omitted, or neglected to be done by the Nigeria Ports Authority under powers granted by the Ports Act. An attempt may be made to reconcile the decision in *N.P.A. v. Construzioni*⁸ with the decision in *NBC v. Bankole*⁹ on the ground that, as opposed to the employment contract in *NBC v. Bankole*,¹⁰ the contract in *N.P.A. v. Construzioni*¹¹ for the extension of the second Apapa Wharf was a specific contract which did not fall within the statutory duties or authority of the appellant. The contract in *N.P.A. v. Construzioni*¹² may have been a contract which the Nigeria Ports Authority had the power but not the duty to make, thereby, excluding the contract from the ambit of the Ports Act 1958, s97. Unfortunately, the Supreme Court failed to consider this point. In the case of *Ibrahim v. J.S.C.*,¹³ the Supreme Court reverted to the original position adopted in *NBC v. Bankole*.¹⁴ The case also involved an action against the termination of a contract of employment and the applicability of the Public Officers (Protection) Law, s2(a) to the action. The Public Officers (Protection) Law, s2(a) is in pari materia with the Ports Act 1958, s97 and the Nigerian Broadcasting Corporation Act, s61(1). The Supreme Court, per Iguh, J.S.C., laid down the conditions which must be satisfied before the Public Officers (Protection) Law, s2(a) becomes applicable to an action instituted against a public officer. The Court held as follows:

However, for section 2(a) of the Public Officers (Protection) Law to avail any person, two conditions must be satisfied, namely:

- i. It must be established that the person against whom the action is commenced is a public officer or a person acting in the execution of public duties within the meaning of that Law;
- ii. The act done by the person in respect of which the action is commenced must be an act done in pursuance or execution of any Law, public duty or authority or in respect of an alleged neglect or default in the execution of any such Law, duty or authority.

In essence, the applicability of the Public Officers (Protection) Law, section 2(a) to an action does not depend on the nature of the act complained of i.e. contractual or non-contractual, but on whether the act was within the scope of the duties and authority of the public officer against whom the action was commenced. If a public officer (which was held to include natural and artificial persons) carries out an act within the confines of his duties and authority then the Public Officers (Protection) Law, section 2(a) would apply to all actions instituted pursuant to such an act. However, if the act is outside the scope of a public officer's duties and authority then the Public Officers (Protection) Law, section 2(a) would not apply. The decision in *Ibrahim v. J.S.C.*¹⁵ ought to have clarified the law but the issue was again complicated by the Court of Appeal decision in *Santana Medical Services Ltd. v. N.P.A.*¹⁶ In this case, the appellant was a company rendering medical services to the Nigeria Ports Authority under a medical retainership agreement. The Nigeria Ports Authority failed to pay its medical bills and the appellant instituted an action to recover its fees. The Nigeria Ports Authority filed a preliminary objection on the ground that the appellant failed to institute the action within the 12 months of the act complained of as stipulated by Ports Act 1958, s97, (now Ports Act 1990, s110(1)). The Court of Appeal relied on the decision of the Supreme Court in *N.P.A. v. Construzioni*¹⁷ and held that:

With respect, the statement of the Supreme Court that Section 97(1) Ports Act does not apply to cases of contract was clear, categorical and unequivocal in that it stated that the

⁶ NBC (n 1)

⁷ ibid

⁸ Construzioni (n 4)

⁹ NBC (n 1)

¹⁰ NBC (n 1)

¹¹ Construzioni (n 4)

¹² ibid

¹³ (1998) 14 NWLR (PT. 584) 1

¹⁴ NBC (n 1)

¹⁵ Ibrahim (n 13)

¹⁶ (1999) 12 NWLR (PT. 630) 189

¹⁷ Construzioni (n 4)

issue of statutory privilege founded on Section 97 Ports Act about contract was not well settled (sic) it proceeded to settle it that Section 97(1) Ports Act did not apply to cases of contract. The observation was not an obiter dictum as contended by the Respondent...

The contention that the *Nigeria Ports Authority v Construzioni Generali Farsura Cogefar SPA & Anor* case was in conflict with its earlier decision of *NBC v Bankole* lacks substance and untenable as two different statutes were considered by the Supreme Court. In NPA's case, the Ports Act and its Section 97(1) was particularly considered. Under the rule of stare decisis where there are conflicting judgments of a superior court the subordinate court is at liberty to elect which one to follow. I adopt NPA v Cogefar SPA case.

Firstly, the writer humbly expresses its disagreement with the decision of the Court in relation to the liberty of the Court of Appeal to elect which of two conflicting decisions of the Supreme Court to follow. In the case of *Osakwue v Federal College of Education, Asaba*¹⁸ the Supreme Court, per Ogbuagu J.S.C., held that where there are two conflicting judgments of the Supreme Court, the Court of Appeal is bound by the latter decision and must follow and apply it. Based on the foregoing, the Court of Appeal ought to have followed the decision in *Ibrahim v. J.S.C.*¹⁹ which was the most recent Supreme Court decision at the time instead of choosing between *N.P.A. v. Construzioni*²⁰ and *NBC v. Bankole*.²¹ Also, although the Court of Appeal did not expressly acknowledge that there was any conflict between *N.P.A. v. Construzioni*²² and *N.B.C, v. Bankole*,²³ the Court tacitly agreed that the decisions arrived at in both cases were different. The Court tried to differentiate both cases on the ground that the statutes considered were different but failed to state the difference between the statutes that resulted in different decisions. The situation is worsened by the fact that the Court of Appeal extensively quoted and relied on the dicta of Sowemimo J. (as he then was) in *Adelakun v Nigeria Ports Authority*²⁴ which is hereunder reproduced verbatim as follows:

The Court will then have to decide whether under Ports Act 1958, s97 Cap 155, that act complained of was done 'In pursuance or execution or intended execution of any Act of Law or of any Public Duties or Authority or in respect of any alleged neglect or default in the execution of such Act, Law, Duty or Authority.' It is, therefore, necessary that evidence should be led to show what is the contract of service between the parties. When that has been determined and evidence taken as to how the Plaintiff's appointment was terminated then it would be open to the court to decide whether the breach complained of comes within the protection of Ports Act 1958, s97 Cap 155 as not having been brought within 12 months of the accrual of return. The preliminary objection was refused with the case to proceed to actual trial.

The dicta of Sowemimo J. (as he then was) is in consonance with the decisions in *NBC v. Bankole*²⁵ and *Ibrahim v. J.S.C.*²⁶ Both of these decisions distinguish between acts that fall within the ambit of the statutory duties and authority of the public body from acts which are outside the scope of the duties and authority of the public body. Having quoted the dicta of Sowemimo J. (as he then was), the Court of Appeal failed to apply the said dicta to the issue before it. The Court did not consider whether the contract between the Nigeria Ports Authority and Santana Medical Services was 'in pursuance or execution or intended execution of any Act of Law or of any Public Duties or Authority or in respect of any alleged neglect or default in the execution of such Act, Law, Duty or Authority.' It also did not give reasons why it chose not to make such considerations. Rather, without any further analysis of the facts, the Court simply applied the dicta of Ibekwe, J.S.C., in *N.P.A. v. Construzioni*²⁷ to the effect that the Public Officers (Protection) Act, s2 does not apply to cases based on contract.

¹⁸ (2010) 10 NWLR (PT. 1201) 1 @ 34, PARA: B

¹⁹ *Ibrahim* (n 13)

²⁰ *Construzioni* (n 4)

²¹ *NBC* (n 1)

²² *Construzioni* (n 4)

²³ *NBC* (n 1)

²⁴ (1968) NCLR 408

²⁵ *NBC* (n 1)

²⁶ *Ibrahim* (n 13)

²⁷ *Construzioni* (n 4)

It must be noted that the writer neither criticises nor commends the decision of the Court of Appeal. In fact, it may well be that on a proper analysis, the contract between Santana Medical Services Ltd and the Nigeria Ports Authority does not fall within the scope of the Nigerian Port Authority's duties or authority. Rather, the writer contends that the Court of Appeal misdirected itself when it adopted the dicta of Ibekwe, J.S.C. without any further analysis of the facts of the case and without adverting its mind to the decisions of the Supreme Court in *NBC v. Bankole*²⁸ and *Ibrahim v. J.S.C.*²⁹ As noted earlier, the main issue in *N.P.A. v. Construzioni*³⁰ was the competence of the 1st respondent's counter-claim due to the 1st respondent's failure to serve a pre-action notice on the appellant. The ratio decidendi of the case was that a public body cannot rely on a provision which makes the service of a pre-action notice mandatory to the institution of an action to defeat a counter-claim which is a direct result of a principal claim filed by the public body. The dicta of Ibekwe, J.S.C. in *N.P.A. v. Construzioni*³¹ was merely obiter and was not binding on the Court of Appeal. The Court had no duty to strictly adopt it in place of the decisions in *NBC v. Bankole*³² and *Ibrahim v. J.S.C.*³³

Achike, J.C.A.'s dicta in *Amao v C.S.C.*³⁴ may have been a breakthrough in understating the mind of the Courts. His Lordship stated at page 228, paragraph: D of the report as follows:

The general trend or tenor of section 2 of the law shows that the act complained of for which protection is sought within the contemplation of the law is not directed to tortious action. It envisages situations where personal or proprietary injury has been occasioned to a person or his property by the act of a public officer. There is nothing in the provisions of section 2 which expressly or impliedly suggests that it extends to acts of a public officer founded on contract.

The Court's opinion that there is nothing in the provisions of the Public Officers (Protection) Law, s2(a) that expressly or impliedly suggests that it extends to acts of a public officer founded on contract is, with the greatest respect, a most narrow interpretation of the Law. It is suggested that, surely, '*any act done in pursuance or execution or intended execution of any Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Law, duty or authority*' covers the execution of contracts and the obligations performed under contracts if such contracts are executed pursuant to any Law, public duty or authority. If the same narrow approach adopted by the Court is reversed, there is also nothing in the provisions of the Public Officers (Protection) Law, s2(a) that expressly or impliedly suggests that acts founded on contract are excluded from the application of the Law. However, regardless of the inconsistencies, the dicta of Achike, J.C.A. may have done more to explain the rationale behind some of the decisions of the Courts than any other judgment. Simply put, the exclusion of limitation Laws to cases based on contracts was due to a 'general trend' in the judiciary. This opinion is bolstered by the following statement of his Lordship on page 229, paragraphs: C – E of the report as follows:

I am clearly of the view that the weight of current judicial opinion is in favour of the conclusion that section 2(a) of the Law has no application to transactions founded on contract. It will be strange and preposterous if an express or specific contract entered into by a public officer as an agent of Federal or State government were to be affected by section 2 of the Law in the event of failure of the public officer to honour terms of the contract.

It is suggested that this current 'judicial opinion' may be a result of an intention to curb what the judiciary felt was the injustice of the arbitrary non-performance and termination of contracts (especially employment contracts) by public bodies without recourse to due process. This is commendable and has received affirmation from some senior members of the bar. In his contribution to this article, Professor Yemi Akinseye-George, SAN, FCIARB, had this to say:

I will personally prefer an approach which will not allow statutory bodies to hide under Limitation Laws or even pre-action notices to escape their contractual obligation voluntarily entered into even if with the so-called statutory flavour.

²⁸ NBC (n 1)

²⁹ Ibrahim (n 13)

³⁰ Construzioni (n 4)

³¹ Construzioni (n 4)

³² NBC (n 1)

³³ Ibrahim (n 13)

³⁴ (1992) 7 NWLR (PT. 252) 214.

Besides, the fundamental principle of equality of parties applicable to the law of Contract will be in jeopardy should one party enjoy undue statutory advantages.

The writer totally agrees with the views expressed by Professor Akinseye-George. However, it is the writer's humble contention that the fulfilment of such intentions must be within the ambit of the Laws enacted by the lawmakers. If Statutes of Limitation are not to apply to contracts, irrespective of whether they fall within the duties and authority of public bodies or not, then the Laws must be amended by the Legislature and, with the utmost humility, not the Judiciary.

It is an elementary principle of our constitutional law that the Legislative arm of government has the sole prerogative to make laws. The role of the judiciary is confined to the interpretation of such laws and the administration of justice within the bounds of the Laws enacted by the Legislature. When the Court embarks on statutory interpretation, the guiding principle of the Court is the discovery of the intention of the lawmaker as conveyed by the words of the statute. It is the duty of the Courts to try and discover the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.³⁵ The intention of the Legislature is the intention conveyed by the plain, unambiguous meaning of the words used in the Statute. The intention of the Legislature is not what the Court believes the Legislature intended to say nor what the Court believes it ought to say.³⁶

It is the writer's humble opinion that the Court of Appeal in *Santana Medical Services Ltd. v. N.P.A*³⁷ ought to have aligned itself with the Supreme Court's decision in *NBC v. Bankole*³⁸ by interpreting the plain and unambiguous words in the Ports Act 1958, s97 in a manner that portrays the meaning of the words used by the Legislature. The words, 'any act done in pursuance or execution, or intended execution of any Act or Law or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such Act, Law, duty or authority' do not portray the intention that all contracts are exempted from the application of the provision. Rather, the deducible intention of the Legislature from the words is that only contracts which fall outside the 'pursuance or execution, or intended execution of any Act or Law or of any public duties or authority' are excluded from the application of the Ports Act 1958, s97.

Interestingly, albeit frustratingly for litigation lawyers, not every Court shared the current 'judicial opinion'. In the case of *N.P.A. Plc v. Lotus Plastics Ltd.*,³⁹ Lotus Plastics Ltd instituted an action at the Federal High Court against the Nigeria Ports Authority Plc and Elder Dempster Agencies Ltd. Lotus Plastics Ltd's case was that it paid freight and warehousing fees to the Nigeria Ports Authority and the 2nd respondent, however, the Tata bus which it had imported was found vandalized in a car park owned and managed by the Nigeria Ports Authority. The Nigeria Ports Authority filed a preliminary objection on the ground that Lotus Plastics failed to comply with the provisions of the Nigeria Ports Decree No. 74 1993, s72(1) before instituting the action. The Federal High Court upheld the preliminary objection and dismissed the suit. Lotus Plastics Ltd appealed to the Court of Appeal and the Court of Appeal allowed the appeal. The Nigeria Ports Authority then appealed to the Supreme Court. The Supreme Court considered whether the contract between the Nigeria Ports Authority and Lotus Plastics Ltd fell within the statutory duties of the appellant as laid out in the Nigeria Ports Decree No. 74 1993, s3(1)(a). In the lead judgment delivered by his Lordship, Mohammed, J.S.C., the Nigeria Ports Decree No. 74 1993, s3(1) & 2, and s72(1) were considered. The sections are hereunder reproduced verbatim:

- 3(1). The company shall –
- a) Provide and operate in the ports, such port facilities as appear to it best calculated to serve the public interest;
 - b) Maintain, improve and regulate the use of the Ports;
 - c) Provide for the ports, the approaches to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids as appear to it best calculated to serve the public interest; and
 - d) Provide such other services as the Minister may, from time to time, require.'
- 3(2). In this section –
 'navigational services' includes the cleaning, deepening and improving of any waterway;

³⁵ *UBA v. CAC & ORS* (2016) LPELR-40569 (CA)

³⁶ *PDP & ANOR v. INEC & ORS* (1999) LPELR-24856 (SC)

³⁷ *Santana* (n 16)

³⁸ *NBC* (n 1)

³⁹ (2005) 19 NWLR (PT. 959) 158

‘port services’ means facilities –

- a) For berthing, towing, mooring, moving or dry-docking of ships in entering or leaving a port or its approach.
- b) For the loading and unloading of goods or embarking or disembarking of passengers in or from a ship;
- c) For the lighter age or the sorting, weighing, warehousing or handling of goods; and
- d) For the carriage of passengers or goods in connection with any of the facilities.’

72(1). When a suit is commenced against the company or an employee of the company –

- a) For an act done in pursuance or execution or intended execution of any enactment or of any public duty or authority;
- b) In respect of any alleged neglect or default in the execution of the enactment, duty or authority,

the suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage within twelve months next after the ceasing thereof.

In resolving the issue of the applicability of the Nigeria Ports Decree No. 74 1993, s72(1) to the facts of the case, the apex Court relied on Preston and Newsom on Limitation of Actions,⁴⁰ under the heading – ‘Proceedings for Breach of Contract’ wherein the learned authors had this to say (Also relied on by Sowemimo J. (as he then was) in *Adelakun v. N.P.A*⁴¹):-

The general considerations as to when the section applies are particularly important where the proceedings are not for tort as in most of the cases so far referred to but for breach of contract...In *Clarke v Lewisham Borough Council* where the action was for wrongful dismissal (that is a claim against an employer for breach of a service contract) Bingham J. went so far as to say that ‘Good Sense’ as well as the authorities showed that the Act was not intended to apply to actions for damages for breach of contract at all. This statement however seems to be too wide. It does seem to me after consideration of all the authorities set out in 38 English and Empire Digest at 119-121 para. 824-831 that the question as to whether the protection of a Limitation Act could be relied upon as a defence in any case especially cases arising from breach of contract would depend on the facts on which an individual case turns. (Underline mine)

Based on the foregoing, the Court held that the Nigerian Ports Decree No. 74 1993, s3(1) & (2) empowered the Nigeria Ports Authority to provide (in the ports operated by it) facilities for the loading and unloading of goods being exported or imported into the country through the ports. The Nigeria Ports Authority was also empowered to provide facilities for warehousing and handling of goods being imported or exported through the ports. The Court then proceeded to examine the 1st respondent’s action against the appellant and held that the action was based on the handling of the 1st respondent’s imported goods, namely, the Tata bus which was unloaded into the warehouse of the Nigeria Ports Authority for which services the 1st respondent paid the warehousing fees to the Nigeria Ports Authority. Based on the above, the Court held that the nature of the acts performed by the Nigeria Ports Authority in its contractual relationship with the 1st respondent were within the statutory duties of the Nigeria Ports Authority as prescribed under the Nigeria Ports Decree No. 74, s3(1)(a), 2(b) and (c). Therefore, the action was statute barred. In another Supreme Court case of *F.R.I.N. v. Gold*,⁴² the issue of the applicability of the Public Officers (Protection) Act, 1990 to cases based on contracts (contract of employment in this case) was not argued by the parties before the Supreme Court. However, the Supreme Court, following the decisions in *NBC v. Bankole*,⁴³ *Ibrahim v. J.S.C.*⁴⁴ and *N.P.A. Plc v. Lotus Plastics Ltd*⁴⁵ unanimously held, *simpliciter*, that the respondent’s action which was based on an employment contract was statute-barred because he had failed to commence the action within three months after the occurrence of the act complained of.

⁴⁰Cecil Herbert Sansome Preston, George Harold Newsom, Lionel Abel-Smith, *Preston and Newsom on Limitation of Actions* (3rd Edition 1953) page 202

⁴¹ *Adelakun* (24)

⁴² (2007) 11 NWLR (PT. 1044) 1

⁴³ NBC (n 1)

⁴⁴ Ibrahim (n 13)

⁴⁵ Lotus (n 39)

The regime of applying limitation provisions to actions based on contracts that fall within the ambit of the duties or authority of public bodies reached its crescendo in the case of *Bakare v. N.R.C.*⁴⁶ In this case, a seven-man panel of the Supreme Court decided an appeal which arose from the termination of the contract of employment of the appellant with the Nigerian Railway Corporation. In its defence at the trial Court, the Nigerian Railway Corporation pleaded the statutory bar in the Nigerian Railway Corporation Act, s83(1) on the ground that the action was instituted after 12 months from the accrual of the cause of action. At the Supreme Court, the appellant argued that the facts of the present case differ from the facts of *NBC v. Bankole*⁴⁷ and that the Nigerian Railway Corporation Act, s17(2)(g)(i) & (ii) and s48 had been wrongly interpreted by the lower Court as bringing his employment within the respondent's statutory duty. The appellant submitted that the provision of section 83(1)⁴⁸ ought not to be construed to lead to injustice and that interpreting section 83(1)⁴⁹ against the appellant would lead to such a result. The appellant further submitted that the contract, being one of master and servant at common law, is completely outside the purview of section 83(1).⁵⁰ Based on these submissions, the appellant invited the Supreme Court to overrule its earlier decision in *NBC v. Bankole*.⁵¹ In summary, the Nigerian Railway Corporation argued that it has been given the authority to make rules and regulations to guide the employment and conditions of service of its staff and that the termination of the appellant's employment was done in pursuance or execution of such authority. Therefore, the appellant's contract of employment is subject to Nigerian Railway Corporation Act, s83(1). The Supreme Court considered the Nigerian Railway Corporation Act, s17(2)(g)(ii) and s48 which is hereunder reproduced as follows:

17(2).

Subject to the provisions of this Ordinance and the Corporations Standing Tender Board Act, 1968 the powers conferred by sub-section (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the Corporation and in particular but without prejudice to the generality of the foregoing sub-section or the board, shall include power:

- g. to enter into agreements with any person
- ii. For the performance or provision by that person of any of the services or facilities which may be performed or provided by the Corporation.'

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The Corporation may make regulations determining generally the conditions of service of servants of the Corporation and in particular, without prejudice to the generality of the foregoing power, may make regulations relating to (a) the appointment, dismissal, discipline, hours of employment, pay and leave of such servant.

The Court held that the Nigerian Railway Corporation Act, s17(2)(g)(ii) and s48 gave the respondent the power to make rules and regulations *inter alia* to guide the employment of its staff. To this end, the relationship between the parties cannot simply be regarded as one of master and servant at common law as it comes within the ambit of the foregoing statutory provisions as an act done under statutory authority. The employment contract between the parties, therefore, fell under Nigerian Railway Corporation Act, s83(1). The Court noted the appellant's application to overrule its decision in *NBC v. Bankole*⁵² which, according to the appellant, was a wide interpretation of the Nigeria Broadcasting Corporation Act, s61(1) and a ready tool for mischievous employers in this era of rising unemployment to back indiscriminate termination of employment contracts without regard to due process. In reaction to the appellant's application, the Court held that the appellant failed to show, according to the decision in *Eporekun v. University of Lagos*,⁵³ that the decision in *NBC v. Bankole*⁵⁴ was wrong or erroneous in law, or that it is *per incuriam*, or that it has become an instrument of injustice. For emphasis, a seven-man panel of the Justices of the Supreme Court, a full Court which is only reserved for the most important constitutional cases and reconsideration of the Court's precedents, decided *Bakare v. N.R.C.*⁵⁵ The Court considered the following arguments: that the application of limitation laws to contracts of employment had become an instrument

⁴⁶ (2007) 17 NWLR (PT. 1064) 606

⁴⁷ NBC (n 1)

⁴⁸ Nigeria Railway Corporation Act

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ NBC (n 1)

⁵² NBC (n 1)

⁵³ (1986) 4 NWLR (PT. 34) 162

⁵⁴ NBC (n 1)

⁵⁵ *Bakare* (n 46)

of justice; that the limitation laws do not apply to contracts of employment; and that the decision in *N.P.A. v. Construzioni*⁵⁶ represents the current state of the law. The Court rejected these arguments and endorsed the decisions in *NBC v. Bankole*,⁵⁷ *Ibrahim v. J.S.C.*,⁵⁸ *F.R.I.N. v. Gold*,⁵⁹ and *N.P.A. Plc v. Lotus Plastics Ltd.*⁶⁰ The decision in *Bakare v. N.R.C.*⁶¹ represented the state of the law for a while. Cases like *Tajudeen v. C.I.P.S.B.*⁶² and *Yare v. N.S.W. & I. C.*⁶³ followed the decision in *Bakare v. N.R.C.*⁶⁴ In *Tajudeen v. C.I.P.S.B.*,⁶⁵ the Court of Appeal considered the applicability of the Public Officers (Protection) Act, s2(a) to an action against the wrongful termination of the employment of the appellant. The appellant argued that the provision does not apply to contracts. On the other hand, the respondent argued that it had acted pursuant to its statutory responsibilities under the Nigerian Customs Service Board Act 1992, s4(2)(b), hence, it enjoys the protection of the Public Officers (Protection) Act, s2(a). The respondent relied on the case of *Bakare v. N.R.C.*,⁶⁶ submitting that the appellant's argument that the Public Officers (Protection) Act, s2(a) does not apply to employment contracts had been debunked by the Supreme Court. In resolving the issue, the Court of Appeal relied on the case of *Bakare v. N.R.C.*⁶⁷ and *F.R.I.N. v. Gold*.⁶⁸ The Court held that the respondent's case is a complaint of the wrongful termination of his employment by the respondent and the said act was done in the day to day activities of the respondent in the discharge of its statutory duty. Under the Nigerian Customs Service Board Act 1992, 4(2)(b), the respondent was empowered to dismiss and exercise disciplinary control over its staff, therefore, Public Officers (Protection) Act, s2(a) applied to the case.

However, the law took an unexpected turn in *N.R.M.A. & F.C. v. Johnson*.⁶⁹ The issue of the applicability of the Public Officers (Protection) Act, s2(a) to actions founded on contract was once again considered by the apex Court. Relying on the decision in *NBC v. Bankole*,⁷⁰ the appellants' counsel argued that there is a distinction between an ordinary contract which a public body can make and a contract which a public body is by statute bound to make. He contended that actions founded on the latter category of contracts are subject to the Public Officers (Protection) Act, s2(a). The appellants' counsel contended that pursuant to the Revenue Mobilisation, Allocation and Fiscal Commission Act 1989, s10(2), under which the 1st appellant appointed the respondents, the contract of employment was one which the 1st appellant had a statutory duty to make under the Act, and as the present action alleges a breach of that contract, the appellants are entitled to the protection offered by Public Officers (Protection) Act, s2(a). Unfortunately, the apex Court did not go into a detailed analysis of the law and the appellants' counsel's submissions. The Court simply stated on page 270, paras: E – F of the report that:

In this matter, while the appellants maintain that the action is caught by section 2(a) of the Public Officers (Protection) Act, the respondents argue that the act is inapplicable. There is no doubt, a careful reading of the respondents' claim will show clearly that it is on contract of service. It is now settled law that section 2 of the Public Officers (Protection) Act does not apply to the cases of contract. See; *Nigeria Ports Authority v. Construzioni General, Farsura Cagefar Spa & Anor* (1974) 1 ANLR. (Pt. 2) 463; *Osun State Government v. Dalami Nigeria Ltd* (2007) 9 NWLR (Pt. 1038) 66; (2007) 3 SC (Pt. 1) 131; (2007) 6 SCM 145; (2007) LPELR2817.

The only other relevant pronouncement on the issue was on page 279, paragraph: G of the report, per Aka'ahs, J.S.C., as follows: 'Since the action instituted by the respondents is a contract of employment, the Public Officers

⁵⁶ *Construzioni* (n 4)

⁵⁷ *NBC* (n 1)

⁵⁸ *Ibrahim* (n 13)

⁵⁹ *F.R.I.N.* (n 42)

⁶⁰ *Lotus* (n 39)

⁶¹ *Bakare* (n 46)

⁶² (2010) 4 NWLR (PT. 1184) 325

⁶³ (2013) 12 NWLR (PT. 1367) 173

⁶⁴ *Bakare* (n 46)

⁶⁵ (2010) 4 NWLR (PT. 1184) 325

⁶⁶ *Bakare* (n 46)

⁶⁷ *ibid*

⁶⁸ *F.R.I.N.* (n 42)

⁶⁹ (2013) 12 NWLR (PT. 1367) 173

⁷⁰ *NBC* (n 1)

(Protection) Law cannot be invoked to bar the action undertaken by the plaintiffs/respondents. The main appeal therefore fails and it is dismissed’.

Like with most of the cases considered in this article, the contract of employment which the Supreme Court was faced with was not a mere contract of employment under common law but a contract of employment with statutory flavor⁷¹ which came into being pursuant to statutory provisions. The conditions, appointment and termination of such contracts are governed by Statutes or regulations made pursuant to Statutes. Contracts of employment with statutory flavor are governed by separate rules from those governing contracts of employment under common law and, more importantly, they are contracts which public bodies have the duty and authority to make. In the writer’s humble opinion, the application of limitation provisions ought not to be excluded from actions founded on such contracts merely because the subject matter of such actions is contractual in nature. Rather, an analysis of the facts and circumstances of each case ought to be carried out to determine whether such contracts fall within the statutory duties or authority of the public bodies seeking to rely on limitation provisions. The only other point left to be made at this juncture is the frustration faced by members of the bar to the ever-changing judicial authorities on the issue, especially after a seven-man panel of the Justices of the Supreme Court was constituted to review the law. The writer hopes that clarity and certainty is brought to this area of the law sooner rather than later.

3. Conclusion

Cases like *N.R.M.A. & F.C. v. Johnson*,⁷² *Santana Medical Services Ltd. v. N.P.A.*,⁷³ *N.P.A. v. Construzioni*⁷⁴ and *Osun State Government v. Dalami Nigeria Ltd*⁷⁵ have adopted a narrow approach to the application of limitation provisions to cases founded on contract, but have failed to expressly provide any legal or public policy reason for such an approach. The lack of certainty of the law on the applicability of limitation provisions to actions founded on contract is a cause for concern. Lawyers face the unenviable situation of being unable to advise their clients as to whether a Court would adopt the approach in the foregoing cases or would adopt the wider approach endorsed in *NBC v. Bankole*,⁷⁶ *Ibrahim v. J.S.C.*,⁷⁷ *F.R.I.N. v. Gold*,⁷⁸ *N.P.A. Plc v. Lotus Plastics Ltd.*⁷⁹ and *Bakare v. N.R.C.*⁸⁰ However, in the humble opinion of the writer, the decision of the Supreme Court in *Bakare v. N.R.C.*,⁸¹ being the only decision by a seven-man panel of the apex Court on this issue, represents the current state of the law and ought to be followed by all Courts as the leading authority on the issue.

⁷¹ *Olaniyan v. UNILAG* (1985) 2 NWLR (PT. 9) 599; (1985) 1 ALL NLR 314

⁷² *N.R.M.A. & F.C.* (n 69)

⁷³ *Santana* (n 16)

⁷⁴ *Construzioni* (n 4)

⁷⁵ (2007) 9 NWLR (PT. 1038) 66

⁷⁶ *NBC* (n 1)

⁷⁷ *Ibrahim* (n 13)

⁷⁸ *F.R.I.N.* (n 42)

⁷⁹ *Lotus* (n 39)

⁸⁰ *Bakare* (n 46)

⁸¹ *Bakare* (n 46)