

SUPREME COURT OF NIGERIA
15TH JULY, 1994. SC. 232/1989.
CORAM:- M. L. UWAIS, I. L. KUTIGI, E. O.
OGWUEGBU, S. U. ONU, Y. O. ADIO, JJSC

EMMANUEL J. IWUCHUKWU RESPONDENT
AND
1. DAVE ENGINEERING CO. LTD
2. ENGR. DAVID C. NWIZU APPELLANTS

APPEALS - *Error of lower court - In taking three appeals together - Whether miscarriage of justice is occasioned.*

COMPANY LAW - *Directors - Where appointment of appellant as a company director - Was not for a fixed time or for life - Which sections of the Companies Decree is applicable.*

COMPANY LAW - *Directors - No provision within the Memorandum & Articles of Association on removal of Directors - When provision of the Companies Decree specifying ordinary resolution - Is deemed applicable.*

COMPANY LAW - *Directors - Where appellant was initially employed as a special assistance - But was subsequently appointed a director - Whether Court of Appeal was right - In holding that appellant can be terminated at will on three months notice.*

DAMAGES - *Special & General damages - Where there is no claim for arrears of salary or allowances - And no proof of special and general damages - Whether the N1,000.00 damages claimed will be granted - Seeing that the appellant's action succeeded.*

JUDGMENT - *Company director's removal - Whether trial Judge was right in finding that appellant was improperly removed.*

PRACTICE A PROCEDURE - *Actions - When reference to the statement of claim - Is found to reveal the real question in issue.*

PRACTICE A PROCEDURE - *English authorities - Since the 1968 Companies Act is in the main same as 1948 English Companies Act - Whether Court of Appeal was right in following English authorities.*

FACTS

The Plaintiff/Appellant was employed by the 2nd Respondent as special Assistant to its Managing Director - The 1st Respondent. After assuming his appointment, the Appellant was appointed a member of the Board of Directors and subsequently an Executive Director of the 2nd Respondent. The Appellant was later appointed a director of Dave Agricultural Development Project Ltd, a subsidiary of the 2nd Respondent. After a discussion, the Appellant was reassigned by the 1st Respondent vide a letter (Exh. 12) to Dave Agric. Development Ltd as the Manager. This letter stated that the executive directorship and Board membership of Appellant in Dave Engineering Co. Ltd. were terminated as a result of his reassignment.

Appellant sent a memo to 1st Respondent indicating his disagreement with a portion of the reassignment letter and subsequently took out the writ of summons that led to this suit. 1st Appellant wrote Exhibit 15 to the Appellant terminating his appointment with Dave Engineering Co. Ltd. in view of the pending suit and disagreement between the parties. The Appellant sought in his said suit before the Federal High Court Enugu, a declaration that his removal as executive director of the 2nd Respondent is ultra vires, restoration of all his entitlement as such executive director, injunction restraining 1st Respondent from interfering with his continued enjoyment of the aforesaid entitlement. Appellant in the alternative, claimed N 1,000,000 (one million naira) being special and general damages. The trial court found for the Appellant and granted all his claims in toto. Respondents' appeal to the Court of Appeal was upheld. The Appellant being dissatisfied has now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in reversing the Federal High Court's judgment. The appeal before the court below was a consolidation of three appeals, incorporating two interlocutory appeals.

HELD (*Unanimously allowing the appeal in part*)

Actions - Real question in issue

1. A close examination of the Appellant's statement of claim reveals that this action concerns his removal as Executive Director and has nothing to do with his appointment as Special Assistant to the 1st Respondent. The appointment of the Appellant as Special Assistant was terminated by the 2nd Respondent with effect from the 31st October, 1983. Whether the termination of the appointment is right or wrong is not the question here, since it does not arise as far as the Appellant's claim is concerned. (P.97 L.23)

Where appointment of director was not for a fixed time

2. The evidence adduced during the hearing of this case in the Federal High Court does not indicate that the appointment of the Appellant as director was for a fixed time too. Furthermore, Exhibit 5 does not show that the Appellant's appointment as Executive Director was made for life and no such evidence was adduced in the trial court. Therefore, the proviso to subsection (1) of section 175 is not applicable also to this case. Similarly, all the subsequent provisions of the other subsections of section 175 of the Companies Act, 1968, which deal with the procedure for or after the removal of a director by passing a resolution, except subsection 6 thereof, have no application to the present case. (P. 99 L. 12)

No provision in the Memo on removal of directors

3. It is very clear from the foregoing that Article 13 (a), (b) and (c) does not apply to the Appellant. No any other procedure has been provided in Exhibit 1 for the removal of a director of 2nd Respondent. Therefore, the only procedure available to the 2nd Respondent when the Appellant was removed from office on 16th September, 1983, as per Exhibit 12, is the procedure similar to that prescribed by section 175 subsection (1) of the Companies Act, 1968. That is of calling a general meeting of the shareholders to pass a resolution removing the Appellant. There was no proof of ordinary resolution passed by the shareholders of the 2nd Respondent removing the Appellant from office as Executive Director.
(P.100L.4)

Termination of Company director at will by 3 month's notice

4. The Court of Appeal was in serious error when it held that the appointment of the Appellant was lawfully terminated at will on his being offered 3 months' salary in lieu of notice. It is his appointment as Special Assistant to the Managing Director that requires and can be lawfully affected by such notice or payment in lieu of notice. Removal from the office of director in the absence of provision in the Articles of Association or contract demands a different procedure which involves the calling of a general meeting and the passing of an ordinary resolution removing the Appellant. (P. 100 L.23)

Trial Judge's finding on removal of the appellant

5. The learned trial judge was right in finding that no general meeting of the company was in fact held and that there was no ordinary resolution passed by the company removing the Appellant as its Executive Director. It follows,

therefore, that the proper procedure for removing the Appellant from his appointment as Executive Director had not been followed. (P. 100 L.23)

Error in taking the three appeals together

6. On the whole, although the Court of Appeal erred in taking the 3 appeals together, as if they were consolidated, there had been no miscarriage of justice in their doing so. (P. 107 L.2)

Reliance on English authorities

7. Whilst the lower Court was wrong in allowing the Respondents' appeal, it acted rightly in following English authorities because our Companies Act, 1968 was in the main the same as the English Companies Act, 1948. (P.107L.7)

No proof of damages.

8. There is no proof that the Appellant had suffered special and general damages. There is no claim for arrears of salary or allowances. The alternative relief of N1,000,000.00 cannot therefore be granted. There is no evidence produced by the Appellant about the present condition of the 2nd Respondent. It cannot be said if it is in a position to or it is still paying its directors the entitlement enjoyed by the Appellant in 1983. In the absence of such evidence, the 3rd relief cannot be granted. (P. 107 L.17)

NOTABLE POINTS OF INTEREST

UWAIS.JSC

1. Removal of a company director

In general a director may be removed from office. The manner of removal may be specified in the Articles of Association of the Company concerned. In the absence of that the manner of removal may be in accordance with statutory provisions, like section 175 subsection (1) of the Companies Act, 1968 which applies to a director appointed for a specific or fixed time other than for life. Where the Articles of Association or the contract of appointment as director does not expressly specify or fix the duration of the director's appointment, such director holds office at will and may be removed or dismissed by an ordinary resolution passed by the shareholders of the company at a general meeting. (P.98 L.26)

2. Whether appellant was a mere ordinary company employee

The court below was therefore in error when it held that the appellant was no more than an ordinary employee who had been promoted and whose contract of employment as regards its termination was as stated in Exhibit “16”. The removal of the appellant from his appointment as Executive Director of the 2nd respondent was illegal, ultra vires and void. (P.I 10 L.3)

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ONUJSC

3. Courts will not impose employee on the employer

For that of the appellant’s appointment as personal assistant to the 1st respondent, the termination of his employment being governed by the normal master/servant relationship, poses no problem. The guiding principle in such cases of contracts of personal service is that courts will not compel an employer to retain an employee in whom the employer has lost confidence. (P.110 L.30)

15 4. When ill-timed ordinary resolution is of no avail

The passing of such an ordinary resolution as a cover for the act of wrongful dismissal contained in Exhibit 17 is of no avail to the respondents since the resolution was purportedly passed when the appellant’s case against them was already in court, thus rendering it (Exhibit 17) incompetent (P. 111 L.4)

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5. Wrongful termination - Onus of proof

“Now, in an action for wrongful termination of appointment, as in the instant case, the onus is on the plaintiff to prove the terms of the agreement allegedly breached. In this case, the appellant having, in my view, been able to establish his claim for the wrongful termination of his appointment on the balance of probabilities, he was entitled to judgment. (P. 111 L.I 8)

6. Failure to prove the damages claimed

However, since in the instant case the appellant merely claimed one Million Naira as damages but led no evidence in proof to some or any of such an amount in the trial court, this court is without power to award him any such damages or compensation. This is the moreso, that neither Exhibit 1 nor Exhibit 5 prescribes the duration of his appointment and more particularly in the case of the latter and indeed Exhibit 4. (P. 112 L.14)

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REPRESENTATION

J.H.C. Okolo, SAN with A. Chude for the Appellant

A.N. Anyamene, SAN with C. Okonkwo for the Respondents.

CASES REFERRED TO

Olaniyonu v. British American Insurance Co. Ltd. (1972) U. I. L. R. (Part 4) 442 5

Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40 at p. 56

Stephens Engineering Ltd. v. Complete Home Enterprises Ltd. (1987) 1 N.W.L.R. (Part 47) 40

Chief Idugboe v. Roz (1978) 6 RC.A. 178 at pp. 188-190

Architects Registration Council of Nigeria v. Professor Fassassi (No. 2) (1987) 10 3 N.W.L.R. (Part 59) 1 (1987) 6 S.C. 1

Eronini v. Harbor (1957) 2 RS.C. 43

Amodu v. Amodu (1990) 5 NWLR (Part 150) 356

Francis v. Kuala Lumpur Councillors (1962) 1 W.L.R. 1411 pages 1477, 1478

Hill v. Parsons & Co. Ltd (1971) 3 All E.R. 1345 1350 15

African Continental Bank v. Ewarami (1978) 4 S.C. 109

Imoloame v. W.A.E.C. (1992) 9 NWLR (Part 265) 303 at 318

Engineering Yalatu-Amaye v. Association of Registered Engineering Contractors Ltd (1990) 4 NWLR (Part 145) 422

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STATUTES & RULES REFERRED TO

Companies Act 1968 ss. 191 (4), 395(1), 175(1) & 6, 135, 168, Articles 75 89, 91 & 94 of Table A

Court of Appeal Rules 1981 0. 1 r.20, 0.3 r. 23

Court of Appeal Act 1976 s. 16 25

Supreme Court Rules 1985 0.8 r. 13

BOOKS REFERRED TO

Nigerian Company Law and Practice by J. Ola Orojo pp. 261 & 262

Company Law by Pennington (3rd Ed.) p. 481 30

LEAD JUDGMENT BY UWAIS JSC

The appellant was the plaintiff in the Federal High Court holden at Enugu, where he instituted an action against the respondents as defendants. 35 In the action the appellant claimed as follows, as per paragraph 12 of his statement of claim:-

“Whereof the plaintiff claims against the defendants jointly and

severally as follows:-

(1) A declaration that the purported removal of the plaintiff as Executive Director of the 2nd defendant by the 1st defendant is ultra vires, null and void and of no effect.

(2) An order compelling the 1st defendant, his servants and/or agents whatsoever to restore all the aforesaid entitlements legally due to the plaintiff as such Executive Director.

(3) An injunction restraining the 1st defendants, (sic) his servants and/or agents in whatsoever capacity, from interfering in anyway with the continued enjoyment of the aforesaid entitlements due to the plaintiff as such Executive Director. In the alternative. The plaintiff claims N1,000,000.00 (One Million Naira) being special and general damages.”

The facts of the case are not in contention and, may be summarised thus. The appellant was employed by the 2nd respondent as Special Assistant to its Managing Director, that is the 1st respondent. The letter (Exhibit 16) by which the appointment was made reads:-

“DAVE ENGINEERING CO. LTD.,

183, Zik Avenue,

P.O. Box 309,

Enugu.

25, Oduduwa Way,

G.R.A. Ikeja,

Lagos.

25th April, 1979.

Mr. Emmanuel J. Iwuchukwu,

No.6, Alderton Road,

GRA,

Enugu.

Dear Sir,

OFFER OF APPOINTMENT AS SPECIAL ASSISTANT TO THE
30 MANAGING DIRECTOR

Following your application dated 25th April, 1979 and the subsequent interview with our Managing Director on the above position, we are pleased to offer you the position of Special Assistant to the Managing Direc

tor with effect from the 1st May, 1979 under the following conditions:-

(i) The post carries an initial Salary of N10,800.00 (Ten Thousand and Eight-hundred Naira) per annum.

(ii) You will be paid an additional 30% (Thirty Percent) of your annual salary as Housing (sic) and allowances.

(iii) The company shall provide you with serviceable car for your 5 official duties.

(iv) You will be expected to work in any part of the Federation of Nigeria where you may be posted.

(v) Leave at the time being will be for two weeks as a general break in operations in December of each year.

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(vi) You and Dave Engineering Company Limited are liable to give each other 3 (three) months notice or three months salary in lieu of three months notice of intention to terminate this appointment.

(vii) You will please indicate your acceptance of the above terms and conditions by signing and dating over fifteen kobo stamps on the copy attached to the original of this letter, which is expected to be returned to us not later than 30th April, 1979.

Yours faithfully,

for: DAVE DEVELOPMENT COMPANY LIMITED

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(Sgd.)

D.C. Nwizu

Managing Director.

cc: Chief Accountant."

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After assuming the appointment the appellant was appointed a member of the Board of Directors of the 2nd respondent with effect from 1st November, 1979, by a letter (Exhibit 4) which reads:-

"DAVE ENGINEERING CO. LTD.,

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116, Ladipo,

Matori Ind. Estate,

Isolo,

Box 9438,

Lagos.

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October, 29th 1979.

*Mr. E.J. Iwuchukwu,
Dave Engineering Co. Ltd.,
Enugu.*

Dear Sir,

DIRECTORSHIP APPOINTMENT

5 *It is a pleasure to inform you that you have been appointed a member of the Board of Directors of Dave Engineering Company Limited, with effect from 1st November, 1979. The Directorship carries annual stipend of N3,000.00(three thousand Naira).*

The Company in its best interest reserves the right, at all times, to
10 *determine the continuity of the directorship of any member of the board.*

We look forward to your progressive contributions in your new appointment.

Yours faithfully,

for: DAVE ENGINEERING CO. LTD.

15 *(SGD.)*

Engr. D.C. Nwizu

Managing Director.”

Another letter dated the 12th January, 1980 (Exhibit 5) was written to the appellant informing him of his appointment as Executive Director of the
20 2nd respondent. The letter reads as follows:-

“DAVE ENGINEERING COMPANY LIMITED

*116, Ladipo,
Matori, Isolo,
25 Box 9438, Lagos.*

12th January, 1980.

Our Ref: DCN/MD/30/Vol.I/26

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*E.J. Iwuchukwu, Esq.,
Dave Engineering Co. Ltd.,
Enugu.*

Dear Sir,

DIRECTORSHIP APPOINTMENT

*Further to my letter No. DCN/MD/30/Vol.1/24 of 29th October, 1979, I have pleasure 5
in informing you that with effect from 1st January, 1980, you have been
appointed an Executive Director of Dave Engineering Company Limited,
following the recent re-organisation in the Company. By this appointment
your membership of the Board of Directors of Dave Engineering Company 10
Limited is now on a full-time basis and you will be assigned to co-ordinate
and to direct Engineering and Agro-Allied Projects of the Company.*

The salary attached to this post would be communicated to you later.

*I sincerely hope that your new position will be an opportunity for
you to continue your invaluable service to the Company. This letter super-
sedes (sic) my earlier letter No. DCN/MD/30/Vol.1/24 of 29th October, 1979. 15*

Yours faithfully,

for: DAVE ENGINEERING CO. LIMITED

(SGD.)

D.C. Nwizu

Chairman/Managing Director.”

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The appellant assumed the office of Executive Director of the 2nd respondent and in that capacity attended meetings of the Company's Board of Directors. A return (Exhibit 2), pursuant to the provisions of section 191 subsection (4) of the Companies. Act, 1968, No.51 of 1968 applicable to this case, was sent by the 2nd respondent to the Registrar of Companies. The 25 return (Exhibit 2) shows that the appellant was one of the directors of 2nd respondent and that his appointment, as such, was with effect from 1st November, 1979. In the course of his tenure, the 2nd respondent won a contract with the Federal Ministry of Communication. The contract was successfully completed by the 2nd respondent and the appellant received a merit award for 30 performing “exceptionally well in the execution of the Project.” The award was conveyed in a letter (Exhibit 9) signed by the 1st respondent as Chairman/Managing Director of the 2nd respondent.

By a letter dated the 18th March, 1981, (Exhibit! 1), the Appellant was

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appointed as a Director of another company - Dave Agricultural Development Project Limited. The letter reads:-

“HEAD OFFICE

111/113 Chime Avenue,

P.O. Box 309,

5 Anambra State,

Enugu.

March 18, 1981.

Our Ref: DADEP/SEC. 01/115

E.J. Iwuchukwu. Esq.,

10 Dave Engineering Co. Ltd.,

111/113 Chime Avenue,

New Haven,

Enugu.

Dear Sir,

15 DIRECTORSHIP APPOINTMENT

I am pleased to inform you that, pursuant to article 19 of the company's Article of Association, the members of Dave Agricultural Development Project Limited, at their general meeting of 10th November, 1980, unanimously resolved to appoint you a Director of the Company. The Company is a Limited Liability Company incorporated on 14th October, 1980, under the Nigerian Companies Act of 1968.

The duties, powers and responsibilities of the Directors are as contained in the company's Memorandum and Articles of Association.

Please accept our hearty congratulations.

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Yours faithfully,

pp: DAVE AGRICULTURAL DEV. PROJECT LTD.

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(SGD.)

J.C.O. Emekwue,

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Company Secretary.”

This Company is a subsidiary of the 2nd respondent. A discussion took place on 2nd September, 1983 between the appellant and the 1st respondent. The appellant was, as a result of the discussion, reassigned to Dave Agricultural Development Project Limited. The letter effecting the re-assignment (Exhibit 12) was written by the 1st respondent and it reads:-

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“DAVE ENGINEERING COMPANY LIMITED

116, Ladipo Street,

Matori Industrial Estate,

Isolo, Mushin,

P.O. Box 9438,

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Lagos.

12th September, 1983.

Our Ref: DCN/MD/8CNol.1

Mr. E.J. Iwuchukwu,

Dave Engineering Co. Ltd.,

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111/113 Chime Avenue,

Enugu.

Dear Sir,

RE: ASSIGNMENT TO DAVE AGRIC. DEVELOPMENT PROJECT LIMITED

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As follow-up to the discussion I had with you on the 2nd of September, 1983, in my office, you are by this letter reassigned to Dave Agric. Development Project Limited, as the Manager incharge of the Poultry Project with effect from the 16th of September, 1983. As a result of this reassignment, your executive directorship and Board Membership in Dave Engineering Co. Limited are terminated with effect from the 16th September, 1983.

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Your new salary is N12,000.00 (Twelve Thousand Naira) P.A. with effect from the 16th of September, 1983. As usual you will be entitled to Housing, Hospital and car allowances where applicable.

The Poultry is expected to pay its way, you will therefore Endeavour to make

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it a worthwhile economic venture.

Yours faithfully,

for: DAVE ENGINEERING CO. LTD.

(SGD.)

D.C. Nwizu

5 *Managing Director” (italics mine)*

On receipt of this letter, the, appellant sent a memorandum (Exhibit 21) to the 1st respondent in which the appellant stated that he did not understand what 1st respondent meant and that he (appellant) was not in agreement with the second paragraph of the letter (Exhibit 12) and indicated that he would later write a full letter to the 1st respondent

It is not clear from the record of appeal if, in fact, the appellant wrote the letter as indicated in his memorandum (Exhibit 21). It would appear that instead, the appellant took out the writ of summons issued in this suit. For the 1st respondent followed up his letter of 12th September, 1983 (Exhibit 12) with yet another letter, dated 24th October, 1983 (Exhibit 22) which reads:

“DAVE ENGINEERING CO, LTD.,

DCN/MD/8CI/Vol.1

24th October, '83.

20 *E.J. Iwuchukwu Esq.,*

Manager - In charge Poultry Project,

Dave Agric. Dev. Project,

111/113 Chime Avenue,

Enugu.

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Dear Sir,

Re - Deployment In Dave Agric.

Development Project

In my letter Ref. No. DCN/MD/8CI/Vol.1 of 12th September 1983, I

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informed you of your re-deployment in Dave Agric. Development Project Ltd., as an alternative to terminating your appointment because of the steadily shrinking financial position of the Company. That letter was sequel to my discussion with you on the 2nd of September 1983, during which you put forward your precarious financial position resulting from your commitments in the training of your children.

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You have not taken up the assignment but you have instead sued the Company for N1,000,000.00 (One million Naira) damages.

Does your action in court mean that you will not work in Dave Agric Development Project Ltd.?

Unless I hear from you within four days of the delivery of this letter to you confirming that you will render loyal and productive service to the Company in the Poultry section, I shall take it that you have relinquished your new appointment and we shall have no option but to treat you as in breach of your contract of service and dismiss you from our service.

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Yours faithfully,

(SGD.)

Engr. D.C. Nwizu

Managing Director)

On 25th October, 1983, the appellant wrote to the 1st respondent but this letter was not put in evidence at the proceedings in the High Court. It is the letter from the 1st respondent, which was written on the 31st October, 1983, (Exhibit 15) that made reference to the appellant's letter. Exhibit 15 reads as follows:-

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"DAVE ENGINEERING CO. LTD.,

116, Ladipo Street,

Matori Industrial Estate,

Isolo, Mushin,

P.O. Box 9438,

Lagos.

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31st October, 1983.

Your Ref. DCN/MD/8C2N 01.1

Mr. E.J. Iwuchukwu Esq.,

Manager-In-charge Poultry Project,

Dave Agric. Dev. Project Ltd.,

5 *111/113 Chime Avenue,*

Enugu.

Dear Sir,

Re - Deployment In Dave Agric.

Development Project Ltd.

10 *Please refer to your letter of 25th October, 1983 on above subject matter. The said letter can only mean that you have repudiated your contract of employment with Dave Agricultural Development Project Limited.*

In the circumstances, you are hereby given three months notice of termination of your appointment with Dave Engineering Company Limited
15 *effective from the 16th of September, 1983, which was the date of your re-deployment to Dave Agricultural Development Project Limited by mutual agreement. Owing to the poor financial position of the Company brought by the current recession, the Company can no longer afford to retain you in its services. You will please proceed on leave immediately for the duration of*
20 *any outstanding period of your earned leave.*

You will please vacate the Company's quarters at plot 416 Independence Layout which you are now occupying, at the end of this notice period.

You should forthwith return all the Company's property including the Peugeot 505 salon car, in your possession to the Accountant Mr. J .E.
25 *Onyeche, and obtain a clearance note from him. The Accounts Department is working out details of your final entitlements which shall be paid to you net of any indebtedness by you to the Company.*

Yours Faithfully,

(Sgd.)

30 *Engr. D. C. Nwizu,*
Managing Director."

Now, what emerges from the foregoing narration of the facts of this case is that the appellant had five appointments offered to him, namely -

1. Appointment with the 2nd respondent as Special Assistant to its Managing Director.
2. Appointment with the 2nd respondent as its Director.
3. Appointment with the 2nd respondent as its Executive Director. 5
4. Appointment with Dave Agricultural Development Project Limited, a subsidiary of the 2nd respondent, as its (former's) Director.
5. Appointment with Dave Agricultural Development Project Limited as Manager of its Poultry Project.

All these appointments, except No.5, were accepted and acted by the Appellant. However, it would appear that Appointment No.2 was subsumed by Appointment No.3 since both appointments made the Appellant a member of the Board of Directors of the 2nd respondent (see Exhibits 4 and 5 above). Section 395(1) of the Companies Act, 1968 defines "director" as including "any person occupying the position of a director by whatever name called" In *Re Marseilles Extension Railway*, 7Ch. 161, Mellish L.J. defines a company director thus -

"A director is simply a person appointed to act as one of a board, with power to bind the company when acting as a board - but having otherwise no power to bind them."

In the case of the 2nd respondent the difference between a director simpliciter and an executive director is given in Exhibits 4 and 5. The former exhibit refers to a director as simply a member of the Company's Board of Directors, while the latter describes an executive director as a member of the Board of Directors on full-time basis with an assigned responsibility. However, the general description of "executive director" has been given in Nigerian Company Law and Practice by J. Ola Orojo, at p.261 thereof:-

"Sometime the articles (of association) give the directors or the Company power to appoint executive, special or alternate directors. In practice, the "executive." or "special" director is an employee of the Company whose status has been raised to that of a director but who continues essentially as such employee, e.g. a Sales Director. His status is usually limited by the articles but may eventually be elevated to full directorial status....."

The Memorandum and Articles of Association of the 2nd respondent had been put in evidence as Exhibit 1. Nowhere in the Articles of Association is reference made to the office of executive director. However, articles 13 thereof provides:-

"A Director may hold any other office or place of profit under the Company (except the office of Auditor) upon such terms as to remuneration,

tenure of office or, otherwise as may be determined by the Board of Directors.”

At the hearing of the case in the Federal High Court, the Court (Tofowomo J.) held that Exhibits 15, 1722 and 23 should be discountenanced because:-

“Evidence also revealed that it was after the Court action taken by the plaintiff against the defendants that the..... letters were written by the 1st defendant.”

On whether the appellant was properly removed as Executive Director, the learned trial Judge held as follows:-

“As to removal of Directors the Articles of Association has not specifically treated it; but S.175(1) and Schedule 1, section 95 at page 392 of the Companies Decree, 1968 deal with it exhaustively. The latter provides as follows - “the Company may by ordinary resolution, of which special notice has been given in accordance with S.135 of the Decree remove any Director before the expiration of his period of office, notwithstanding anything in its Articles or in any agreement between the Company and such Director. Such removal shall be without prejudice to any claim the Director may have for damages for breach of any contract of service between him and the company.” The procedure under S.175(1) of the Companies Decree, 1968 as to the removal of Directors is expatiated upon in Nigerian Company Law and Practice by J. Ala Orojo at page 262 stating as follows:-

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Therefore, if in any event the plaintiff is to be removed as a Director, the procedure laid down as stated above must be followed otherwise, his removal will be in breach of Statutory Provisions and the principle of natural justice. The evidence does not show that the procedure was followed.

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It is now apparent from the evidence before me that the removal of the plaintiff as Executive Director and member of the Board of Directors of 2nd defendant company is in breach of the principle of natural justice and in breach of the Statutory regulations and procedure.”

The learned trial Judge then considered the effect of the removal and came to the conclusion that it was a nullity and that the appellant was entitled to judgment. He, therefore, granted all the appellant’s claims in toto.

The 1st and 2nd respondents appealed from the decision of the High Court to the lower court. That court (Katsina-Alu; Macaulay and Oguntade,

J.J.C.A.) upheld the appeal and reversed the decision of the trial court. In doing so, the Court of Appeal held, per Oguntade, J.C.A.:-

“Throughout the hearing, the respondent did not produce a separate contract governing his appointment as executive director. I am satisfied from the totality of the evidence before the lower court that the respondent was not more than an employee who had been promoted and whose contract of employment as regards its termination is as stated in Exhibit 16. When an employee like respondent has been lucky to get accelerated promotion, he does not for that reason alone cease to be an employee. He earned salary per annum. He reported daily for work in the office. He was subject to the control of the 1st appellant whom he agreed was his overall boss and yet he argued he was not a servant. Out of naivety, I think he said his membership of the Board of a Company in which he had no share holding was for life. I think otherwise. I agree that the respondent remained all through a servant and that the contract of employment was determinable by three months’ notice as stipulated in exhibit 16.”

Learned Justice considered the provisions of section 175 subsection (6) of the Companies Act, 1968 and came to the following conclusion:-

“I am of the view that the effect of section 175(6) of the Companies Act, above, is to make it unnecessary for the ordinary resolution to be passed where the person to be removed as director is subject to an agreement which makes it possible for him to be removed notwithstanding the provisions of Section 175(1). The respondent in this case was not a director appointed for any fixed term so there can be no question that he was being removed “before the expiration of his period of office.” He was put on the Board of 2nd Appellant at the sole wish of the latter. He derived the position by virtue of his employment. If the employment came to an end by determination, as in this case, the respondent would, in my view, without further ado, lose his position as a member of 2nd appellant’s board.

.....
The simple question is - was respondent a director who had an employment contract with 2nd appellant which said contract stipulated how the employment could be determined? If he was, then he came within the ambit of section 175(6) of the Act and it would not matter that his name had been registered with the Registrar of Companies or that such name appeared on the letter heads of 2nd appellant.

There could not be any infraction of the rules of natural justice involved if any employer determines the employment in accordance with the

period of notice agreed between parties. It was mutual and respondent by giving (sic) due notice”.

The appeal now before this Court is from the decision of the lower court. The appellant formulated the following issues in his brief of argument for our determination:-

5 “(i) *Did not the misconception entertained by the Justices of Appeal, regarding which of the appeals in the cause that was before that Court occasion a serious miscarriage of justice in the verdict arrived at on the appeal?*

10 (ii). *Was it still open to that Court to entertain the appeal on the principal issue of the status of the appellant vis a vis the 2nd respondent company, and to reach a verdict contrary to its previous subsisting decision on the same issue in Appeal No. FGA/E/36/84? OR Does the decision so arrived at not offend the time honoured principles of judicial precedent?*

15 (iii) *Was the Appeal Court right in holding that the principles established in Shitta Bey’s case were inapplicable to or unavailing in support of the appellant’s case?*

20 (iv) *Was the Court of Appeal right in relying on the English Common Law, the provisions, of the English Company’s Legislations and the decisions thereon, in reaching its conclusions, instead of the clear and expressed provisions of the Nigerian Company’s Act 1968?*

25 (v) *Is there any OR sufficient evidence, as accepted by the Court of Appeal, to sustain their verdict OR was the Court of Appeal right in reversing the judgment of the Federal High Court of 21/3/85?”*

And for their part the 1st and 2nd respondent drafted the following issues in their brief of argument -

 “(1) *Had the 2nd respondent the vires to remove the appellant from membership, of its board?*

30 (2) *If yes, was the appellant properly removed from the services of the 2nd defendant either as a member of the board of directors or as the personal assistant of the 1st defendant under section 175 subsections 1 and 6 of the Companies Act and his existing contractual terms of employment?*

 (3) *Were the respondents or anyone of them liable to the plaintiff/appellant by reason of the said removal?*

35 (4) *Whether, having regard to the powers of the Court of Appeal under Order 1 Rule 20 of the Court of Appeal Rules 1981 and S.16 of the Court of Appeal Act, 1976, and to the necessity of avoiding multiplicity of suits, under the legal maxim “interest reipublicae ut sit finis litium” the*

Court of appeal was not right in bringing all issues raised in this appeal together and determining them in one main judgment without splitting them in such a way as to encourage multiplicity of issue and appeals.

(5) Whether, upon the facts of this case, there was a cause of action against the 1st defendant/respondent.

(6) Whether, upon the totality of the evidence adduced in this case, the case is not one (and the respondents submit it is) in which the Supreme Court should exercise its power under Order 8 Rule 13 of the Supreme Court Rules, 1985, and refuse to interfere with the judgment of the Court of Appeal on the ground that no substantial wrong or miscarriage of justice had been occasioned by the judgment.”

10

It is now pertinent to mention that the appeal before the lower court was a consolidation of three appeals. There were two interlocutory appeals from the rulings made by the Federal High Court. The third appeal is the substantive appeal. All the facts of the case narrated so far relate to the substantive appeal. The issues for determination presented by the parties in their respective briefs of argument pertain to both the interlocutory and the substantive appeals. I intend to deal with the substantive appeal first before advertng to the interlocutory appeal.

Of the 5 issues for determination which the appellant proposed only issues nos. (iii), (iv) and (v) apply directly to the substantive appeal. On the other hand, four out of the six issues formulated in the respondent's brief are based on the substantive appeal. These are issues Nos. (1), (2), (3) and (6). I will now deal with those issues.

It is argued in the appellant's brief that the appointment of the appellant as an employee or servant of the 2nd respondent must be treated separately from his appointment as a Director of the Company. So that his removal as Director must comply with the provisions of the Companies Act, 1968. It is submitted that the appellant was not properly removed as director of the 2nd respondent. The case of *Olaniyonu v. British American Insurance Co. Limited.* (1972) 2 UILR (Part 4) 442 is cited in support. It is argued further that the Appellant could only be removed as director in compliance with the provisions of section 175 of the Companies Act, 1968 and if this was not done then the removal must be held to be null and void in accordance with the principle laid down in *Shitta-Bey v. Federal Public Service Commission*, (1981) 1 S.C. 40 at pp. 56. It is canvassed that Exhibit 15, which the Court of Appeal relied upon as having terminated the appellant's Appointment, was written on 31st October, 1983 after the action in this case was instituted on the 14th October, 1983 and the writ of summons was served on the respondents before 20th October,

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1983. Therefore, it is argued that the Exhibit cannot in law sustain a defence against the purported removal of the appellant as director, even if the appellant were a servant of the 2nd respondent. Next, is the complaint that in determining the status of the appellant vis-a-vis the 2nd respondent, the Court of Appeal relied heavily on English decisions based on the interpretation of common law and English Company Acts. It is submitted that this is wrong since the provisions of the Nigerian Companies Act, 1968 have exhaustively covered the issue in question and therefore those provisions should have been followed and applied by the Court of Appeal to the exclusion of the English law. Reference is made to *Henry Stephens Engineering Limited v. Complete Home Enterprises Limited*. (1987) 1NWLR (Part 47) 40. Finally, it is argued that in the absence of compliance with the provisions of section 175 of the Companies Act, 1968, the appellant's appointment as Director remains valid and subsisting on the authority of *Chief S. Idugboe v. Araf Roz & Ors.*, (1978) 6 F.C.A. 178 at pp.188-190.

15 In his oral argument, Mr. Okolo learned Senior Advocate, for the appellant pointed out that the main issue for determination in this appeal is whether the appellant was lawfully removed from the Board of Directors of the 2nd respondent. He canvassed that the Court of Appeal relied on Exhibits 12, 14, 15 and 27 to hold that the appellant was properly removed. He submitted 20 that as the Exhibits were written and served on the appellant after the writ of summons in this case had been taken out by the appellant, the appellant's appointment was not properly terminated. Learned Senior Advocate argued that the Articles of Association of the 2nd respondent (Exhibit 1) do not provide the procedure for the removal of directors and submitted that in the 25 absence of such procedure it is section 175 of the Companies act that applies. Therefore a director of the company can only be removed by an ordinary resolution of the company and no such resolution was passed in this case.

In reply, it is argued in the respondents' brief of argument that the 30 appellant has confused the position of an employee of a company with that of a director by relying on the Approved Conditions of Service of the 2nd respondent. It is submitted that the appellant's appointment as director was not based on shareholding as the appellant was not a shareholder of the 2nd respondent, nor was his appointment for any fixed period. That he held his 35 position at the pleasure of the 2nd respondent and he was so informed on the appointment being made. It is further contended that the appellant's appointment as personal assistant to the 1st respondent was terminated by Exhibit IS in accordance with the terms of his contract by giving him three months' notice. That the appointment of the appellant as Executive Director was made

gratuitously by virtue of his appointment as Special Assistant to the 1st respondent. It is submitted that the decision in Shitta-Bey's case (*supra*) does not apply to the present case because the Appellant's contention at the trial was that he was not an employee of the 2nd respondent. Reliance is placed on section 175(6) of the Companies Act, 1968 to contend that the appellant's appointment as Executive Director was not for life and that he could be removed. 5

In his oral reply, Mr. Anyamene, learned Senior Advocate, for the respondent, submitted that where there is no fixed period of appointment of a director the provision of section 175(1) of the Companies Act, 1968 will not apply. He contended that the appellant was appointed at pleasure and therefore his tenure could be terminated at any time and the provisions of section 175 subsection (6) of the Companies Act, 1968 apply. 10

Now, as already shown in this judgment, the appellant's first appointment was that of being a Special Assistant to the 1st Respondent. The condition for the appointment as given in Exhibit 16 is *inter alia* that the appellant's appointment could be terminated by being given 3 months' notice or 3 months' salary in lieu of notice. The letter terminating the appointment is Exhibit 15 which was written on 31st October, 1983. It has been argued and held by the trial court that this letter having been written after the commencement of this case had no bearing on the case and was discountenanced. The question, therefore, is: could this be right? I do not think so. A close examination of the appellant's statement of claim reveals that his action concerns his removal as Executive Director and has nothing to do with his appointment as Special Assistant to the 1st respondent. It is therefore, wrong to regard Exhibit 15 as wrongfully issued by the 2nd respondent. It follows, therefore, that the appointment of the appellant as Special Assistant was terminated by the 2nd respondent with effect from the 31st October, 1983. Whether the termination of the appointment is right or wrong is not the question here, since it does not arise as far as the appellant's claim is concerned. 20 25 30

With regard to the removal of the appellant as Executive Director, it is Exhibit 12 that states that his appointment in that capacity was terminated with effect from 16th September, 1983. It is this letter that provoked the institution of the action in this case. The question then is: Was the Appellant lawfully removed as Executive Director? 35

Although section 168 of the Companies Act, 1968 provide that every company registered on or after the commencement of the Act on 1st October, 1968 must have at least 2 directors, the appointment of such directors whether as first directors or subsequent directors is governed by the articles of asso-

ciation of the company - See Articles 75, 89, 91 and 94 of Table A of the Companies Act, 1968. In the case of the 2nd Respondent articles 10, 11 and 12 of its Articles of Association (Exhibit 1) provide as follows:-

“10. *The first Directors of the Company shall be appointed by an instrument in writing signed by the subscribers to the Memorandum of Association of the Company. Until so appointed Mr. David Chukwuemeka Nwizu of 183, Zik Avenue, Uwani, Enugu and Mr. Chike Nwizu of 9, Fox Lane, Uwani, Enugu, shall be Directors for the time being. Unless and until otherwise determined by the Company in General Meeting, the member (sic number) of Directors shall not be less than two or more than seven.*”

11. *It shall not be necessary for any Director of the Company to acquire or hold any share qualification.*

12. *If at any time there shall be only one Director of the Company or there shall be no director of the Company, A General Meeting for the purpose of electing additional or new Director of the Company may be convened by the holder or holders of not less than two-thirds of the issued share capital of the Company. Article 94 of the said Table “A” shall not apply to the Company.”*

It is significant that neither Exhibit 4 nor Exhibit 5 above make any reference to a General Meeting of the 2nd Respondent where the appellant was appointed Director and Executive Director respectively, even though the parties are at one, in their pleadings and evidence adduced, that the Appellant was a Director and Executive Director of the 2nd respondent at different times. Be that as it may.

In general a director may be removed from office. The manner of removal may be specified in the Articles of Association of the Company concerned. In the absence of that the manner of removal may be in accordance with statutory provisions, like section 175 subsection (1) of the Companies Act, 1968 which applies to a director appointed for a specific or fixed time other than for life. Where the Articles of Association or the contract of appointment as director does not expressly specify or fix the duration of the director’s appointment, such director holds office at will and may be removed or dismissed by an ordinary resolution passed by the shareholders of the company at a general meeting - See Company Law by Pennington, 3rd Edition, at page 481.

By section 175 sub-section (1) of the Companies Act, 1968 every company has the power to remove any director before the expiration of his period of office notwithstanding anything in its articles or the director’s con

tract of service. However, the provision does not enable a private company to remove a director who held office for life on 1st October, 1968, so that such a director can only be removed if the Articles of Association so provide. The section reads:-

“175(1) A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him. 5

Provided that this subsection shall not, in the case of a private Company, authorise the removal of a director holding office for life on the commencement of this Act, whether or not subject’ to retirement under an age limit by virtue of the articles or otherwise.” 10

The evidence adduced during the hearing of this case in the Federal High Court does not indicate that the appointment of the appellant as director was for a fixed time to suggest the application of the above provisions of the Act. It is the case of the appellant that no ordinary resolution was passed by the 2nd respondent before the Appellant was removed. Nor does Exhibit 12 indicate so. Furthermore, Exhibit 5 does not show that the Appellant’s appointment as Executive Director was made for life and no such evidence was adduced in the trial court. Therefore, the proviso to subsection (1) of section 175 is not applicable also to this case. Similarly, all the subsequent provisions of the other subsections of section 175 of the Companies Act, 1968, which 15 deal with the procedure for or after the removal of a director by passing a resolution, except subsection 6 thereof, have no application to the present case. Subsection (6) provides:-

“Nothing in this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or as derogating from any power to remove a director which may exist apart from this section.” 25

The import of the underlined provisions in the subsection is that there may be a power to remove a director from office than by a resolution at 30 General Meeting as envisaged under section 175. Usually, this power is found in the articles of association. The Articles of Association of the 2nd respondent (Exhibit 1) provides in article 13 thereof as follows:-

“13. The office of the Director shall be vacated:-

(a) If by notice in writing to the Company he resigns such office. 35

(b) If he becomes bankrupt or insolvent or enters into any arrangement with his creditors generally.

(c) If he is found lunatic or becomes of unsound mind.

A director may hold any other office or place of profit under the Company (except the Office of Auditor), upon such terms as to remuneration, tenure of office or otherwise as may be determined by the Board of Directors.”

It is very clear from the foregoing that Article 13(a), (b) and (c) does not apply to the appellant. No any other procedure has been provided in Exhibit 1 for the
 5 removal of a director of 2nd respondent. Therefore, the only procedure available to the 2nd respondent when the appellant was removed from office on 16th September, 1983, as per Exhibit 12, is the procedure similar to that prescribed by section 175 subsection (1) of the Companies Act, 1968. That is of calling a general meeting of the shareholders to pass a resolution removing
 10 the Appellant - see pp.481 Company Law, 3rd Edition, by Pennington. As I mentioned earlier, and as found by the learned trial Judge (quoted above), there was no proof of ordinary resolution passed by the shareholders of the 2nd respondent removing the appellant from office as Executive Director. Notwithstanding, the fact that Exhibit 17, which is a certified copy of the
 15 return of the particulars of directors and changes amongst the directors, which was sent by the 2nd Respondent to the Registrar of Companies on or about 29th September, 1983, in accordance with section 191(4) of the Companies Act, 1968, showing that the appellant was

“*removed by the subscribers to the Memorandum and Articles (of Association) with effect from 16th September, 1983.*” because the trial Judge found it to be a sham.

With respect, therefore, the Court of Appeal was in serious error when it held that the Appointment of the Appellant was lawfully terminated at will on his being offered 3 months’ salary in lieu of notice. It is his appointment
 25 as Special Assistant to the Managing Director that requires and can be lawfully effected by such notice or payment in lieu of notice. Removal from the office of director in the absence of a provision in the Articles of Association or contract demands a different procedure which involves the calling of a general meeting and the passing of an ordinary resolution removing the appellant.
 30 The respondents’ case as per paragraphs 17, 18 and 19 of their Statement of Defence was that a special meeting of the company was called. However, the evidence showed that no notice of such meeting was served on the appellant and no minutes of the meeting were produced at the hearing in the Federal High Court. Consequently, the learned trial Judge was right in finding that no
 35 general meeting of the company was in fact held and that there was no ordinary resolution passed by the company removing the appellant as its Executive Director. It follows, therefore, that the proper procedure for removing the appellant from his appointment as Executive Director had not been followed.

Finally, I think I need to point out that where a director is removed under a power in the articles of association or in accordance with section 175(1) of the Companies Act, 1968, or indeed by an ordinary resolution, he may sue by virtue of the provisions of section 175(6) of the Companies Act, 1968, for wrongful dismissal or compensation for loss of office, if he has an express service contract which does not empower the company to dismiss him in that way - see *Southern Foundries (1926) Ltd. v. Shirlaw*, (1940) 2 All E.R. 445; (1940) A.C. 701. 5

It is now appropriate to return to the remaining issues Nos. (i) and (ii) in the Appellant's brief of argument and Nos. (4) and (5) in that of the Respondents. 10

The appellant's brief states that the Court of Appeal misunderstood the appeal before it. Although 2 appeals were filed in that Court in respect of this case, that is interlocutory and substantive appeals, only one, namely the main appeal, which is against the final decision of the Federal High Court delivered on 21st March, 1985, came up before the Federal High Court on 7th December, 1985 for hearing. The interlocutory appeal, which is an appeal against the order of stay of execution of judgment, made by Eigbedion J. on 12th April, 1985, was not consolidated together with the main appeal. Consequently, the briefs filed in the Court of Appeal by the parties in the main appeal were confined to the main appeal and did not touch on the interlocutory appeal. 15
The reference to cross-appeal, or second appeal or third appeal, by the Court of Appeal, in its judgment is a misconception of the appeal which the Court of Appeal was supposed to determine. Although Oguntade, J.C.A. stated in his judgment that the main appeal was allowed, the judgment of Macaulay J.C.A. 20
dismissed it and allowed the cross-appeal. The drawn up order of the Court of Appeal on the judgment it delivered shows that the main appeal succeeded. It is then submitted that the consideration of the appeal which was not before the Court of Appeal for adjudication, adversely affected its conclusion on the main appeal, which was before it for determination, and it thereby occasioned 25
miscarriage of justice. 30

In reply, the Respondents' Brief conceded that as a matter of general law, a court does not adjudicate on a matter not placed before it or canvassed by the parties at the hearing.

It is submitted that such is not what happened in the lower court. It is argued that in the face of multiplicity of applications, appeals, applications for stay of execution, interlocutory appeals and varieties of orders, an appeal court is, following the public policy principle of *interest republicae ut sit finitum*, entitled to bring all the matters together and determine the real and 35

cardinal issue or issues between the parties and arrive at substantial justice by settling, once and for all, the real dispute in the case. The case of Architects Registration Council of Nigeria v Professor Fassassi, (No.2), (1987) 3 NWLR (Part 59) 1; (1987) 6 S.C. 1, is cited in support and reference was made to the powers of the Court of Appeal under Order 3 rule 23 of the Court of Appeal Rules, 1981 which reads -

“23. *The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be exercised or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed or complained of the decision.*”

It is necessary for the sake of clarity to state what happened in the Federal High Court in respect of the appeals which the appellant herein contends, that were not properly before the Court of Appeal when that Court determined them together with the substantive appeal that was before it.

Soon after the appellant took out a writ of summons in the Federal High Court, he filed a motion in that Court on 18th October, 1983; in which he applied

“.....*for an order of interim injunction restraining the defendants, their servants, agents and privies from interfering in anyway with the rights and entitlements of the plaintiff as an Executive Director of Dave Engineering Co. Ltd. respecting the salary thereof due to him as well as all other fringe benefits including a paid Driver, free housing and day/night watchmen until the determination of this suit.*”

The application was heard by Tofowomo J. who delivered his ruling on 13th December, 1983 granting the application as prayed. The respondents herein brought a motion in the Federal High Court, for the stay of execution of the order made in favour of the appellant pending the determination of the appeal against the order, which was filed in the court of Appeal on 15th December, 1983. It is not clear from the record of appeal as to what happened in the Federal High Court to the motion; but what is clear is that there was an interlocutory appeal to the Court of Appeal against the order for interim injunction.

On 25th October, 1983, the respondents filed a motion in the Federal High Court praying for an order striking out the suit brought by the appellant for want of jurisdiction by the trial Court. The application was heard by the

Federal High Court (Tofowomo J.) and ruling was delivered on 25th November, 1983, dismissing the application. The respondents were not satisfied with the ruling and so they filed an interlocutory appeal to the Court of Appeal on 28th November, 1983.

The suit went to hearing in the Federal High Court and the judgment in that Court (Tofowomo J.) was delivered on 21st March, 1985 in favour of the Appellant. The respondents filed a notice of appeal to the Court of Appeal, against the decision, on 22nd March, 1985. This is the main appeal.

On 25th March, 1985, the respondents filed a motion in the Federal High Court: -

“for an order staying the following orders made in the court’s judgment delivered on 21st of March, 1985, pending the determination of the applicant’s appeal to the Court of Appeal.

The motion was heard by Eigbedion, J. and it was granted. Appellant was dissatisfied and he, therefore, filed a notice of appeal to the Court of Appeal, against the ruling, on 25th April, 1985.

In effect, altogether 4 appeals were filed in the case, from the Federal High Court to the Court of Appeal. The second of these was heard by the Court of Appeal as Suit No. FCA/E/36/1984 and was disposed of on 5th June, 1985. Thus, 3 appeals remained pending in the Court of Appeal.

When the parties were invited to the Federal High Court for the settlement of record, the appellant was represented by counsel - J.H.C. Okolo and the respondents were represented also by counsel- c.c. Ezek wem for AN. Anyamene, SAN. The documents for ali the 3 pending appeals were considered and the following conditions of appeal were imposed by the Principal Registrar of the Federal High Court - Mr. S.M. Chidom.:-

“The appellants in First Appeal (Interlocutory) having paid into Court N400.00 deposit for records and N200.00 against costs on appeal, shall in the case of Second Appeal filed by them, deposit only N100.00 for records and pay the hearing fee of N24.00. The appellant in the Third Appeal shall deposit N200.00 for record and shall pay into Court against costs on appeal the sum of N200.00 or in the alternative enter into bond with one Surety in the same amount. All conditions shall be fulfilled within 10 days from today’s date.”

The record of appeal does not show that the 3 pending appeals were consolidated by order of the Court of Appeal or indeed the Federal High Court. The confusion, therefore, arose at the time of settling the record of proceedings for the purpose of the main appeal to the lower Court.

The appellant filed an appellant’s brief of argument in the Court of

Appeal on 24th July, 1985 and a respondent's brief of argument on 14th October, 1985. Both briefs bear the Suit No. CA/E/112/1985. The respondents followed suit. They filed a respondents' brief of argument on 5th September, 1985 and an appellants' brief of argument on 13th September, 1985, with both brief bearing the suit No. CA/E/112/85.

5 When the case came up before the Court of Appeal on 7th December, 1987, Mr. A.N. Anyamene, S.A.N. appeared for the appellants while Mr J.H.C. Okolo appeared for the respondent. Mr. Anyamene addressed the Court of Appeal on the substantive appeal before that Court and then stated,

10 *"We are not appealing on grounds of jurisdiction."* Judgment was then re-served by the Court of Appeal.

In his judgment, Macaulay, J.C.A, stated at the beginning thereof as follows:

"This appeal involves the composite hearing of the following three

(3) appeal, viz:-

15 *First Appeal (Interlocutory)*

Between:

1. Engr. David C. Nwizu)

2. Dave Engineering Co. Ltd.) ... Defendants/Appellants

20 *AND*

Emmanuel J. Iwuchukwu Plaintiff/Respondent

Second Appeal

Between:

1. Engr. David C. Nwizu)...Defendants/

25

2. Dave Engineering Co. Ltd.)Appellants

AND

Emmanuel J. Iwuchukwu Plaintiff/Respondent

Third Appeal

30 *Between:*

Emmanuel J. Iwuchukwu ... Plaintiff/Applicant/Appellant

AND

1. Engr. David C. Nwizu) Defendants/

2. Dave Engineering Co. Ltd.) Respondents

From the foregoing it is immediately clear that the appeals and cross-apps (sic) before us, emanate from a dissatisfaction with certain aspects of decisions handed down, on the one hand, in the second and third appeals, in separate hearings before Tofowomo J. whilst on the other hand, the 3rd directly challenges the Ruling of Eigbedion, J. All the three Rulings (sic) were delivered at the Federal High Court sitting at Enugu at the relevant times.

In the First Appeal

The learned trial Judge, Tofowomo, J., on 13/12/83, ruled against the defendants in respect of their application for stay of execution.

15

In the Second Appeal

The same Judge On 21st March, 1985, gave judgment in favour of the plaintiff against the Defendants, jointly and severally. Arising out of this, (sic),

In the Third Appeal

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Eigbedion, J. on 12/4/85, ruled in favour of the defendants, this time around, in respect of their application for a stay of execution, whereby he granted a stay of the judgment and orders earlier made in the second appeal above, dated 21st March, 1985."

From the foregoing, it is clear that there had been a mix up with regard to the 2nd and 3rd appeals because they were not ripe for hearing, the necessary briefs not having been filed, and more importantly, those appeals not having been consolidated together with the substantive appeal.

The order drawn up by the Court of Appeal states -

"It is hereby ordered as follows:-

30

1. That the cross-appeal of the defendants/appellants be and is hereby allowed with costs of N750.00.

2. That main appeal of the Plaintiff/Appellant be and is hereby dismissed with costs of N450.00 in favour of respondents.

3. That the action against 1st appellant is hereby dismissed with costs of N350.00 in the court below and N250.00 in this Court.

4. That the appeal against the interim order made on 13/12/83

requiring the 1st and 2nd appellants to take steps to implement their decision to remove the plaintiff (respondent in the main appeal) not having been pursued by both parties for the want of brief, must be treated as abandoned and is hereby struck out.

5 *5. That the appeal against the order made by Eigbedion, J. in staying the earlier order of the court will be, and stands dismissed with costs of N100.00.*

6. That the Judgment and costs of the Court below are hereby set aside and in its place, N400.00 costs are awarded in the Court below in favour of the defendants."

10 When, on 7th December, 1987, learned counsel for the respondents, Mr. Anyamene, S.A.N. said in the lower court that he was not pursuing the grounds of appeal on jurisdiction, there was in fact no more appeal on that point, it had since been disposed of on 5th June, 1985 by the Court of appeal in Suit No. FCA/E/36/1984 (which was heard by Phil-Ebosie, J.C.A., Olatawura, 15 J.C.A., as he then was, and Aikawa J.C.A.) So that in effect all the 3 appeals pending in the Court of Appeal remained extant. These are the main appeal, the appeal against the order of interim injunction granted by Tofowomo J. on 13/12/83 pending the determination of the action before him and the interim order of stay of execution of the judgment of Tofowomo J. which was granted 20 by Eigbedion, J. The Appellants' brief filed by Anyamere, S.A.N. in the Court of Appeal was in respect of the main appeal, only. There was no appellants' brief of argument filed by him in the appeal against the order of interim injunction made by Tofowomo, J. Therefore, that appeal did not come up for hearing in the Court of Appeal and I suppose it was that appeal that Mr. Anyamene, 25 S.A.N. had intended to indicate that he was not pursuing. The interlocutory appeal by the respondents, which was in respect of an order pending the determination of the case by the Federal High Court, could not have served any useful purpose since the trial by that court had in any event long been concluded. Had the interlocutory appeal been pursued in the Court of Appeal, 30 it would have amounted to crying over spilt milk and a mere academic exercise. Again the appeal by the appellant, which was against the interim order granted by Eigbedion, J. for Stay of execution pending the determination by the Court of Appeal of the main appeal could have been pursued in that Court since the appellant had filed a brief of argument. But the question is: What useful purpose 35 would that have served? The interim stay of execution remained extant only up to the time the judgment of the Court of Appeal was delivered. So that if even it had been argued, it would automatically have become spent at the

time the judgment of the Court of Appeal was delivered.

On the whole, although the Court of Appeal erred in taking the 3 appeals together, as if they were consolidated, I am of the opinion that for the foregoing reasons, there had been no miscarriage of justice in their doing so.

Lastly, the appellant complained that the Court of Appeal was in error when it relied on English authorities to allow the appeal by the respondents. Whilst the lower court was wrong in allowing the respondents' appeal, it acted rightly in following English authorities because our Companies Act, 1968 was in the main the same as the English Companies Act: 1948 - See Appendix XVII of Nigerian Company Law by J. Ola Orojo.

In the result, this appeal succeeds and I will allow it. I find no difficulty in granting the declaration sought by the Appellant. The second relief is directed against the 1st respondent instead of the 2nd respondent since the former only acts on its behalf. The justice of the case demands that both the 1st and 2nd respondents should be so compelled. Similarly, the third relief is directed at the 1st defendant alone. It should have been sought against the 2nd respondent. This relief is in the alternative. There is no proof that the appellant had suffered special and general damages. There is no claim for arrears of salary or allowances. The alternative relief of N1,000,000.00 cannot therefore be granted. There is no evidence produced by the appellant about the present condition of the 2nd respondent. It cannot be said if it is in a position to or it is still paying its directors the entitlements enjoyed by the appellant in 1983. In the absence of such evidence, I am of the view that the 3rd relief cannot be granted. In the final analysis, I make the following orders

1. The appeal is allowed and the decision of the Court of Appeal is set aside with N1,000.00 costs to the appellant against the 1st and 2nd respondents jointly.

2. I declare that the purported removal of the appellant as Executive Director of the 2nd respondent by the 1st respondent is ultra vires, null and void and of no effect.

3. I hereby compel the 1st and 2nd respondents their servants and/or agents whatsoever to restore to the appellant the entitlements legally due to him as Executive Director of the 2nd respondent.

KUTIGIJSC

I agree with the judgment just delivered by my learned brother Uwais, J.S.C. which I was privileged to read long before now.

OGWUEGBUJSC

5 I have had the advantage of preview of the judgment just delivered by my learned brother, Uwais, J.S.C. and I am in full agreement with his reasoning and conclusion.

The main issue in this appeal is whether the removal of the appellant as Executive Director of the 2nd defendant by the 1st defendant is illegal, ultra vires and void.

Both the appellant and the respondents were agreed that the former was appointed Executive Director of the 2nd respondent and that his status as such was registered with the Registrar of Companies pursuant to sections 177 and 191 (4) of the Companies Act, 1968.

15 Whereas the appellant contended that his removal from office was in breach of section 175(1) of the Companies Act, the respondents maintained that there was no need to adopt the procedure laid down in section 175(1) of the. Act and that the appellant could be removed in accordance with the terms of Exhibit "16".

20 The court below agreed with the respondent. It held that the appellant remained all through a servant whose contract of employment was determinable by three months' notice as stipulated in Exhibit" 16" and that it was not necessary for an ordinary resolution to be passed.

As to how the appellant was removed from office, paragraphs 17 and 25 18 of the statement of defence and the evidence of D.W.4 are relevant. Paragraphs 17 and 18 read:

30 *"17. As regards the plaintiff's membership of the Board, the members of the company i.e. the 2nd defendant, removed him by proper resolution which in accordance with law was filed with the Registrar of Companies. The said resolution is hereby pleaded and will be relied on at the hearing.*

18. No notice of the intention to move the said resolution was given to the plaintiff because he was not being removed for misconduct or other reprehensible act but was merely being removed because the company could 35 no longer afford to retain him in its service, and this required no representa

tion from the plaintiff.”

In support of the averments in paragraphs 17 and 18 of their statement of defence, D.W.4 (1st respondent) testified as follows:

“The shareholders authorised me to remove the plaintiff. The meeting of the shareholders for the removal of the plaintiff was held at Ogui Road, Enugu: I am not sure of the number of the place. It was held on 12th September, 1983. The Secretary of the Company was not around by then. The minutes of the meeting were not kept. It was a special meeting. No other Directors except me was present. It is not compulsory that the other Directors should be there. We had several meeting of shareholders. I was not asked to produce any minutes of shareholders meetings.”

From the pleadings and the evidence, the respondents failed to prove that the appellant was removed from office in accordance with the Companies Act. Section 175(1) provides:-

“(1) A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him:

Provided that this subsection shall not, in the case of a private company, authorise the removal of a director holding office for life on the commencement of this Decree, whether or not subject to retirement under an age limit by virtue of the articles or otherwise.”

Special notice must be given of the resolution to remove the appellant as Director. Neither the members nor the board of directors of a company have an inherent power to remove directors before the normal expiration of their period of office in the absence of a power to do so in the articles. If the articles do not specify the duration of a director's appointment he holds office at will as in the appellant's case and may be removed by an ordinary resolution passed by the members. See Company Law by Pennington, 2nd edition page 465.

By the Companies Act, 1968 every company now has the power to remove any director before the expiration of his period of office notwithstanding anything in its articles or the director's service contract. This provision does not apply to enable a private company to remove a director who held office for life on 18/11/68 when the Act came into force.

The removal of a director under section 175(1) of the Act may be costly to the company because his removal does not prejudice any right which he has to compensation for loss of office or to damages for wrongful dismissal- see section 175(6) of the Act.

The only means of removing the appellant therefore was pursuant to section 175(1) of the Act. No special notice was given and an ordinary resolution of the

2nd respondent company was not also passed before the appellant was removed from office. See *Eronini v. Harbour & Ors.* (1957) 2 F.S.C. 43; (1957) SCNLR 184.

The court below was therefore in error when it held that the appellant was no more than an ordinary employee who had been promoted and whose contract of employment as regards its termination was as stated in Exhibit" 5 16". The removal of the appellant from his appointment as Executive Director of the 2nd respondent was illegal, ultra vires and void.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Uwais, J.S.C., I would allow the appeal, set aside the judgment of the court below and restore the judgment of the learned trial 10 judge. The appeal is accordingly allowed by me. I also endorse all the consequential orders contained in the judgment of my learned brother Uwais, J.S.C. including the order as to costs.

ONU JSC

15 Having been privileged to read in draft form the judgment of my learned brother Uwais, J.S.C. just delivered, I agree with it that the appeal be allowed.

My few words of comments in justification of my stand of concurrence are as follows:-

20 Firstly, the Articles and Memorandum of Association of the 2nd respondent (Exhibit 1) makes no provisions for the removal of the appellant both as special assistant to 1st respondent and as Executive Director in the employment of the 2nd appellant.

Secondly, neither in appellant's Directorship Appointment letter of 25 29th October, 1979 (Exhibit 4) wherein he was appointed a member of the Board of Directors of 2nd respondent nor in that of 12th January, 1980 (Exhibit 5) superseding Exhibit 4 wherein he was appointed an Executive Director, are provisions made for the mode of his removal.

For that of the appellant's appointment as personal assistant to the 30 1st respondent, the termination of his employment being that governed by the normal master/servant relationship, poses no problem. The guiding principle in such cases of contracts of personal service is that courts will not compel an employer to retain an employee in whom the employer has lost confidence.

Thirdly, and in respect of the appellant's directorship appointment 35 one has to fall back on the statutory provisions, which in this case is governed by Section 175(1) of the Companies Act of 1968. That section provides;

“175. A company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him.”

The passing of such an ordinary resolution as a cover for the act of wrongful dismissal contained in Exhibit 17 is of no avail to the respondents since the resolution was purportedly passed when the appellant's case against them was already in court, thus rendering it (Exhibit 17) incompetent. In other words, Exhibit 17, being a belated act after the event, in that the case in hand was already in court before the resolution was passed, provided no escape route for the respondents in the breach of their contract of service which is supplemental to the Articles and Memorandum of Association (Exhibit 1). 5 10

Fifthly, the service of a letter of Re-deployment in Dave Agric. Development Project dated 31st October, 1983 (Exhibit 15) on the appellant giving him 3 months notice of termination of his appointment with retrospective effect to 16th September, 1983 when the appellant had on 18th October, 1983 taken out his writ against the respondents, was no more than an ineffective 15 and futile notice devoid of any efficacy.

Now, in an action for wrongful termination of appointment as in the instant case, the onus is on the plaintiff to prove the terms of the agreement allegedly breached. See *Amodu v. Amodu* (1990) 5 NWLR (Pt.150) 356. In this case, the appellant having, in my view been able to establish his claim for the wrongful termination of his appointment on the balance of probabilities, he was entitled to judgment. It has been held in *Francis v. Municipal Councilors of Kuala Lumpur* (1962) 1 W.L.R. 1411 by Lord Morris of Borth-y-Guest at pages 1477, 1478 that 20

“When there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will be made but” special circumstances” will be required before such a declaration is made” 25

See also *Hill v. Parsons & Co. Ltd.* (1971) 3 All E.R. 1345, 1350 (per Denning, M.R.) and *African continental Bank v. Ewarami* (1978) 4 S.C. 109. 30

What constitutes special circumstances will depend upon the particular facts of each case. In *Imoloame v. W.A.E.C.* (1992) 9 NWLR (Pt.265) 303 at 318, a case in which the Court of Appeal ordered the payment of three months salary in lieu of notice in place of the re-instatement order made by the trial Court, this court (Per Karibi-Whyte, J.S.C.), dismissed the appellant's appeal. In the instant case, the removal of the appellant was an interference with the terms of the existing contract of service (Exhibit 5) the appellant had with 2nd respondent and his removal for which no provision is made in Exhibit 35

1, constituted the breach of contract of service giving rise to the action wherein he sought a declaration etc. His purported removal from the services of 2nd respondent was therefore in breach of the Companies Act, 1968. See *Engineer Yalatu-Amaye v. Association of Registered Engineering Contractors Ltd.* (1990) 4 NWLR (Pt.145) 422.

- 5 For such a removal of the appellant as a director, Section 175(6) of the Companies Act (ibid) normally would entitle him to damages or compensation. The section provides:

“175(6) *Nothing in this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in*
10 *respect of the termination of his appointment as director or of any appointment terminating with that as a director, or as derogating from any power to remove a director which may exist apart from this section.*”

However, since in the instant case the appellant merely claimed one Million Naira as damages but led no evidence in proof to some or any of such
15 an amount in the trial court, this court is without power to award him any such damages or compensation. This is the moreso, that neither Exhibit 1 nor Exhibit 5 prescribes the duration of his appointment and more particularly in the case of the latter and indeed Exhibit 4, neither remuneration.

It is for these and the fuller reasons contained in the lead judgment of
20 my learned brother Uwais, J.S.C. that I too will allow the appeal, set aside the decision of the Court of Appeal sitting in Enugu and make the same consequential orders inclusive of those as to costs as therein contained.

ADIO JSC

25 I have had the advantage of reading, in draft, the judgment of my learned brother, Uwais, J.S.C, and I agree that the appeal succeeds. It is hereby allowed. I abide by the consequential orders, including the order for costs.

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