Pre-Action Protocols refer generally to the conduct expected of parties prior to the commencement of an action. This concept made its way into our jurisprudence in 2012 when, in addition to originating processes and the mandatory accompanying documents, it was required by the High Court of Lagos State (Civil Procedure) Rules 2012 (the “Old Rules”) that the Claimant file a pre-action protocol form stating that the parties had attempted amicable settlement before resorting to litigation, that a memorandum of claim setting out options for settlement has been issued and exhibiting evidence of such settlement attempts. These are essentially condition precedents to the commencement of an action principally aimed at ensuring that, only disputes which could not be settled amicably were brought before Courts for resolution.

However, despite the intentions of the Rules of Court in introducing this mechanism, its purposive application has been stifled by bad practice of legal practitioners and superior court decisions failing to see pre-action protocols for what they are - condition precedents to discourage the filing of frivolous and unnecessary law suits.

Pre-Action Protocols till date – Performance Assessment

The High Court of Lagos State, when confronted with the issue of the function of pre-action protocols and the consequence of non-compliance with pre-action protocol requirements, consistently held that they are condition precedents to an action and that, where these conditions are not met, such non-compliance goes to the root of the action and nullifies same.

The Court of Appeal, however, has inconsistent views on the point but very recently held that failure to file a Pre-action Protocol Form 01 or comply with any of the pre-action protocol requirements under the Old Rules does not nullify the action. In reaching this decision, the Court relied on the provision of the Old Rules that states the consequence of non-compliance with commencement filing requirements to be that the Registry ought not to accept the processes for filing.
Accordingly, the Court went on to hold that, by accepting the processes for filing, an action was fully in motion and could not be nullified on the basis of non-compliance with pre-action protocol requirements under the Old Rules, a decision in sharp contrast with the clear intention of the Old Rules and the expositions of the High Court of Lagos State.

In instances where counsel have partly complied with the pre-action requirements, the Courts have been of no significant help but rather have placed the barest minimum requirements on the form and content of a memorandum of claim and the pre-action protocol requirements in general. It has been held that a mere letter to the Defendant(s) will suffice since the Old Rules do not specify the contents of the memorandum of claim referred to on the face of the Pre-Action Protocol Form 01.

The result of this inconsistency in the application of the law has led to countless controversies with parties often contesting the compliance with pre-action protocol requirements and its effect on the jurisdiction of the Court prior to delving into the merits of the action. In a number of cases, the decision of the High Court on this question has been subject of appeal thus leading to inordinate delay in the prosecution of the case below the lower court. These, among other reasons, are the ills which the High Court of Lagos State (Civil Procedure) Rules 2019 (the “New Rules”) and Practice Directions on Pre-Action Protocols seek to cure.

The New Regime – 2019 Rules & Practice Direction

In a bid to improve the overall efficiency of the civil justice administration system in Lagos, the New Rules were issued. The New Rules, as expected, not only consider the thorny issue of pre-action protocols and the effect of non-compliance with the requirements, Practice Directions were also issued specifically to deal with and prescribe the form and content of pre-action protocols. This, no doubt reinforces the original intent of the Lagos State judiciary to encourage the use of appropriate forms of alternative dispute resolution mechanisms and ensure proper and timely adjudication of cases deemed suitable for trial.

In summary, the innovations of the New Rules and the Practice Directions can and will be discussed under the following headings: (i) Expansive Pre-Action Protocol Requirements; (ii) Claim-Specific Pre-Action Protocol Requirements; (iii) Introduction of Pre-Action Protocol Bundle; and (iv) Certainty on Effect of Non-Compliance with Pre-Action Protocol Requirements.

Expansive Pre-Action Protocol Requirements

Under the new regime, the pre-action protocol requirements are more expansive than what obtained under the Old Rules where all that was required was the form 01 and a memorandum of claim. The new regime sets out specifically the documents which must be filed in compliance with the pre-action protocol requirements of the rules. The legal narrative for the expansive pre-action protocol requirements is set out below.

First, the New Rules in listing the documents which must accompany an originating process, in an apparent bid to give effect to the Practice Directions, includes “Pre-Action Protocol Form 01 with necessary documents”. The phrase “…necessary documents” leaves room for the practice directions on pre-action protocol to prescribe what documents will accompany the pre-action protocol form 01 and the practice direction does so effortlessly.

Acting on the enablement provided by the New Rules, the Practice Directions on Pre-Action Protocols mandate pre-action correspondence by the parties geared towards the settlement of the dispute. It specifies the content of a memorandum of claim to be issued by an intending Claimant, mandates a response by the prospective Defendant and specifies the content of such a response while also prescribing timelines for all pre-action correspondence.
In brilliant fashion, the Practice Direction contemplates situations where the Defendant may refuse to participate in such pre-action correspondence. The Claimant is allowed to file an affidavit of non-participation of settlement talks which will then deem the Claimant to have fully complied with pre-action protocol requirements even without the Defendant’s participation.

In equally commendable fashion, the Practice Direction allows a party seeking pre-emptive remedies (such as ex parte orders/injunctions) to proceed to file a valid action without full compliance with the pre-action protocol requirements. A claimant in this situation only has to file a memorandum of claim issued to the Respondent to satisfy the pre-action protocol requirements under the Rules. To however justify the filing of this document alone, the ex parte application must be filed as well. Once the pre-emptive application is considered, the Court will then order the Claimant to fully comply with all pre-action protocol requirements.

In line with the foregoing, the New Rules and Practice Directions have significantly improved on setting out what is required of parties as far as pre-action protocols are concerned. This also cements the notion that pre-action protocol requirements are condition precedents required of parties prior to the commencement of an action and not just a mere formality as it had become prior to the issuance of the New Rules.

**Introduction of the Pre-Action Protocol Bundle**

Having examined the substance of the pre-action protocol requirements for general claims and for specific claims, the Practice Direction also stipulates the form in which the Pre-Action Protocol compliance documents should be presented to the Court at the point of commencement of the action.

Specifically, the Practice Direction requires that, at the commencement of an action, the Originating Processes and its accompanying frontloaded documents be spiral-bound in one bundle while the Pre-Action Protocol Form 01 and all documents to be filed in compliance with the pre-action protocol requirements as stipulated in the Practice Direction, be spiral-bound in a separate bundle (the “Pre-Action Protocol Bundle”). The Practice Direction goes on to state the order in which the documents in the Pre-Action Protocol Bundle should be arranged. It is believed that this will help present the processes in more orderly fashion especially in light of the additional documents which will be filed as a result of the more detailed requirements under the Practice Direction.

**Claim-Specific Pre-Action Protocol Requirements**

The Practice Direction stipulates requirements which intending Claimants must fulfil prior to the commencement of an action. However, it goes further to provide claim-specific requirements for actions with certain subject matters – defamation, land, landlord-tenant relationships, debt recovery and mortgages.

These claim-specific pre-action protocol requirements set out specific documents that will be required to accompany a claim for the subject-matter of its category. Also, it modifies the requirements in relation to the content of the memorandum of claim to be issued by the claimant and the response to be issued by the defendant. It also alters the timelines in light of the burden that may be imposed on the parties where certain subject-matters are involved. For instance, in debt recovery claims, it is required that the Claimant annexes to the Letter of Claim, a statement of account of the debt, any interests accrued as well as any administrative charges. Also, in Recovery of Premises claims, a document showing the existence (or acknowledgement) of a landlord-tenant relationship between the parties must be annexed to the Letter of Claim.
In addition, in Land matters, as opposed to the seven (7) days within which the Defendant is expected to reply under the General Pre-Action Protocols, the Defendant is allowed a thirty-day (30) period.

These claim specific requirements apply side-by-side and collaboratively with the general pre-action protocol requirements set out in preceding parts of the Practice Directions.

Certainty on the Effect of Non-Compliance with Pre-Action Protocol Requirements

The uncertainty that plagued the Courts (the High Court and Court of Appeal) as to the effect of non-compliance with pre-action protocol requirements under the Old Rules have been abolished under the New Rules and the Practice Direction. While the Rules make it clear that failure to comply shall nullify the action, the Practice Direction goes even further to stipulate situation-specific consequences for non-compliance with any provision of the Practice Direction. This, without a doubt, aids in the implementation of the spirit of Pre-Action Protocols and consequently, in the overall administration of justice.

In addition, the Practice Direction imposes a daily default fee of NGN 1000 (One Thousand Naira) which accrues in favour of the party proposing settlement where the other party fails to respond within the timelines stipulated under the Practice Direction. This Practice Direction, however, provides that this fee may be waived in the interests of settlement. It is expected that this will further encourage speedy compliance with the pre-action protocol requirements and positively impact on the bargaining power of the allegedly wronged party where the counter-party is sloppy in responding to settlement proposals.

Significance/Implication

The primary function of pre-action protocols is to, as much as possible, mandate the amicable settlement of disputes. The expansive pre-action protocol requirements will, to a large extent, be helpful in achieving this aim as the mandatory pre-action correspondence should enable parties take a full view of the disputes prior to the commencement of an action. With an attempt at amicable settlement now firmly a legal mandate, it is believed that, more than ever before, the traditional dispute resolution before our Courts will become a last resort option. This will see Courts decongested with more room freed up to consider disputes not capable of being amicably settled. In addition, this process should help preserve the relationship between disputing parties and allow the opportunity to explore settlement options within their means and prior to experiencing the adversarial air in Court proceedings.

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