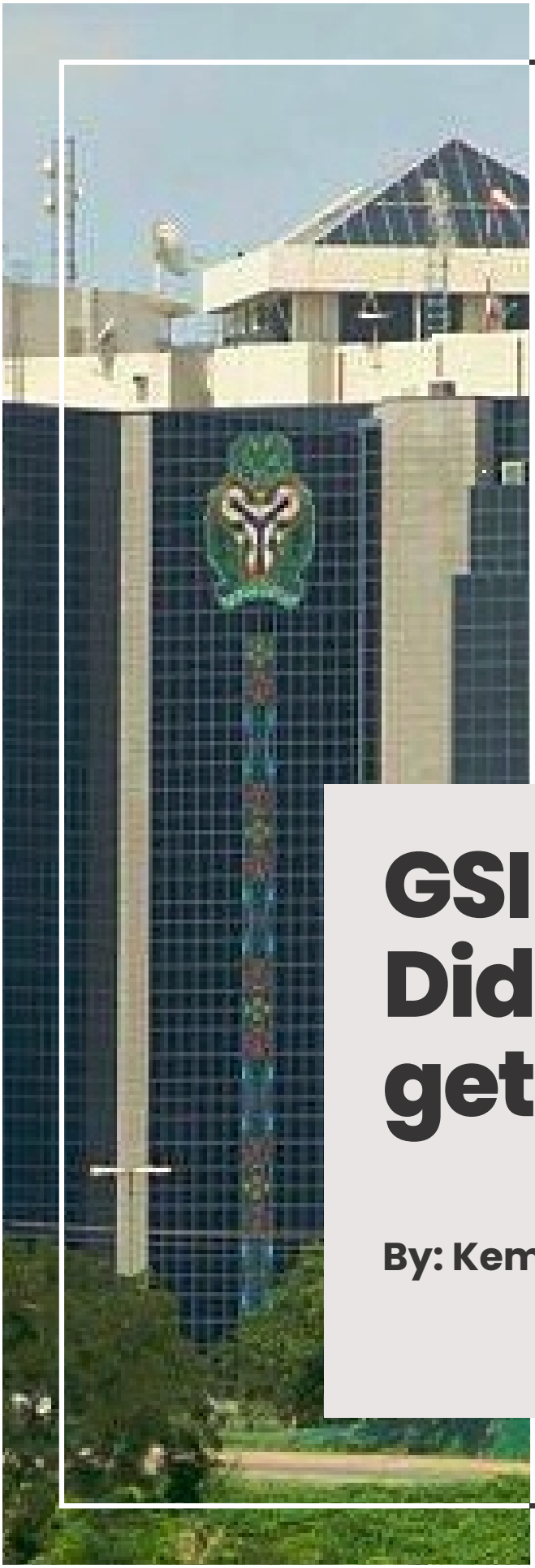

PINHEIRO LP

GSI Directives; Did the CBN get it right?

By: Kemi Pinheiro,SAN,FCIArb,FIoD

Introduction

In order to facilitate and enhance loan recovery processes across banks in Nigeria, the Central Bank of Nigeria (CBN) recently issued the Guidelines on Global Standing Instruction (GSI) (Individuals).

The GSI contains notable provisions on the obligations of a Borrower to execute a GSI mandate permitting a creditor bank to debit any of its bank account in Nigeria in repayment of the loan facility availed the Borrower. The need for such intervention by the CBN is further evident by the statistics on delinquent loans in Nigeria as presented by the National Bureau of Statistics which reveals that as at Q4 2019 bank loans to companies stood at N17.19 trillion, indicating a 4% increase when compared to total loan of N15.13 trillion that was disbursed to the private sector in 2018.

In this article, I will briefly examine the provisions of the GSI Guidelines and consider some of its pitfalls and consequent legal implications. I will also proffer solutions that will assist the CBN in resolving the identified pitfalls and challenges.

Overview of the GSI Guidelines:

GSI is essentially a mandate authorizing recovery of due loan obligations from any and all deposit accounts maintained by a defaulting Borrower with other banks other than the Creditor bank. The GSI is limited to debt recovery only and cannot be used to recover any penal charges that may have accrued on a loan.

The GSI Guidelines makes provision for the responsibilities of the Borrower, the Creditor bank, the Participating Financial Institution (PFI), the Nigerian Inter-Bank Settlement System (NIBSS) and the Central Bank of Nigeria in making the process of debt recovery through the GSI seamless.

By clause 3.2 of the GSI Guidelines, a Borrower is obligated to ensure that all his/her accounts are linked with Bank Verification Number (BVN) and

execute a GSI mandate with clear terms and condition in either hard or digital copy in favour of the creditor bank before such Borrower can access a loan from any financial institution in Nigeria. Interestingly, a joint account to which the borrower is a signatory is also listed in the GSI Guidelines as an account qualifying for recovery through the activation of the GSI mandate.

Detailed provisions have also been made in the Guidelines for sanctions on a Creditor Bank that wrongly activates a GSI mandate and for a Participating Financial Institution attempting to shield the account of a borrower.

Legal Challenges and Pitfalls of the GSI Guidelines:

However, laudable as the GSI Guidelines may seem, it is not without its own legal challenges and pitfalls which include but

not limited to the following:

1. **GSI Guidelines are Ultra vires the powers of CBN**:

Whilst it is conceded that the CBN has powers as the regulator of financial institutions in Nigeria under the CBN Establishment Act (CBN Act) and the Bank and Other Financial Institutions Act, Cap. B3, Laws of the Federation of Nigeria, 2004 (BOFIA) to regulate how banks carry out banking transactions, it must be noted that the powers of the CBN cannot be applied and/or exercised to control and/or regulate contractual relationship between a person and its bank by making mandatory provisions for a person to execute a GSI mandate. In this regard, the application of the Guidelines when put to the test of legality may not stand the test.

To demonstrate this point, a community reading of the provisions of the CBN Act and the BOFIA discloses that no powers or functions were delegated to the CBN to regulate contracts and/or contractual obligations between a bank and its customer. A loan facility is described in ***Incorporated Trustees of Diamond Bank Plc &Anor v. Ogbonna Leonard Irechukwu & Ors(2018) LPELR-44866(CA),*** as being a purely civil contractual transaction.

It is the law that a statutory body must in its actions keep within the limit of the powers donated to it by the enabling law failing which all such excess acts shall be deemed as ultra vires. See: ***Borno State &Anor v. Bams Investment (Nig) Ltd(2017) LPELR-43290(CA).***

Consequently, it is my opinion that the issuance of the Guidelines to the extent that it seeks to regulate simple contracts between a bank and its customers as well as make mandatory provision for a borrower to execute a mandate to recover the loan availed from any of its accounts in other banks, is ultra vires the powers of the CBN.

2. **Activation of the GSI mandate may constitute a Usurpation of the Powers of Court:**

In making the GSI Guidelines, the CBN seem to have overlooked the provision of section 6(6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) as it relates to the powers of the Court to determine the civil rights and liabilities of a person. Why have I said so? Basically, it is not unlikely in most loan transaction in Nigeria for the borrower to either dispute the amount of indebtedness claimed by a creditor bank or the indebtedness itself. In that scenario, will it be appropriate for the Creditor bank armed with the provision of the GSI Guidelines and the consequent GSI mandate to activate same to its own benefit and appropriate such funds standing to the credit of the borrower in other banks irrespective of the dispute? I certainly do not think so, as any suggestion in that regard (as would appear the GSI Guidelines may allow) would constitute the Creditor bank as the judge and jury in its own cause which in itself is an infringement of the constitutional rights of the borrower to approach the Court in the determination of his civil rights and liabilities.

There are an avalanche of cases that point unambiguously to the fact that courts guard their constitutional powers jealously and would resist any attempt to erode or any incursion into those powers. They would inevitably not likely cede their obligations to the CBN or the bankers committee. We do not need Artificial Intelligence to predict that such powers will not be ceded to the CBN or the Bankers Committee. See the case of ***Chevron (Nig) Ltd v IMO State House of Assembly & Ors (2016) LPELR-CA/PH/633/2008.***

Similarly, an instruction issued by the Economic and Financial Crimes Commission (EFCC) in alleged exercise of its powers under the EFCC Act to Guaranty Trust Bank (GTB) to freeze the funds standing to the credit of its customer on the basis of an ongoing investigation was held to be unconstitutional and illegal. In condemning manner in which the instruction was issued and complied with, their Law Lords in the case of ***Guaranty Trust Bank v. Adedamola (2019) 5 NWLR @ PG 30*** held that:

"The Economic and Financial Crimes Commission has no powers to give direct

instructions to Bank to freeze the Account of a Customer, without an order of Court, so doing constitutes a flagrant disregard and violation of the rights of a Customer… It is in the interest of both Government and citizens that laws are respected, as respect for the rule of rule promotes order, peace and decency in all societies, we are not an exception. Our Financial institutions must not be complacent and appear toothless in the face of brazen and reckless violence to the rights of their customers."

The point made here is not diminished by the fact that the borrower executed a GSI mandate because the mandate cannot be construed as granting or conferring adjudicatory powers to the Creditor bank or the CBN where there is a dispute. See the case of ***Adedeji v NBN Ltd (1989)1 NWLR (pt.96) 212.***

3. **Application of the GSI to joint accounts:**

Another critical element in the Guidelines that is worrisome is its application to joint accounts as provided in clause 2.0 without any regard to the principle of privity of contract. It is imperative to state that the settled position of the law is that a Loan Agreement can only be enforced against a party to it. See: ***Ebhota & Ors. v. Plateau Investment and Property Development Co. Ltd. (2005) LPELR-988(SC).***

A joint account is a qualified account to the extent that any mandate to draw down on the funds therein must be jointly executed by all the signatories to the account. See: ***Ndoma-Egba v. A.C.B. Plc (2012) 2 BFLR pg. 250***. Furthermore, the law is also trite that monies in joint account cannot be subject of enforcement of a court judgment on the reasoning that such funds cannot be said to be "debt due". See the case of ***Hirschhorn v. Evans (1938) 3 ALL ER 491,*** where it was held that:

"A joint account cannot be subject of a garnishee order for debt by one of the parties."

See also: ***One Investment and Consultancy Limited v. Cham Poh Meng (2016) SGHC 208***.

Consequently, the application of the Guidelines to joint accounts would constitute a breach of the right of the non-defaulting party

and render the creditor bank and/or the participating bank liable in damages.

4. **Nature of contract with other participating banks**

Another major pitfall of the Guidelines is the fact that it fails to contemplate the mandate an individual borrower/account holder has with the other participating bank. To demonstrate this point, it is important to note that for every account maintained by a person in a bank, there is an implied confidentiality obligation on the Bank not to disclose any details of the account to any other person.

In most cases, irrespective of any executed mandate, the holder of an account may also specify that his consent must first be sought and obtained before any debit can be posted to his account. In that scenario, can the Participating Bank lawfully honour a GSI mandate without first obtaining the consent of the account holder as specified? What then happens where such consent is withdrawn by the account holder?

To appreciate this point, it must be noted that the Guidelines of the CBN cannot be equated with a law validly passed and made by the Legislature. The implication therefore is that the Guidelines cannot curtail the contractual rights of a party as only a law can in appropriate circumstances do so.

Furthermore and also of importance is the fact that there is no privity of contract between the Borrower and the Bankers' Committee which may have, perhaps, been capable of extending the Borrower's obligations to other banks. This is however is not the case here.

It is therefore my opinion that the application of the GSI Guidelines would not absorb the participating bank from liability arising from a breach of its contractual obligation to an account holder.

5. **Injury to the concept of Juristic personality:**

Although it appears that the GSI Guidelines seems to be directed only to individuals, assuming it was also directed to limited liability companies, this will, in my view, assault the concept of juristic personality as established in the locus classicus case of ***Salomon v. Salomon & Co Ltd (1896) UKHL 1***. This is because the GSI contemplates a situation where the Banks, without first approaching the Courts to lift the veil of incorporation as provided for under the Companies and Allied Matters Act 1990, would be able to proceed against individual directors. Whereas, it is trite that the powers to lift the veil of incorporation are vested in the Courts. See:

Bauchi State Government & Ors v. Arewa Ceramics Ltd & Ors (2019) LPELR-47490, Vilbeko (Nig) Ltd v. Nigerian Deposit Insurance Corporation (2006) 12 N WLR (Pt 994) 280

I am therefore of the opinion that an extension of the GSI Guidelines to Companies will injure the principle of juristic personality.

The Way Forward:

Having identified the legal challenges and pitfalls that may negatively impact on the application of the GSI Guidelines, it is necessary for me to make recommendations which I believe would save the banks and other financial institutions from the looming barrage of litigation that are likely to result from the application of the GSI.

Firstly, I am aware that there is currently in Insolvency Bill at the National Assembly. It is therefore my recommendation that rather than issue Guidelines such as the GSI Guideline in bits and pieces, the CBN should support the Legislature in fast tracking the enactment of the Insolvency Act. It is also suggested that a provision can be included giving powers to the Banks to approach the Court for interim attachment of funds of a borrower which will be similar to the provisions in the EFCC Act. This is what is obtainable in other jurisdictions such as India where the **Insolvency and Bankruptcy Code** was recently passed in **2016** and the **United Kingdom Insolvency Act of 1986**. See also the Insolvency Act 24 of 1936.

Secondly, the CBN must establish a supervisory committee to oversee the approval of loans for financial institutions more particularly the grant of loans to individuals and companies. This is because most loans have remained non-performing due to the failure of bank officials to comply with required standards of due diligence especially collaterization before the grant of the loan. Also, a robust disciplinary process with commensurate sanctions must be put in place for erring banking officials who fail to apply the standard procedure of due diligence. I will suggest that such process should include an advertorial of the findings made against the erring official to serve as deterrent to others.

In conclusion, it is well noted that non-performing loans have far reaching implications on the economy of the country, however the regulators such as the CBN must be mindful not to create a bigger challenge for the financial sector by the implementation of policies which may occasion needless protracted litigations and claims for financial compensation for wrongful activation of a GSI mandate.

'Kemi Pinheiro, SAN, FCIArb, FIoD.
Principal Partner, Pinheiro LP

Lagos Office
5/7 Folayemi Street,
Off Coker Road,
Ilupeju, Lagos, Nigeria.
P.O.Box 50240, Falomo, Ikoyi
Tel: (234-1-)802 2259 872
814 3233 555
01-7752 444

Abuja Office
D5008,
Brains and Hammers Estate,
Gwarimpa, Abuja Nigeria.
Tel: (234-9-) 813 648 3781
701 224 4728

www.linkedin.
com/in/pinheirolp

@pinheirolp1

www.pinheirolp.com