BERNARD LONGE V FIRST BANK PLC: UNSETTLING SETTLED PRINCIPLES OF EMPLOYMENT AND CORPORATE LAW

Akintunde Emiola* and Idowu A. Akinloye**

ABSTRACT

This article critically reviews the Nigerian Supreme Court's decision in Longe v First Bank PLC. It argues that the failure of the Court to meticulously consider the effects of suspension on a director who is also an employee of his company and to distinguish between executive and non-executive director led the Court to a wrong decision in the case. It argues that the decision of the Court unsettles established and settled principles of corporate and labour law and, therefore, calls on the Court to review its decision at the earliest opportunity.

Keywords: *Supreme Court, Director, Company, Employee, Executive, Non-executive.*

INTRODUCTION

In a way, the case of *Bernard Longe v First Bank of Nigeria Plc*[1] is both significant and sensational. Parties to the case might have since forgotten it, but its echo still resonates with emotions in legal and academic circles.[2] Why? On 10 March 2010, the Supreme Court of Nigeria delivered judgment in the case on appeal, which was stupefying and bewildering because, like 'a bull in a china shop', it unsettled settled principles of corporate governance and that of the law of employment.

But some scholars hailed the judgment because they believed it was 'the first time in the history of labour law in Nigeria that the apex court held that an employee in a *private*[3] employment could be reinstated.'[4] However, the issue of reinstatement is not the focus of this discussion. This review primarily argues, among other issues, that the Supreme Court failed to adequately and effectively consider the implication of suspension of a director who is an employee of his company. The Court also failed to appreciate the different categories of directors and the legal status that each category has in the company.

* **KSC, LL.B (Lond), LL.M, Ph.D, BL. Emeritus Professor of Business Law and Former Dean of Faculties of Law, Ambrose Alli University, Delta State University, and Niger Delta University.**

** **B.Th, LL.B, LL.M, Ph.D, BL. Lecturer, Faculty of Law, Ajayi Crowther University, Oyo, Nigeria.**

1. [2010] 6 NWLR (pt 1189) 1.
2. Misthura Otubu, 'Longe v First Bank of Nigeria PLC [2010] 6 NWLR (pt 1189) 1 SC.: An Ethical Twist' (2017) 1(1) Unilag Law Review; B Atilola, 'Expanding the Frontiers of Employment with Statutory Flavours: A Review of the Supreme Court's Decision in Longe v First Bank' (2011) 5(3) Labour Law Review 1; Omolola Coker, 'Supreme Court Rules on Removal of Managing Director' <https://www.internationallawoffice.com/Newsletters/Litigation/Nigeria/Kola-Awodein-Co/Supreme-Court-rules-on-removal-of-managing-director> accessed 23 February 2022; OD Amucheazi and EA Oji, 'Reinstatement of a Dismissed Employee in a Contract of Employment: A Case Review of Long v First Bank of Nigeria PLC' (2010) 4(2) Labour Law Review 19; PI Iweoha, Esq. PE Oamen, Esq. MI Anushiem and U.M.J Ekeneme 'Longe v First Bank of Nigeria Plc: A view in Support of the Supreme Court Decision' (2016) 4(1) Madonna University Law Journal 76-89.
3. Italics for emphasis.
4. See SO Tonwe (ed), *Saved to Serve: The Academic Biography of Professor Akintunde Emiola* (Amfitop Book. Co 2018) 179, 180; See also Misthura Otubu 'Longe v First Bank of Nigeria PLC [2010] 6 NWLR (pt 1189) 1 SC.: An Ethical Twist' (2017) 1(1) Unilag Law Review.

This discussion is structured as follows. After the introduction, it briefly summarizes the facts of the case of *Longe v First Bank of Nigeria.* It then examines the different categories and duties of directors. This laid the foundation for the discussion of the next section that evaluates the nature and effect of suspension for the duties of a director. The article then raises a query as to who won *Longe's* case. The article submits that three principal parties were involved in the case: Bernard Longe, the Bank and the Supreme Court, but they all lost the case. The review concludes that the decision of the Supreme Court that a suspended director was still entitled to a notice of meeting to attend board meetings was made in error. Therefore, the decision does not deserve to be a good precedent and should not be followed. Since the Supreme Court's decision in the case was based on the provisions of the Companies and Allied Matters Act 1990 (the Companies Act), references in this review are also made to the same. However, equivalent provisions of the Companies and Allied Matters Act 2020 (CAMA 2020) are provided in the footnotes to make it relevant to contemporary readers.

The facts of *Longe's* Case

The facts of the case are straightforward. Bernard Longe was initially employed as an executive director of First Bank of Nigeria Ltd. By virtue of that office, every director — elected or employed — is '*entitled*[5] to receive a notice and attend the directors' meeting unless any reason under the Act disqualifies him from continuing with the office of director'.

Bernard Longe had been attending the directors' meeting since he was an ordinary executive director. His subsequent appointment as managing director did not add any further right under section 266(1)[6] of the Companies Act. After all, "a managing director is a director with added responsibilities."[7] Along the line, the Appellant did some transactions quite unfavourable to the Bank and resulted in a colossal financial loss to the company. He was queried and interviewed and was given a specific time to take remedial measures and report back to the board of directors. No report was given. Faced with that *fait accompli,* the board suspended Longe from work; and called a board meeting to consider how to recoup the considerable loss it had suffered. Longe was not sent notice of the meeting. He was aggrieved for not receiving the board meeting notice as provided by section 266(1)[8] of the Companies Act.

Consequently, Longe brought an action against the Bank on the grounds that: (i) he was entitled to be given notice of the meeting involving his appointment, and (ii) as he was not given notice of the meeting, the meeting was invalid and accordingly all decisions taken at that meeting were unlawful, null and void and in particular the decision to revoke his appointment. The First Bank argued that due to Longe's suspension by the board, he was not entitled to further notice of the meeting at which his appointment was revoked.

5. Italics for emphasis. 'Entitled' means "to give (someone) a right:" Webster's Dictionary, 315; 'to give a legal right or title to:' Black's Law Dictionary (5th edn 1981) 477. See also, *Opeola & Ors v Opadiran & Ors* [1994] 5 NWLR (pt 344) 368.
6. See CAMA 2020, s 292(1).
7. *Anderson v James (Sutherland Peterhead) Ltd* [1941] SC 203; See also, *Moresby White v Rangeland Ltd* [1962] 4 SA 285; Anthony O Nwafor 'Are Directors Servants of the Company? Nigerian Company Law Perspective'" (2007) 3(3) The Corporate Governance Law Review 351, '… directors who enjoy dual capacities, such as director and managing director, could in the latter capacity be referred to as servants of the company. This status has attendant thereto additional responsibilities and benefits to the director'.
8. CAMA 2020, s 292(1).

The main and the only issue before the High Court was whether, by reason of his suspension, the Appellant was "disqualified by any reason under the Act from continuing with the office of director." The board believed he was disqualified as a result of his suspension. The Federal High Court and the Court of Appeal both dismissed Longe's claims, and Longe then appealed to the Supreme Court.

The Supreme Court overturned the decisions of the lower courts. It issued a declaration that the board of directors of the Bank could not lawfully hold a board meeting without giving notice to Longe and that all decisions taken at any such meeting were unlawful, null and void and incapable of having any legal effect. In effect, the Bank's decision to sack Longe, which was made at the meeting of the board of the Bank held in his absence, was illegal, null and void as it did not follow the due process under sections 266(1) and (2) of the Companies Act.[9] The Court's decision was predicated on the ground that since Longe was not dismissed but was only suspended, he was entitled to attend the board meeting. The Court did not also appear to recognize any difference between executive and non-executive directors. However, the issue of Longe's suspension was tangentially relevant to the issue of whether Longe was "entitled to receive notice of the directors' meeting."

Categories of Directors

To justify its decisions in the case, the Supreme Court went all out of its way and said *ex-cathedra,* and without qualification or reservation, that there is no difference between executive and non-executive (i.e., elected) directors. That statement is not only inaccurate but misleading. There are more than a dozen differences between them. It is only accurate concerning a director's fiduciary duty of good faith as well as the duty of care and skill. There are many fundamental differences between executive and non-executive (elected) directors. Some of them are listed as follows.

First, non-executive directors are *elected* by shareholders and entrusted with the company's policies' control, formulation, and direction on their behalf.[10] Executive directors do not direct; they are employees employed on contract by the board of directors to *execute* the policies formulated by the board of directors and charged with the day-to-day administration and management of the company, which includes attending board meetings.

Second, the route by which each category of directors gets to the board of directors is different. A non-executive director is elected to the board by the shareholders' resolution in a general meeting after the first set of directors is required to be named in the company's memorandum at registration.[11] That of the executive director is by a contract of employment.[12] Third, while the board may suspend an executive director like any other employee, such as Longe, the board has no power to suspend from its meeting a non-executive director elected by the shareholders. Even the general meeting cannot suspend a non-executive director; all it can do is remove him from his directorship. Fourth, a non-executive director is a 'trustee of the company's monies, properties and power and … shall exercise [such] powers … in the interest of the company and all the shareholders';[13] thus

9. CAMA 2020, s 292(1) & (2).
10. ibid, CAMA 1990, s 282(1) and CAMA 2020, s 305.
11. CAMA 1990, s 247 and CAMA 2020, s 272.
12. *Emmanuel Iwuchukwu v David Nwizu & Ors* [1994] 7 NWLR (pt 357) 379, 386.
13. Companies Act, CAMA 1990, s 283(1) and CAMA 2020, s 309(1).

constituting the non-executive director not only as a trustee but also the agent of the shareholders who elected him into office.[14] The executive director does not owe any fiduciary duty directly to "all the shareholders individually or collectively"; he owes them to the company's general meeting and his fellow directors.[15]

Fifth, the company is not under any obligation to pay its elected director "a kobo" for services rendered unless "the company [through the general meeting] agrees to pay …."[16] On the other hand, the company is bound to pay its executive director his wages as any other company staff. Sixth, fiduciary duties under section 279(3) of the Companies Act[17] are expanded by section 282(1), which specifically declares in the *proviso* in section 282(2)[18] that an executive director, as an employee, might incur "additional liability" or acquire more benefit "under the master and servant law … if there is an express or implied contract to that effect." The *proviso* does not apply to non-executive directors, and it is acknowledged that the *proviso* to section 282(2) does not derogate from duties imposed on all directors. Still, it talks of executive directors carrying additional liability by virtue of their contract. However, where a non-executive director is appointed managing director by the board by virtue of section 64(b) of the Act,[19] he thus accepts employment and the *proviso* in section 282(4) of the Act[20] will apply to him as well.

Seventh, where also an executive director is wrongfully removed from his office under its absolute discretion in section 262(1) of the Act,[21] he is entitled to "compensation or damages" under the statute and any other relief, including the common law, — for the termination of his employment. With the removal of an elected director, the question of compensation does not arise.

Duties of Executive Director

Longe did not make his suspension an issue in the case, nor did he deny the right of his employer to suspend him based on an employer's right to discipline an erring employee. In *Anthony Udemah v National Coal Corporation*,[22] the Court held that "the right to suspend is always available to an employer to effect proper investigation or during the process of disciplinary action." Similarly, in *Lewis v Heffer*,[23] Lord Denning said: 'suspension in such a case [as in investigation] is merely by way of good administration.' And he added:

> No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless [the employee] is given notice of the charge and an opportunity of defending himself … At that stage, the rules of natural justice do not apply.[24]

14. CAMA 1990, s 283(2) and CAMA 2020, s 309(2).
15. See ss 64 (b) of 1990 CAMA and 88 (b) of 2020 CAMA; See also, *Ephraim Faloughi v Williams* [1978] 4 FRCR 31.
16. Companies Act 1990, s 267(4) and CAMA 2020, s 293(4).
17. See CAMA 2020, s 305(3). Except that the 2020 provision has included that a director shall further "have regard to the impact of the company's operations on the environment in the community where it carries on business operations.
18 See CAMA 2020, s 308(1) and (2).
19. See CAMA 2020, s 88(b).
20. See CAMA 2020, s 308(4).
21. See CAMA 2020, s 288(1).
22. [1991] 3 NWLR (pt 180) 477, 480.
23. [1978] 1 WLR 1061, 1073.
24. According to federal civil service rule 04118, suspension is invoked 'where a *prima facie* case (the nature of which is serious) has been made against an officer and it is considered necessary in the public interest that he should forthwith be prohibited from carrying on his duties.'

But the Supreme Court seemed to ignore that basic fact of employment law. Sections 279[25] and 283(1)[26] of the Companies Act impose fiduciary duties on all directors — duties of *utmost good faith*,[27] to [protect] preserve the company's assets; to be prudent in handling the company's monies, and "exercise [the] degree of care, diligence, and skill which a reasonably prudent director would exercise in comparable circumstances.[28]

The duty of 'care and skill' is an employment rule. It simply means that in a contract of employment, a servant owes "the implied duty to take reasonable *care* and exercise maximum *skill* in discharging his contractual obligations."[29] The 'duty of care and skill' in corporate management is not just *implied;* it is a statutory obligation incorporated in section 279(3) of the Companies Act.[30]

The expectation of the "degree of care… and skill with which a reasonable prudent director would exercise [his duty] in comparable circumstances" is significant.[31] It simply means that the company is not to use its standard, but what peer-directors would do in the circumstances and situations. The authors are unaware of a reported case where a bank manager — not to talk of a director — involved his company in a huge loss and had a pat on the back. The case of *E.R. Usen v Bank of West Africa Ltd* [32] — incidentally the former name of First Bank decided by the same Supreme Court — is elucidating and straight to the point. Usen, a bank clerk, involved the bank in a significant loss. The Supreme Court held that the company was entitled to dismiss the clerk on that single act of misconduct. And the degree of care expected of a director is higher than that of a clerk or manager — and much higher still of a managing director. The appellant in *Longe v First Bank* might be a 'skilled' and astute banker, but the facts of the case, which he did not dispute, show that the loss was due to failure of the "duty of care."

It has been said[33] that the "negligence [including the duty of care] which would justify a dismissal will have to be considered with reference to the degree of care required in the particular kind of employment and the magnitude of the loss incurred or damage suffered by the employer."

The proviso fortifies the provision of sections 279(3) to subsection (4) of section 282[34] of the Companies Act. It stresses the point that an executive director might suffer "additional liability … under the law of master and servant," which emphasizes the employment status of the post of executive director. The board itself would have committed a breach of section 266(1)[35] if it had notified the suspended executive director of its meeting, who was disqualified to attend it for breach of his statutory duties under sections 279 and 282 of the Act. It would have amounted to condonation of the breach.

25. Companies Act 1990 ss 279(1), (3), (6), (7) and CAMA 2020, s 305(1), (3), (6), (7).
26. CAMA 2020, s 309(1).
27. CAMA 1990, s 282(1) and CAMA 2020, s 308(1).
28. ibid, s 279(3) and CAMA 2020, s 305(1).
29. See A Emiola, *Nigerian Labour Law* 4th Ed.(2008), p. 89.
30. CAMA 2020, s. 305(3).
31. EO Akanki "Negligent Management by Company Directors" (1975) 9 *Nigerian Law Journal* 47.
32. (1965) 1 All NLR 244; (1965) NSCC 196.
33. A Emiola, *Nigerian Labour Law (*4th edn 2008) 91-92.
34. CAMA 2020, s 305.
35. CAMA 2020, s 292(1).

It is true that every director has conferred on him by section 266(1) of the Companies Act the privilege to receive notice of and to attend meetings of the board of directors of his company. However, the enjoyment of that privilege is contingent upon the director fulfilling and complying with the conditions set out in sections 279 and 282 (among others) incorporated by the Act as part of the terms of employment of the director. Subsection (8) of section 279 is blunt and unequivocal in stressing that no "article or resolution or contract shall relieve a director from liability incurred under the section." It is strongly submitted that *ipso facto,* breach of any fiduciary duty under section 279 of the 1990 Companies Act and 305 of the 2020 Companies Act will disqualify a director from office and subsection (8) is unequivocal that "no article or resolution of the company or contract shall relieve a director [elected or employed] from liability under this section. Sections 258 of the 1990 Act and 284 of the 2020 Act further deal with *forfeiture* of office by an elected director who fails to meet the conditions for an elected (by shareholders) director.

Part of the judgment of the Supreme Court in Longe's case was the annulment of the meeting of the board, leaving the company to live with the pain of its financial loss and the shock of being unable to deal with an erring employee. Section 266(3) of the Companies Act can be invoked only if a right is absolutely vindicated. The defence of the Respondent/Bank right from the High Court is that the Appellant was *suspended from work.* It is the bank's only defence. So, the Court was meant to consider whether suspension is a factor in determining whether any reason under the Act disqualifies a director "from continuing with the office of a director."[36] To ignore to consider the bank's defence was to deny it a fair hearing or natural justice. Following *Kanda v Governor of Malaya*,[37] the same Supreme Court decided that "the right to be heard is such an important, radical and protective right that the courts strain every nerve to uphold it and even imply it."[38] The Appellant did not deny the fact of misconduct and suspension from work. His only claim was the right to attend the board's meeting. And that puts the provision of section 266(1) of the 1990 Act on the first burner. It is submitted that the issue of the right to attend the board's meeting must be determined on the consideration of the bank's defence that suspension of the appellant from work also suspends the contract that gives him the right to attend the board meeting. But the Supreme Court did not consider that defence upon which the bank got judgment in the lower Court but simply irked section 266(3) to annul the board's proceedings. That was contrary to justice, natural or equitable.

The Supreme Court held that an employee-director suspended from work was still 'entitled' to continue to perform the duties of the office by attending board meetings. That decision was not based on any sound corporate or employment law principle. What law entitles a staff on suspension to sit with the employer to determine his guilt or innocence? Both section 266(1) and all extant laws do not support the basis of the Court's judgment. The Court further submitted that the Appellant was suspended from work, not from the board. But the bank's defence was suspension from work also suspended the contract from which Longe derived the right to attend the board meeting. That defence was not considered, talk more of being evaluated.

36. CAMA 1990, s 266(1) and CAMA 2020, s 292 (1).
37. [1962] AC 322, 337.
38. See *Olatunbosun v NISER* [1988] 2 NWLR (pt 80) 25, 47; the Court further said in *Adigun & Ors v AG of Oyo State* [No. 2] [1987] 1 NWLR (pt 53) 678, 708: "It is said that the appellant have not shown that they suffered any injury by the denial of fair hearing. Do they really have to show injury or prejudice? It is implicit in the very act of denial because the denial is an injury to the right of fair hearing,,,"

In a similar, though not identical case, Lord Atkins held[39] that a dismissal [or suspension] destroys the legal basis upon which a managing director may make his claim. He added:

> The contract of employment… was dependent upon the managing director continuing to be a director. The continuance of the directorship was a concurrent condition.

Does a director or managing director suspended from work ["continue] with the office of a director while on suspension"? That was the issue in *Longe v First Bank Ltd.* But the Supreme Court did not consider that crucial question!

The Issue of Suspension

In its ordinary usage, *suspension* means 'an imposed temporary withdrawal of right or privilege.'[40] Black defines 'suspension' as 'a temporary stop, a temporary delay, interruption.' But as regard employment, Black further states that 'suspension' is "a temporary withdrawal or cessation from employment."[41] In *Boston Sea Fishing Co. v Ansel*,[42] the English Court of Appeal held that suspension from office or post merely amounts to saying "so long as you hold [the office]… and until you are legally dismissed, *you must not do anything*[43] in the discharge of the duties which under your office you ought to do towards your employer". Nigerian courts have approved the definition of "suspension in employment." Salami JCA said:[44]

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

If the "suspension of an employee" also suspends his contract — which Black refers to as "cessation from employment" — how could the appellant continue to perform the duty of attending board meetings? And if he cannot, what is the use of giving him notice of a meeting he is disqualified from attending? The contract is gone with suspension and so also all the rights conferred by the contract.

In the interest of justice and equity, the Supreme Court was under moral and legal obligation to take the issue of suspension and decide if it could be a factor or was relevant in determining whether an executive director "is *disqualified* under the Act from continuing with the office of director." That is crucial because it was the only plank upon which the Bank rested its defence. Failing to consider the issue meant, in law, that the case of the Bank was not considered. That is neither justice nor equity.

39. *Southern Foundries Ltd v Shirlaw* [1940] AC 701, 740.
40. Webster's Dictionary 997*; University of Calabar v Esiaga* [1997] 4 NWLR (pt 502) 719, the Court of Appeal (at 723) held: 'suspension is temporary privation or deprivation, cessation or stoppage of or from privileges an and right of a person'.
41. *Black's Law Dictionary* (5th edn 1981) 1297.
42. (1886-90) All ER Rep 65, 67.
43. Italics for emphasis.
44. *Bernard Longe v First Bank of Nigeria PLC* [2006] 3 NWLR (pt 967) 228, 269.

Who won the case?

In the end, no one won the case! The Supreme Court, Bernard Longe and First Bank came out of it brutally bruised. The Supreme Court's approach to the case was pedestrian. The Court failed to consider the enormity of the ripple effects of its decision, as an apex court, on the banking system, corporate management and the law of employment. The main issue in the case, as already noted, revolved around the interpretation of section 266(1) of the Companies Act.[45] The Court failed to consider the relevance of –

a. the conditions or limitation of the right conferred by the provisions of the Act;
b. the obligatory fiduciary duties of sections 279, 282 and 283[46] imposed on all directors as a condition for the exercise of the right conferred by section 266(1);
c. whether a director suspended from work is not "disqualified" by reason of his suspension for breach of sections 279, 282 and 283 of the Companies Act; Oputa, JSC, held in *Nishizawa Ltd v Jethwani*[47] that in the interpretation of a statute, "[it] is the duty of the court to try and get at the *real* intention of the legislature by carefully attending to the *whole scope* of the statute to be construed." This the Supreme Court did not do in Longe's case.
d. whether it aligns with the intention of section 266(1) of the Act or the law of employment that a director suspended from work is still entitled to notice to attend the meeting of the company's board of directors. If the Court had considered the effect of suspension in relation to the right conferred by section 266(1) and the disqualification *proviso* (or condition), it would, perhaps, have found it needless to invoke the provision of subsection (3) of the section to invalidate the meeting of the board and its decision.
e. The Supreme Court quietly ignored to consider these issues, which would have ensured justice and equity between the parties to the case. Moreover, the finality of the Supreme Court's judgment imposes a moral duty and a legal obligation on the Court to consider the cases of all the parties.

First Bank was the "whipping boy" in the case. The Court's decision left the Bank to "lick the wound" of its colossal financial loss occasioned by the appellant's act and to live with the memory of an unmerited loss of the case to its errant employee. *Longe* might have 'won' the case, but at what cost? He left the Court premises as "banking guru" who almost brought his bank to financial ruins. He left the Court with "suspension stigma" still stuck to his lapel! The Supreme Court judgment was, at best, a pyrrhic victory.

CONCLUSION

Regarding the facts of the case — facts undisputed — Longe's appeal should have been dismissed. It is submitted that the decision of the Supreme Court in *Longe v First Bank of Nigeria* should not be followed as precedent. The case was decided *per incuriam*. Although it was said that the decision of the Supreme Court is "final and final forever,"[48] there have been instances when the

45. CAMA 2020, s 292(1).
46. See CAMA 2020, ss 305, 308 and 309.
47. [1984] ANLR 470, 499.
48. *Architects Registration Council of Nigeria (No. 4) v Professor Fassassi* [1987] 3 NWLR (pt 59) 42; [1987] 6 SCNJ 5.

Supreme Court reversed itself.[49] This occurs where all the facts of a case or all relevant authorities had not been brought to the attention of the Court in the particular case. *Longe v First Bank of Nigeria* is such a case.

With the greatest respect, the Supreme Court should revisit the case because to uphold it as precedent is likely to encourage indiscipline and disloyalty in corporate management and unsettle the settled principles of common law rules of employment built up painstakingly over centuries.

49. *Inakoju & Ors v Abraham Adeleke & Ors* [2007] 4 NWLR (pt 1025) 423; in it the Supreme Court reversed its decision in *Balarabe Musa v Speaker, Kaduna State House of Assembly* [1983] 3 NCLR 229 on requirements for the impeachment of governors.