

THE RIGHTS AND PRIVILEGES OF A COMPANY DIRECTOR ON SUSPENSION

By

Damfebo K. Derri*

INTRODUCTION

The rights and privileges of a company director came under examination in the case of *Bernard Longe v. First Bank Nigeria Plc.*¹ In that case, the plaintiff/appellant, Bernard Ojeifo Longe was employed executive director and later on promoted Managing Director/Chief Executive in an independent service contract of the defendant/respondent, First Bank Plc. He disbursed a loan of \$131,700,000 (one hundred and thirty-one million, seven hundred thousand dollars) without security, and the money was forfeited. The Board of Directors of defendant/respondent called an extraordinary meeting on Monday April 22, 2002 and invited the plaintiff/appellant to explain the circumstances surrounding the loan. At the end of plaintiff/appellant's briefing, the Board suspended him from office and directed him to make efforts to recover the money. Two months later, June 13, 2002, the Board convened another meeting where the appointment of plaintiff/appellant was revoked. Plaintiff was not given notice of the Board meeting at which the decision to terminate his appointment was taken. The plaintiff took out a writ, challenging his removal contending that under section 266 of the Companies and Allied Matters Act,² (CAMA) he was entitled to be given notice of the meeting and that failure to give him notice rendered his termination null and void.

The question was whether the plaintiff who was on suspension due to alleged mismanagement of loan facilities against him was entitled to receive notice of directors' meeting.

In deciding this issue, the Supreme Court, in interpreting the provisions of sections 262 and 266 of CAMA, held that the plaintiff was entitled to receive notice of the board meeting which terminated his appointment as Managing Director/Chief Executive, and that failure to give him the said notice rendered the meeting and the subsequent termination of his appointment a nullity. According to the Supreme Court:

It was never part of the plaintiff's case that he did not commit any offence justifying the revocation of his appointment. His case was simple and straight forward. It was that whereas section 266(1) states that he shall be entitled to receive notice of meeting at which the revocation of his appointment was to be discussed, no such notice was given to him. The combined requirement of sections 266(1) and 262 is that a director to be removed must be given notice of the meeting. It is not the requirement of the law that such director about to be removed must be present at the meeting. He may receive the notice and refuse to show up at the meeting. What section 266(3) punishes is the failure to give such notice.³

The Court further said:

¹ (2010) 6 NWLR (Pt.1189) 35; [2010] 3 SCM 85; see also *Bernard Longe v. First Bank Plc* [2006] 3 NWLR (Pt. 2006) 228 CA

² Cap C20 LFN, 2004.

³ [2010] 3 SCM 85 at 107 per Oguntade, JSC

Appellant was not given notice as required by section 266(3) of CAMA. Although the appellant was on suspension, he still retained the right to be given notice of the meeting particularly having regard to the fact that issues affecting his rights were to be discussed.⁴

This article examines this judgement.

Issues in the Judgement

There are two principal issues in the judgement which need to be examined. These are:

- (i) Is a Director/Managing Director on suspension entitled to attend directors' meetings?
- (ii) Do sections 262 and 266 of CAMA apply to employee or working directors?

Is a director/managing director on suspension entitled to attend directors' meeting?

In strict legal parlance, suspension of an employee from work arises where an employer directs the employee not to report for work, and during the period, he withholds his salary or an aliquot part of it.⁵ The legal effect of suspension is that the employee must not do anything in the discharge of the duties of his office. The suspension is done in order to facilitate investigation into some alleged malpractice in a department. In *Lewis v. Heffer*⁶ Lord Denning said:

Very often, irregularities are disclosed in a government house, and a man may be suspended on full pay pending inquiries. Suspicion may rest on him, and so he is suspended until he is cleared of it Suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply.

In *University of Calablar v Esiagu*,⁷ the Court of Appeal defined 'suspension' as temporary privation or deprivation, cessation or stoppage of or from the privileges and rights of a person. Also, in *Boston Sea Fishing Co. v. Ansell*,⁸ the court said:

When a man is suspended from the office he holds, it merely amounts to saying so long as you hold the office and until you are legally dismissed, you must not do anything in the discharge of the duties which under your office you ought to do towards your employer.

And Salami, JCA has said:

Suspension of an employee is also the suspension and cessation of the employee's contract of employment as well as the rights and privileges, duties and powers attached to his position.⁹

⁴ [2010] 3 SCM 85 at 120 per Tabai, JSC

⁵ See *Patel v. State of Maharashtra Air*, 1968, SC 800; (1970) 103, International Labour Review 155 (Indian SC).

⁶ (1978) 3 All ER 354

⁷ [1997] 4 NWLR (Pt. 502) 719, 723

⁸ [1886-90] All ER 65

⁹ *Bernard Longe v. First Bank Plc* [2006] 3 NWLR (Pt. 967) 228, 267

To both Oguntade¹⁰ and Adekeye JJSC, suspension means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office and that it *operates “to suspend the contract”*¹¹ rather than terminate the contractual obligations of the parties to each other. It is necessary to note that all of the managing director's rights and duties are derived from the contract. If as conceded by the court that suspension also suspends the contract, what right is left?

It is clear from the above judicial authorities that suspension has the effect of suspending the contract of employment. The privilege of attending board meeting is derived from the contract of employment. It follows that once the contract is suspended, the foundation of the right to attend meeting is destroyed. Emiola says¹² that “in effect the contract and its rights and duties are frozen on the date and point of suspension.” When a contract is suspended, all rights and obligations are also suspended. In the instant case, the right to attend board meeting is a right under the contract and cannot exist independent of the contract that had been suspended. That precisely was what Salami JCA meant when the case reached the Court of Appeal.¹³ According to him:

The suspension of the appellant is not an issue in this appeal ... Having accepted the suspension of his only subsisting appointment with the respondent he was not entitled to the notice of the meeting. On suspension of the appellant's appointment of managing director/chief executive, all his rights, privileges and powers consequential or attached to the employment, including attending board meetings ceased. The notice of the board meeting is not given for the fun of it. It is given for serious business of the company. It is, therefore, not issued informally to a person who is otherwise entitled to attend but barred by reason of his suspension. All authorities show that he was not entitled to the notice of the meeting except to enable him to be there to disrupt the meeting or cover up his tracks. Assuming he was entitled to the notice, without deciding, the practice is that the person being discussed would step out to enable other members of the board freely take their decision concerning him.

The view of Salami, JCA, represents the law. For if the effect of suspension as agreed by both the Court of Appeal and the Supreme Court is that it also suspends the contract, it follows that the appellant had no legal right to attend the board meetings during the period of his suspension.

From the above argument, it is submitted that a director/managing director on suspension is not entitled to attend directors' meeting where his matter is the sole item for discussion. Even rules of natural justice do not allow a person to be a judge in his own cause. Secondly, the plaintiff cannot also validly claim that he was not given a hearing. The explanation he was allowed to make regarding the loan before the suspension constituted enough hearing.

Sections 262 And 266 and Employee – Directors

The second principal issue in the judgement is whether the provisions of sections 262 and 266 of CAMA are applicable to employee or working directors. The emergence of directors in a company is governed by sections 247, 248 and 249 of CAMA which provide:

¹⁰ [2010] 3 SCM 85 at 110 – 111

¹¹ [2010] 3 SCM 85 at 131 – 132

¹² Emiola, A., *Nigerian Labour Law*, 4th ed. (Ogbomosho: Emiola Pub. Ltd., 2000) p.111

¹³ *Bernard Longe v. First Bank Plc* [2006] 3 NWLR (Pt. 967) 228 at 267

247. subject to section 246 of the Act, the number of directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them or the directors may be named in the articles.
- 248(1) the members at the annual general meeting shall have power to re-elect or reject directors and appoint new ones.
- 249(1) the board of directors shall have power to appoint new directors to fill any casual vacancy arising from death, resignation retirement or removal.

The scheme under sections 247 to 249 recognizes (1) directors appointed by the subscribers of the memorandum of association or majority of them or those named in the articles. (2) directors appointed at the annual general meeting, or (3) directors appointed by the board to replace such directors as may have died, resigned, retired or be removed. The directors envisaged under section 247 to 249 are member-directors.

Law and realism draw a line between member-directors and employee-directors. Their appointments are governed by different principles. A member-director is elected at the annual general meeting (AGM) and is responsible to the company at general meeting. An employee-director is engaged by the Board of Directors on a contract of employment. It follows that the modes of their removal from office must also be different. In fact, sections 262 and 266 of CAMA are meant to protect member-directors who can only be removed by the general meeting. This argument is consistent with the definition of a director under section 244(1) of CAMA on which the Supreme Court so heavily relied. It provides as follows:

244(1) Meaning of directors: Directors of a company registered under this Act are *persons duly appointed by the company*¹⁴ to direct and manage the business of the company.

From the above definition, directors “duly appointed” are only those whose names are listed in the incorporation statement,¹⁵ or *elected* by the shareholders at annual general meeting¹⁶ or *appointed* by the board to fill casual vacancy.¹⁷ *Longe* who was appointed executive director and subsequently promoted managing director/chief executive could not have come under the definition in section 244(1). It is submitted that the definition applies to only member-directors and not employee or working directors.¹⁸ Appointment of working-directors — executive or managing — is exclusively vested in the Board of Directors, not in the company at general meeting.

Section 63(2) of CAMA provides that “the respective powers of the members in general meeting and the board of directors are to be determined by the company’s articles;” and that “except as otherwise provided by the company’s articles, the business of the company shall be managed by

¹⁴ Emphasis supplied

¹⁵ Section 247

¹⁶ Section 248(1)

¹⁷ Section 249(1)

¹⁸ Working director is also known as ‘executive’ or ‘special director.’ A working director is an “employee of the company whose status has been raised to that of a director but who continues essentially as an employee, e.g. a sales director. His status is usually limited by the articles, (*Southern Foundries Ltd. v. Shirlaw* (1940) AC 701; *Read v. Astoria Garage Ltd.* (1952) 1 All ER 922) but may eventually be raised to full directorial status,” per Uwais, JSC in *Emmanuel Iwuchukwu v. Nwizu Ltd. & Anor* [1994] 7 NWLR (Pt.357) quoting with approval Orojo, J. O., *Nigerian Company Law and Practice* (1992), p.261

the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting.”¹⁹ No article provides expressly for the appointment of employee-director nor has any provision of the Act done so. The appointment of executive director, therefore, falls within those that Emiola states are “residual powers [vested in the board] necessary or incidental to the smooth administration of the corporation.”²⁰ The contractual power of the company is derived mainly from section 71 of CAMA.

So, sections 262 and 266 could not have had in contemplation the removal of managing director. Removal of a senior manager (managing director/chief executive) will be discussed at board meeting, and no law, CAMA or common law, expects him to attend the board meeting where the decision to relieve him of his employment is to be taken.

It is pertinent to note that section 266(1) does not give a director a blanket right to receive notice of board meeting. It is not absolute. Section 266 of CAMA provides:

266(1) Every director shall be entitled to receive notice of directors’ meetings, *unless disqualified by any reason under the Act*²¹ from continuing with the office of director.

There is clearly an element of limitation under the provision. Where circumstances dictate otherwise, the director may be disqualified *from receiving the notice*²² of meeting. In the particular case of *Longe*, there are two reasons why *Longe* was disqualified from receiving notice to attend the board meeting. First, he was on suspension, and it is settled by the cases that suspension of a worker also suspends his contract under which he could claim any right of attendance at the board meeting. Second, the nature of allegations of financial impropriety (which he did not deny) amounts to breach of his fiduciary duty to the company²³ justifying his suspension. Section 279(1), (3), (8) and (9) of CAMA provides as follows:

279(1) – A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.

279(3) – A director shall act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such a manner as a faithful, diligent, careful and ordinary skilful director would act in the circumstances.

279(8) – No provision, whether contained in the articles or resolutions of a company, or in any contract, shall relieve any director from the duty to act in accordance with this section or relieve him from any liability incurred as a result of any breach of the duties conferred upon him under this section.

279(9) – Any duty imposed on a director under this section shall be enforced against the director by the company.

Section 282(4) of the Act is also most appropriate here. It provides that

¹⁹ Section 63(3)

²⁰ *Nigerian Company Law*, 2nd Ed. (Ogbomoso: Emiola Pub. Ltd., 2007) p.391, 392.

²¹ Emphasis supplied

²² Emphasis supplied

²³ Section 279(3)

“the same standard of care in relation to the director’s duties to the company shall be required for both executive and non-executive directors.

On the fiduciary duties of director, Emiola²⁴ comments:

“A director may be an employee for one purpose and, therefore, fixed with the duty of *fidelity*; for another purpose, he may be an agent, in which case he owes a duty to take care and not to enrich himself at the expense of the principal; and for yet another purpose, he may be a trustee, who is bound to system the *confidence* reposed in him. It is for lack of a precise description of this multi-purpose status that a director has been labelled as ‘fiduciary’ by the courts.”²⁵

These provisions re-enacted the equitable rule of fiduciary duty which the company is entitled to enforce in equity apart from section 279(9) of CAMA.

Invariably, a managing director or an executive director is appointed full-time and it has been held in majority of cases²⁶ that a person holding such post for reward is an employee.²⁷ But whether he is such an employee will depend on the terms of his employment. The procedure for determination of the appointment of working director – managing or executive – depends on the terms of his service agreement. The lawfulness of the termination of a director who is employed under a service contract must find validity in the contract and the ordinary rules of the law of contract. An employment of an executive director or managing director may also be covered by section 291 of CAMA on an independent contract of employment. Of course, such executive director or managing director remains an employee-director and is member of the board of directors by virtue of his appointment.

Every contract of employment is subject to the rules of common law. Obviously, section 291²⁸ of CAMA applies exclusively to a situation where the director holds employment with a company for more than five years. One significant feature of an appointment under section 291 is that it is one with “statutory flavour” in that it cannot be terminated by the company by notice; or can be so terminated only in specified circumstances.²⁹ Executive or managing director may be removed from office before the end of his tenure. The manner of his appointment will, however, determine the procedure of his removal.³⁰

CONCLUSION

The rights and privileges of a company director under sections 262 and 266 are not applicable to employee or working directors. Even if the sections are applicable (which is not conceded), the provisions are not absolute. Therefore, in the case of *Longe v. First Bank Nigeria Plc.*,³¹ the plaintiff/appellant was not entitled to enjoy those privileges during his period of suspension

²⁴ Emiola, A., *Nigerian Company Law*, Ibid. p.262

²⁵ *Ayodele & Anor v. Foam Nigeria Ltd & Ors.* 1 FRCR (1974) 174; *Re Forest of Dean Coal Mining Co.* (1873) 10 Ch.D. 450; *Re City Equitable Fire Insurance Co.* (1925) Ch.407.

²⁶ *Boulton v. ACTAT* (1963) 2 QB; *Emmanuel Iwuchukwu v. Nwizu & Anor* [1994] 7 NWLR (Pt. 357) 379.

²⁷ *Anderson v. James Sutherland Ltd.* (1941) SC 203

²⁸ Section 291 does not envisage a director appointed under sections 247, 248(1) and 249(1) of CAMA

²⁹ CAMA s.291(1)(a)(b)

³⁰ *Bernard Longe v. First Bank Plc* [2006] 3 NWLR (Pt.967) 265 CA

³¹ (2010) 6 NWLR (Pt.1189) 35

because his employment contract through which he would claim the rights was also suspended due to an alleged breach of fiduciary duty.