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Stare Decisis and Judicial Outcomes in Pre-Election Matters

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Abstract
In all common law jurisdictions,adherence to the principle of stare decisisis of great jurisprudential import. It assists in making judicial outcomes predictable.In recent times, there has been a consistent outcry over conflicting decisions of the Supreme Court in election-related cases among courtroom advocates.This paper aims to interrogate Supreme Court decisions in pre-election cases and find whether they are evidence of conflicting outcomes. This is with a view to providing some guides to court room advocates and to send a pedagogical message to the court.The methodology used in this paper is doctrinal. Certain provisions of the Electoral Acts 2006 and 2010 anddecisions of the Supreme Court based on those provisions are subjected to contents analysis.The paper finds that whereas there is considerable consistency in the court's pre-election decisions between 2007 and 2009, there are clear cases of inconsistency in the decisions of the court from 2013 to date. The paper concludes thatexcept the Supreme Court reverts to adhering to the principle of stare decisis, judicial outcomes will continue to be unpredictable,and this will erode public confidence in the judicial system.

Keywords: Court Decision, Election Matters, Judicial Outcomes, Precedents, Supreme Court

Introduction

Stare decisis means to abide by former precedents where the same points come again in litigation.[723]Under this doctrine, lower courts are bound by the theory of judicial precedent. Judicial precedent is an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.[724] The Supreme Court is required by the doctrine of *stare decisis* to be bound by its previous decision.[725]Although, where it is satisfied that its previous decision is erroneous or was reached *per incuriam* and will amount to injustice to perpetuate the error by following such decision, the court will overrule it or depart from it.[726] Adherence to the doctrine of *stare decisis* and the principle of judicial precedent ensures consistency in judicial decisions and predictability in judicial outcomes given the same set of facts. The principle 'provides…some degree of certainty upon which individuals can rely on the conduct of their affairs and a basis for the orderly development of legal rules.[727] The principle of *stare decisis* is further ringfenced by the well-established rule in *Sodeinde Bros Ltd v ACB Ltd*[728]that a five-person panel of the Supreme Court cannot overrule or depart from an earlier decision of a five-person panel of the court. Only a fullpanel, i.e.,a seven-man panel of the court, can overrule ordepart from an earlier court decision.

In this paper, it will be shown that whereas, there appears to be a high level of consistency and some appreciable degree of adherence to the doctrine of *stare decisis* in the decisions of the Supreme Court in pre-election matters decided under the Electoral Act 2006, there is an unimpeachable avalanche of evidence to show a persistent non-observance of the principle in decisions of the court in pre-election cases decided under the Electoral Act 2010 (as amended).

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[723]*Clement v Iwuanyanwu*(1989) 3 NWLR (pt 107) 39, 53.
[724]*Adesokan v Adetunji*(1994) 5 NWLR (pt 346) 540, 578 para C.
[725]*Adesokan v Adetunji*(1994) 5 NWLR (pt 346) 540, 578 para G.
[726]*Johnson v Lawanson*(1971) 1 All NLR 56; *Bucknor-Maclean v Inlaks Ltd* (1980) 8-11 SC; *Odi v Osafile*(1985) 1 NWLR (pt 1) 17; *Rossek v ACB Ltd* (1993) 8 NWLR (pt 312) 382; *Adesokean v Adetunji*(1994) 5 NWLR (pt 346) 540, 562 paras G-H.
[727]*Adesokan v Adetunji*(1994) 5 NWLR (pt 346) 540, 578 para G.
[728] (1982) vol 13 NSCC 184.

Judicial Outcomes under the Electoral Act 2006

The Electoral Act 2006 was the first legislation in the present democratic era in Nigeria that gave courts some control over the powers of political parties to change nominated candidates whose names had been forward to INEC preparatory to elections. Section 34 of the Electoral Act 2006 provided:

> 34. (1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.
>
> (2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.
>
> (3) Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection 1 of this section.

Prior to the above legislative reform, the settled position was that political parties had absolute control over their choices of candidates for elections, and the courts could not exercise any supervisory power over them, even when they broke their rules, as they often did in the sponsorship or substitution of candidates for elections.[729] This was because the courts considered such matters as belonging to the internal affairs of political parties over which the courts had no jurisdiction. As a matter of fact, the issue of nomination or sponsorship of candidates for election was considered non-justiciable, even when internal regulations or constitutions of the political parties were broken in arriving at the decisions in this regard. When the reform in section 34 of the 2006 Electoral Act was introduced, it became possible for an aspirant who won his party's primaries but whose political party wrongfully substituted his name with the name of another person who either did not participate or failed in primaries, as its candidate for an election, to seek redress in the law court.[730]

[729] *Onuoha v Okafor* [1983] 2 SCNLR 244;*Dalhatu v Turaki*(2003) 7 SC 1;(2003) 15 NWLR (pt 843) 310.
[730] *Lau v PDP* (2018) 4 NWLR (pt 1608) 60.

This development gave rise to pre-election litigation. It became possible that pre-election matters filed in the appropriate High Court could be heard up to the Supreme Court, notwithstanding that the election in issue had been held before final judgment was rendered.[731] Generally, even where the election winner had been sworn in into office, that does not make the pre-election matter abate.[732]

In *Ugwu v Ararume,*[733]the Supreme Court had to determine whether the reason advanced by the PDP that the name of Ararume,who came first in PDP's 2007 Imo State Governorship primaries, had been forwarded to INEC 'in error', was 'a cogent and verifiable reason' for his substitution with Ugwu, who was in the 16th position in the result of the primaries. The Supreme Court held that the reason 'in error' was not cogent and verifiable and therefore did not satisfy the requirement of section 34(2) (2) of the Act 2006. The court, therefore, granted an injunction restraining PDP and INEC from substituting Ararume with Ugwu as the candidate for the 14th April 2007 Governorship election in Imo State. In *Amaechi v INEC,*[734] PDP primaries for the 2007 Governorship election of River State was held, and Amaechi won. His name was forwarded to INEC as PDP's candidate for the election. Later, PDP substituted Amaechi with Omehia, who did not participate in the primaries, on the ground that the name of Amaechi's name had been forwarded to INEC 'in error'. On the day of the election, it was Omehia that was the candidate of the PDP. The election was held and Omehia was declared the winner and later swornin as the Governor of Rivers State. Upon finding that the substitution was wrongful and contrary to the requirement of section 34(2) of the Electoral Act 2006, the Supreme Court upheld Amaechi's appeal and declared him entitled to be the Governor of Rivers State. On the strength of the judgment, Amaechi became the Governor of Rivers in the stead of Omehia.

Again, in *Odedo v INEC,*[735]the appellant won PDP primaries held on 24th November 2006 for the election of the member of the House of Representatives representingIdemili North and Idemili South Federal Constituency, scheduled for held on 21st April 2007. PDP sent the appellant's name to INEC. However, less than 60 days to the election, the PDP substituted the appellant's name with the name of a candidate who lost in the primaries. The appellant brought an action to the High Court. The trial court gave its decision on 5th April, 2007, dismissing the appellant's suit. The election eventually held on 21st April 2007. On appeal, the Court of Appeal

[731]*Amaechi v INEC* (2008) 5 NWLR (pt 1080) 227; *Eligwe v Okpokiri* (2014) LPELR-24213 (SC).
[732]*Eligwe v Okpokiri* (2014) LPELR-24213 (SC).
[733] (2007) 12 NWLR (pt 1048) 365.
[734] (2008) 5 NWLR (pt 1080) 227.
[735] (2008) 17 NWLR (pt 1117) 554

held that the case had become academic because the election had been held on 21st April 2007. On further appeal, the Supreme Court, following its earlier decision in Ameachi**,** held that a pre-election matter does not become academic merely because an election had been held, after the institution of the pre-election matters. The Supreme Court declared the appellant as the candidate who ought to have been sponsored for the election. The court made a consequential order deeming him to be the winner of the election and entitled to be a member of the House of Representatives representing Idemili North and Idemili South Constituency.

Ugwu v Ararume,[736] *Amaechi v INEC,*[737]and*Odedo v INEC*[738]weredecided on the basis that the reasons advanced for the change of the affected candidates were not 'cogent and verifiable' and therefore failed to meet the requirement of section 34(2) of the Electoral Act 2006. In these three cases, the conduct of PDP fell short of the norms of section 34(2), and the judicial outcomes were consistent and predictable. There was clear evidence of the observance of the principle of *stare decisis* by the Supreme Court.

The Supreme Court's decision in Amaechi attracted scathing criticisms from opposition parties and academia members, largely because it threw up an unprecedented scenario in which a person who was not the candidate that stood for the Governorship election of Rivers State became the Governor of the State. A commentator doubted whether the Supreme Court has the power under the Constitution to declare an unelected person the Governor of a State in Nigeria and characterised the decision in Amaechi as a 'judicial coup'.[739] The political tension and upheaval generated by political parties' persistent failure to observe democratic norms, provisions of the Electoral Act and their guidelines in the nomination of their candidates, and the criticisms of the decision in Amaechi and cases along that line,necessitated further statutory intervention.

[736] (2007) 12 NWLR (pt 1048) 365
[737] (2008) 5 NWLR (pt 1080) 227.
[738] (2008) 17 NWLR (pt 1117) 554
[739] F Adekeye, 'The Judicial Coup Does the Supreme Court have constitutional power to pronounce an unelected person a governor in Nigeria?' available athttp://www.nigerialawguru.com/articles/constitutional%20law/THE%20JUDICIAL%20COUP.doc>accessed on 20-04-2022.

Judicial outcomes under the Electoral Act 2010 (as amended)

The Electoral Act 2010 introduced more reforms, which increased legislative control over political parties' powers over their choice candidates. Under section 31(5) of the Act, it became possible to challenge a nominated candidate who forwarded false information or document to INEC in support of his nomination. The Act proscribed in section 33, the substitution of a nominated candidate, except in the case of withdrawal or death of such candidate before the election. In section 87(9), it also granted to an aspirant who participated in his political party's primaries the right to seek redress in the Federal High Court, a State High Court or High Court of the FCT, if his political party violated any provision of the Electoral Act or its guidelines in the conduct of its primaries.

While section 31(5) or section 87(9) of the Act, respectively, created the basis for challenging a nominated candidate who presented false information to INEC or who emerged through a primary election held in violation of the Act and the guidelines of the political party, the interpretation of section 141 became a major influence on the possible judicial outcomes when pre-election cases are successfully proved. Section 141 of the Act provided: '141. An election tribunal or courtshall not under any circumstance declare any person a winner at an election in which such a person has not fully participated.The Supreme Court's application of section 141 of the Electoral Act 2010 (as amended) produced inconsistent outcomes which make nonsense of the principle of *stare decisis.* A review of some of the decisions of the court shows clearly that not only did the Supreme Court fail to adhere to the principle of *stare decisis*, it acted contrary to the laid down rule that a five-person panel of the court cannot overrule an earlier decision of the court.

In *CPC v Ombugadu*,[740]Ombugadu won the CPC's primary held on 11 January, 2011 for the nomination of its candidate for election to the House of Representatives in Akwanga/Wamba/Nasarawa Eggon Federal Constituency. CPC submitted the name of Ombugadu to INEC on 31st January, 2011 for the election scheduled for 9th April 2011. On February, 2011, the CPC submitted to INEC a letter of withdrawal purportedly signed by Ombugadu and a notice of change of candidate (Form CF004) signed by Yakubu, who was now being put forward as CPC's new candidate, purportedly elected in another party primary held on 15 January, 2011. Meanwhile, INEC had received a letter of complaint alleging that Ombugadu did not withdraw from the contest and had not written or signed any letter of withdrawal. INEC

[740] (2013) 18 NWLR (pt 1385) 66.

did not act on the documents submitted by CPC to substitute Ombugadu with Yakubu. According to INEC, CPC did not satisfy the legal requirements for the candidate's substitution. The failure of INEC to carry out the substitution sought prompted CPC and Yakubu to approach the Federal High Court for reliefs, which, among others, included an order declaring Yakubu as the candidate of the CPC for the said election. As at the date of the election, INEC relied on the name of Ombugadu as the candidate of CPC. Ombugadu raised a preliminary objection to the jurisdiction of the court. The trial court dismissed the preliminary objection, granted the reliefs sought in the originating summons, and made a consequential order directing INEC to return Yakubu as the winner of theelection.

Dissatisfied with the trial court's decision, Ombugadu appealed to the Court of Appeal. The Court of Appeal allowed the appeal on 25th May 2012 and set aside the trial court's decision, holding, inter alia, that by virtue of section 141 of the Electoral Act 2010, the trial court could not make the consequential order made. On appeal to the Supreme Court, one of the issues that called for determination wasNgwuta JSC's language in his leading judgment, 'the propriety *vel non* of the consequential order made by the trial court in view of section 141 of the Electoral Act'. While holding that the trial court had jurisdiction over the pre-election matter, the Supreme Court held that the trial judge had no jurisdiction to order INEC to return the Yakubu as the winner of the election.

The import of the decision in *CPC v Ombugadu*[741] is that, since it was Ombugadu who stood for the election in contestation in that case, it was wrong for the trial court to orderINEC to return Yakubu as the winner ofthe election. This was because a person who did not participate in an election could not, according to the court in that case, be declared the winner of the election, as section 141 had changed the possibility of an Ameachi-like judicial outcome. The decision in *CPC v Ombugadu*,[742] was a decision of a five-person panel of the court reached on 19th July 2013.

On 1st January, 2014, in *Gbileve v Addingi*,[743] another five-person panel of the Supreme Court gave the consequential orders the court refused in Ombugadu. In *Gbileve v Addingi*,[744] after Addingi, a House of Assembly aspirant of the Action Congress of Nigeria (ACN) had won ACN's primaries for Buruku Constituency of Benue State, the Benue State Chairman of the

[741] (2013) 18 NWLR (pt 1385) 66.
[742] (2013) 18 NWLR (pt 1385) 66.
[743] (2014) 16 NWLR (pt 1433) 394,
[744] (2014) 16 NWLR (pt 1433) 394,

party substituted her name with the name of Gbileve and forwarded Gbileve's name to INEC as the party's candidate for the election. Addingi wrote letters of protest, one to the National Chairman of the ACN and the other to the chairman of Legal Services and Clearance Committee. Despite the protest, it was the Gbileve who contested the election. At the suit of Addingi, the trial court and Court of Appeal gave judgment in her favour. The Supreme Court, in affirming the concurrent judgments of the two courts below, held that, where a party abides by the Electoral Act and party guidelines to conduct its primaries and a candidate emerges as the winner, the party or any of its officials cannot whimsically substitute the candidate who emerged the winner of the primaries. The court further held that where that happens, the candidate substituted has a legal right to go to court and where the court is unable to rule on the illegal substitution before the election takes place; if the candidate who became the beneficiary of the substitution wins the election, the candidate substituted can be declared the winner of the election. The Supreme Court consequently ordered that Gbileve should vacate his seatin Benue State House of Assembly;INEC should issue a fresh certificate of return to Addingi as the winner of the election and; that Addingi should be sworn in by the Speaker of the House of Assembly.

It is clear from the foregoing that, contrary to the established precedent that a five-person panel of the Supreme Court cannot overrule or depart from the decision of a panel of equal number in *Sodeinde Bros. Ltd v ACB Ltd;*[745] a five-person panel of the court in *Gbileve v Addingi,*[746] overruled and departed from the earlier decision in *CPC v Ombugadu*,[747]regarding consequential orders grantable in pre-election matter.

Again, on 14th May 2014, a five-person panel of the Supreme Court in *Jev v Iyortom*(No. 1)[748]reached a decision granting consequential orders which conflicted with those granted in *Gbileve v Addingi*[749], even though the two cases arose from the same set of facts in Benue State ACN primaries.In *Jev v Iyortom* (No. 1),[750]the CAN conducted its primary election to choose its candidate for the Bukuru Federal Constituency of Benue State. The 1st respondent, Iyortom, won the election with 8,030 votes against the appellant Jev, who scored 1,316 votes. Despite the result of the election, ACN declared Jev as the winner, a development that prompted Iyortom to

[745] (1982) vol 13 NSCC 184.
[746] (2014) 16 NWLR (pt 1433) 394,
[747] (2013) 18 NWLR (pt 1385) 66.
[748] (2014) 14 NWLR (pt 1428) 575.
[749] (2014) 16 NWLR (pt 1433) 394,
[750] (2014) 14 NWLR (pt 1428) 575.

file an action at the Federal High Court. The Federal High Court declared Iyortom as the winner of the election and directed ACN to send his name to INEC and INEC to recognise him as the candidate of ACN for the election. ACN and INEC did not obey the judgment of the FHC. Election subsequently held, Jev was declared the winner and sworn in into the House of Representatives. The Court of Appeal affirmed the decision of the trial court and on further appeal to the Supreme Court, the Supreme Court affirmed the decision of the Court of Appeal, and granted the following consequential orders, namely that: (a) Jev should vacate his seat ofin the House of Representatives immediately; (b) INEC should conduct a bye election in the constituency within 90 days with Iyortom as candidate of the Action Congress (now All progressives Congress).

Consequential order number (b) above in *Jev v Iyortom*(No. 1)[751] is in conflict with *Gbileve v Addingi*[752]in which the victorious claimant was ordered to replace the earlier declared the wrong candidate in the House of Assembly. These conflicting outcomes were troubling because the two cases arose from the same factual background.

Barely five months after the decision in *Jev v Iyortom* (No. 1),[753] precisely on 24th October 2014, another five-person panel of the Supreme Court in *Gwede v INEC*;[754]having found that INEC wrongfully refused to effect the substitution of the candidate that had withdrawn from the election and had been effectively substituted with a new candidate his political party, the court ordered the wrongful candidate who won and had been sworn-in, to vacate his seat. It further ordered INEC to re-issue a fresh certificate of return to the new candidate who ought to have been the candidate for the election. It is clear again that the judicial outcome in *Gwede v INEC,*[755] in terms of consequential orders, conflicts with the decision of the five-person panel in *Jev v Iyortom* (No 1).[756]

Exactly 56 days after the five-person panel decision in *Gwede v INEC,*[757] precisely on 19th December 2014, another five-person panel of the Supreme Court in *Eligwe v Okpokiri,*[758] reached yet another decision which contradicted its earlier decisions in *Gwede v INEC,*[759]

[751] (2014) 14 NWLR (pt 1428) 575.
[752] (2014) 16 NWLR (pt 1433) 394.
[753] (2014) 14 NWLR (pt 1428) 575.
[754] (2014) 18 NWLR (pt 1438) 56.
[755] (2014) 18 NWLR (pt 1438) 56.
[756] (2014) 14 NWLR (pt 1428) 575.
[757] (2014) 18 NWLR (pt 1438) 56.
[758] (2015) 2 NWLR (pt 1443) 348.
[759] (2014) 18 NWLR (pt 1438) 56.

and*Gbileve v Addingi*,[760]with respect to the consequential orders granted in a pre-election suit. In *Eligwe v Okpokiri*,[761]Eligweand Okpokiri, contested the 3rd January 2011 PDP primaries for the nomination of a candidate for the Ahoada West Constituency seat in Rivers State House of Assembly. At the end of the primaries, Okpokiri, who scored 118 votes, was declared the winner. Eligwe came second with 109 votes. The PDP subsequently presented the name of the Okpokirito INEC as its candidate for the election. Dissatisfied with the result of the primaries, Eligwe wrote two petitions to the PDP 'Panel of Appeal', complaining of irregularities and overvoting in the primaries. When no result was forthcoming from the 'Panel of Appeal', Eligwefiled an action in the Federal High Court. In that action, he prayed to the court to declare him the winner of the PDP primaries. The trial judge acceded to the prayers of the appellant and declared him the winner of the primaries, and ordered the PDP to send his name to INEC. This order was obeyed and the appellant contested the House of Assembly election and won. He was sworn in as a Rivers State House of Assembly member. The Okpokiri appealed against the decision to the Court of Appeal. Eligwe filed a preliminary objection against the appeal, arguing that the appeal had become academic, as there was no live issue and the Court of Appeal had no jurisdiction over the matter. The preliminary objection was premised on the fact that the election had taken place and that, given the provision of section 141, the Court of Appeal could not make an order declaring the respondent as the winner of the election, even if his appeal had succeeded. The Court of Appeal overruled the preliminary objection, which led to the lodging of the instant interlocutory appeal in the Supreme Court. The main issue before the Supreme Court was whether or not the Court of Appeal had the jurisdiction to hear the appeal arising from a pre-election matter after the election had been held and the winner sworn in as a member of the Rivers State House of Assembly. At the Supreme Court, Eligwe argued that having regard to the provision of section 141 of the Electoral Act 2010, the appeal in the Court of Appeal had become a futile academic exercise. The Supreme Court held that section 141 does not operate against Okpokiri'scase. The mere fact does not extinguish a pre-election matter or appeal arising from the same that the election had taken place and the winner sworn in the office. The Supreme Court concluded that, given the provision of section 141 of the Electoral Act 2010, if the respondent succeeds, the Court of Appeal will not be able to order that he should replace the appellant in the House of Assembly as ordered in *Ameachiv INEC*, but that the remedy to have

[760] (2014) 14 NWLR (pt 1428) 575.
[761] (2015) 2 NWLR (pt 1443) 348.

the election nullified to pave the way for him to participate in a bye-election[762] and damages for wrong deprivation of the right to contest an election is available to the respondent.

The underlined portion of the decision of the Supreme Court in Eligwe, in which it is stated that a court in a pre-election could, where the election had been held subsequent to the initiation of the action but before judgment, order for the nullification of the election and order a fresh election (based on the interpretation of section 141 of the Electoral Act) was yet again a clear departure from earlier decisions of the court in *Gbileve v Addingi*,[763] and *Gwede v INEC*,[764]on the interpretation of the same section 141 of the Electoral Act. Eligwewas later departed from in subsequent decisions of the Supreme Court.[765]

The leading judgment of Ngwuta JSC in Eligwe was supported by the concurring judgments of Mohammed CJN[766], Muntaka-Coomassie,[767] Rhodes-Vivour[768] and Okoro[769] JJSC. However, while supporting the leading judgment, Mohammed CJN stated that: 'The section [section 141 of the Electoral Act 2010 (as amended] is clearly directed at an election tribunal or a court like the Court of Appeal exercising their instance jurisdiction in the hearing and determination of election petitions brought by aggrieved candidates at the conclusion of an election.[770] In His Lordship's view, this was the combined effect of sections 133 and 141 of the Electoral Act 2010, particularly the definition of 'tribunal' and 'court' in section 133(1) of the Act.

In a comparative analysis of decisions of the Supreme Court in *Amaechi v INEC*,[771] *CPC* **v** *Ombugadu*,[772]*Eligwe v Okpokiri*[773]and *Usman v Moddibo*,[774] Chief Akin Olujinmi is worried that adjudication in Nigerian courts is creating more issues than it tries to solve. That certainty of

[762] Underlining is for emphasis.
[763] (2014) 14 NWLR (pt 1428) 575.
[764] (2014) 18 NWLR (pt 1438) 56.
[765]*Jev v Iyortom (No. 2)* 15 NWLR (pt 1483) 484; *APC v Karfi* (2018) 6 NWLR (pt 1616) 479; *Moddibo v Usman* (2020) 3 NWLR (pt 1712) 470; *APC v Marafa* (2020) 6 NWLR (pt 1721) 431; *PDP v Eremienyo* (2021) 9 NWLR (pt 1781) 274.

[766] (2015) 2 NWLR (pt 1443) 348, 378 para D.
[767] (2015) 2 NWLR (pt 1443) 348, 380 para G.
[768] (2015) 2 NWLR (pt 1443) 348, 382 para C.
[769] (2015) 2 NWLR (pt 1443) 348, 384 paras-F-H .
[770]*Eligwe v Okpokiri* (2015) 2 NWLR (pt 1443) 348, 377 para E.
[771] (2008) 5 NWLR (pt 1080) 227, 296.
[772] (2013) 18 NWLR (pt 1385) 66.
[773] (2015) 2 NWLR (1443) 378.
[774] (2020) 3 NWLR (pt 1712) 470.

the law has departed adjudication because of some factors, one of which he identifies as 'vanishing' loyalty to the principle of *stare decisis*.[775] He posits further that:

As we all will remember, it was the lack of internal democracy in theorganisation of the affairs of political parties that gave birth to the jurisprudence of Amaechi v. INEC. In protest, the National Assembly rushed an amendment to the Electoral Act, 2010 as reflected in Section 141, which provides that "An election tribunal or court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election. Based on this provision, the Supreme Court in *CPC v. Ombugadu*(2013) 18 NWLR (Pt. 1385) 66 at 119H, held that Section 141 of the Electoral Act, 2010 as amended had set aside the decision in Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 at 296. That was a five-person panel. In its subsequent decision in *Eligwe v. Okpokiri&Ors* (2014) LPELR -24213, page 31-33 or (2015) 2 NWLR (Pt. 1443) 348, the Supreme Court differently constituted (also 5 member panel) held that Section 141 of the Electoral Act applied to only Election Tribunal and the Court of Appeal sitting at first instance in the hearing of election petition affecting the office of the President and did not affect the jurisdiction of the regular courts seised of pre-election cases to invoke the law as laid down in Amaechi v. INEC. In its latest decision in *Modibbo v. Usman* (2020) 3 NWLR (Pt. 1712) 470 at 517, the Supreme Court revisited the issue of Section 141 of the Electoral Act. It was again a panel of 5 members. It disagreed with the decision in *Eligwe v. Okpokiri&ors* and held that it was no longer good law. I have a dilemma here. What has played out in these cases is that the Supreme Court has in three different cases taken positions in which a five-person panel reversed, overruled or disagreed with a former five-person panel on the same point. Yet this has happened notwithstanding the decision of the Supreme Court in *Sodeinde Brothers (Nig.) Ltd v. African Continental Bank Ltd* (1982) 6 S.C. 70 at 71line 10 where it was held that a panel of the Supreme Court with equal number as a former panel cannot overrule or reverse the former panel on the same issue. There is no doubt we will have to live with the uncertainty and the injustice it spins for some period of time.[776]

The evidence presented above in this chapter shows clearly that the problem of inconsistent judgments of the Supreme Court is larger than what Chief Akin Olujinmi, SAN had thought. In any case, the consistency analysis done by Chief Akin Olujinmi, SAN, on *Eligwe v Okpobiri*[777]

[775] Chief Akin Olujinmi, CON, SAN, unpublished speech titled: 'Speech made at the Dinner organized by the Nigerian Bar Association, Akure Branch in Honour of Chief Wole Olanipekun, SAN on 16th July 2021'.
[776] Chief Akin Olujinmi, CON, SAN, unpublished speech titled: 'Speech made at the dinner organized by the Nigerian Bar Association, Akure Branch in Honour of Chief Wole Olanipekun, SAN on 16th July 2021'.
[777] (2015) 2 NWLR (pt 1443) 348.

and *Usman v Moddibo*[778] is, no doubt, actuated by the pronouncement of Mohammed CJN in the former case that: 'The section [section 141 of the Electoral Act 2010 (as amended) is directed at an election tribunal or a court like the Court of Appeal exercising their instance jurisdiction in the hearing and determination of election petitions brought by aggrieved candidates at the conclusion of an election'. The same pronouncement forms the basis of a comment made by Eko JSC in the leading judgment in *Usman v Moddibo*,[779] where His Lordship held that the position of the law as espoused in *Eligwe v Okpokiri*[780] (that section 141 is directed at the election tribunals and Court of Appeal sitting in the trial of presidential election petition), is no longer extant in view of the provision of section 285(13) of the Constitution (as amended).[781]

A critical examination of the ratio of Eligwe shows that it was never decided in that case that section 141 is directed at the election tribunals and Court of Appeal sitting as the trial court inthe presidential election petition. On the contrary, the Supreme Court relied on and applied section 141 of the Electoral Act in arriving at its decision dismissing the interlocutory appeal brought before it. For example, Ngwuta JSC stated in the leading judgment that:

> With profound respect to the learned silk, [i.e. counsel to the appellant] I do not share his view that the change in the law brought about by S. 141 of the Electoral Act 2010 (as amended) has rendered the appeal at the court below a futile academic exercise or that the change in the law has ousted the jurisdiction of the court below to hear the appeal.[782]

The pronouncement of Mohammed CJN quoted above was not shared by other members of the panel. Such pronouncement cannot be found, either in the leading judgment of Ngwuta JSC or the concurring judgments of Muntaka-Coomassie, Rhodes-Vivour and Okoro JSC. It is settled law that the judgment of an appellate court of multiple judges in the leading judgment, supported by the majority of the panel. In the course of the rendition of his concurring judgment, a judge makes a pronouncement that is not addressed in the leading judgement, such pronounce is

[778] (2020) 3 NWLR (pt 1712) 470.
[779] (2020) 3 NWLR (pt 1712) 470.
[780] (2015) 2 NWLR (pt 1443) 348, 377 para E.
[781] *Moddibo v Usman* (2020) 3 NWLR (pt 1712) 470, 517 paras C-E and 519 para C.
[782] *Eligwe v Okpokiri* (2015) 2 NWLR (pt 1443) 348, 373 paras E-F.

treated as mere *obiter dictum*.[783] Interestingly, even in *Moddibo v Usman*, Eko JSC recognised that, '…the judgment of multiple panel appellate court is the majority judgment or opinion'.[784] In the final analysis, the Supreme Court consistently recognised in*CPC v Ombugadu,*[785]*Eligwe v Okpokiri*[786]and*Usman v Moddibo*[787] (discussed below), that section 141 of the Electoral Act changed the law and prevented a person who did not participate in an election from being declared the winner in the outcome of pre-election litigation.

The aspect of the decision of the five-person panel of the Supreme Court in Eligwe, which is obviously in conflict earlier decisions of five-person panels of the court in *Gwede v INEC,*[788] and *Gbileve v Addingi*[789] is that portion of the decision in Eligwe, where the Court held: 'If the 1st respondent succeeds in the court below, he would not, thanks to S. 141 of the Electoral Act, be declared winner of the election in which he did not participate. His remedy will (sic) have the election declared null and void and fresh election in which he will contest as his party's candidate ordered.'[790] As shown earlier, the Supreme Court began to depart from decisions nullifying election and ordering the conduct of a fresh election in pre-election matters while interpreting section 141 of the Electoral Act 2010 (as amended) in its decisions in in *Gbileve v Addingi*[791]and later, in *Gwede v INEC*.[792]

After Eligwe, precisely on 27th February 2015, a full panel (a seven-man panel) of the Supreme Court, on the application of counsel to the respondent in *Jev v Iyortom*(No 2),[793]reversed its consequential orders in *Jev v Iyortom* **(**No 1),[794]and ordered: (a) INEC to issue a fresh certificate of return to Iyortom; (b) the Speaker of the House of Representatives and the Clerk of the National Assembly to swear-in Iyortom as a member of the House of Representatives. In coming to this decision, the Supreme Court held that:

[783]*Abacha &Ors v Fawehinmi* (2000) LPELR-14 (SC) 115-117 paras C-A.
[784] (2020) 3 NWLR (pt 1712) 470, 511 paras G.
[785] (2013) 18 NWLR (pt 1385) 66.
[786] (2015) 2 NWLR (1443) 378.
[787] (2020) 3 NWLR (pt 1712) 470.
[788] (2014) 18 NWLR (pt 1438) 56.
[789] (2014) 16 NWLR (pt 1433) 394.
[790] (2015) 2 NWLR (pt 1443) 348, 372-374 paras C-B, per Ngwuta JSC in the leading judgment in the case. Underlining is for emphasis.
[791] (2014) 6 NWLR (pt 1433) 394.
[792] (2014) 18 NWLR (pt 1438) 56.
[793] (2015) 15 NWLR (pt 1483) 484.
[794] (2014) 14 NWLR (pt 1428) 575.

> …this court not being one of the courts mentioned in section 133(2) of the Electoral Act [2010 (as amended)] is not one of the courts to which section 141 regulates. This is much more so since the issue for consideration was not an election petition appeal but a pre-election matter. In appropriated cases, this court has exercised its power to order successful litigants to be sworn in immediately without the rigour of having to go through another election. The applicant herein should not be an exception. See Amaechi v INEC (2008) All FWLR (Pt. 407) 1; (2008) 5 NWLR (Pt. 1080) 227; *OrhenaAduguGbileve v & Anor v NgunamAddingi& Anor …*

Conclusion

It clear from the foregoing analysis that whereas, there is a considerable consistency in the Supreme Court's pre-election decisions between 2007 and 2009, there are clear cases of inconsistency in the decisions of the court from 2013 to date. Conflicting decisions from the apex court in any jurisdiction is a big challenge, not only to the judiciary as an institution, but to the populace in general who should see the judiciary as a bulwark against injustice and oppression. It is clear that except the Supreme Court reverts back to adhering to the principle of *stare decisis,* judicial outcomes will continue to be unpredictable and this will result in loss of public confidence in the judicial system.