

COURT OF APPEAL
LAGOS DIVISION
5TH JANUARY, 2006. CA/L/492/2003
CORAM:- I. A. SALAMI, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJCA

MR. BERNARD OJEIFO LONGE	APPELLANT
AND		
FIRST BANK OF NIGERIA PLC.	RESPONDENT

COMPANY LAW - Appointments - Executive Director - Where appointed the Managing Director - Relinquishes his former appointment (H1)

COMPANY LAW - Directors - Executive Directors and the Managing Director - Are employees of the company - And do not have same status - As Directors appointed under ss. 247 - 249 of CAMA (H2)

STATUTES - Company law - Directors - Clear words - Where the words of the Articles of Association - And relevant law are not ambiguous - They should be given their ordinary meanings - Source of appellant's misapprehension clarified (H3)

MASTER & SERVANT - Suspension - Dual capacity - Proof - Where appellant was promoted - From office of Executive Director to Managing Director - The prior appointment is terminated - And proof of the contrary rests on him (H4)

MASTER & SERVANT - Suspension - From holding office of the Managing Director - Entails cessation of the employment contract - With the attached rights and powers (H5)

MASTER & SERVANT - Fair hearing - Suspension and termination of servant - Where done in desperate interest of the Master's business the servant will not be entitled to fair hearing - Prior to the suspension (H6)

COMPANY LAW - Memorandum & Articles of Association - Has effect of a contract under seal - And can only be amended through special resolution (H7)

COMPANY LAW - Directors - Judicial precedents - Distinguishing - Yalaju-Amaye case is not on all fours with this case - On the issue of status and privileges of Directors (H8)

MASTER & SERVANT - Appointment - The Board that has power to appoint - Has reciprocal power to remove - Vide Interpretation Act s. 11(1) (H9)

COMPANY LAW - Directors - Removal of - Notice of Board meetings - Shall be given to every Director save where he is disqualified - Like the appellant in this case (H10)

FACTS

Before the Federal High Court Lagos, the plaintiff/appellant filed an action against the defendant/respondent. Appellant was the Managing Director/Chief Executive of the respondent for some time before he was suspended by the Board of Directors, and was subsequently removed from office. He held the office of an Executive Director from where he was promoted to the office of Managing Director. In this suit appellant claimed inter alia, (i) a declaration that the Respondent's Board of Directors cannot lawfully hold any meeting without giving notice thereof to the appellant and all decisions taken at any such meeting is unlawful, null and void. (ii) A declaration that the decision of the respondent's Board of Directors meeting held on 13-6-2002 to revoke the appellant's appointment is wrongful, void and incapable of having any legal consequence. He also sought an injunction. In his written address respondent abandoned 3 out of his eight claims.

At the end of hearing, the trial court dismissed appellant's claim. Being dissatisfied, appellant has appealed to the Court of Appeal relying on

8 grounds of appeal and raising 4 issues for determination. It would seem that what appellant misconstrued is the fact that there are different classes of Directors of a Company with different powers and privileges. So that he was claiming a right that does not avail him as a mere employee of the respondent under the Articles of Association and sections of the Company and Allied Matters Act (CAMA).

ISSUES FOR DETERMINATION

(i) Whether for the purpose of deciding the entitlement or otherwise of the plaintiff to the reliefs claimed by him in this action, it was necessary for the court below to embark on the trial of allegations of negligence, gross misconduct and irregularities made against the plaintiff in the statement of defence (as the court below did) or whether such trial as aforementioned was unnecessary and irrelevant (as the plaintiff contends).

(ii) Whether the plaintiff was entitled to be given notice inviting him to attend the meeting of the Board of Directors of the defendant bank held on the 13th day of June, 2002 (as the plaintiff contends) or whether he was not entitled to be invited to attend the said meeting by reason of the fact that he was “*suspended effective from April 22, 2002*” (as the court below held).

(iii) Whether in so far as he holds the office of a Director of the defendant company, the relationship between the plaintiff and the defendant is that of employer and employee (as the court below held) or otherwise as the plaintiff contends.

(iv) Whether or not any decision of the Board of Directors of the defendant bank made at a meeting of the said Board after the 22nd of April, 2002 to which the plaintiff was not invited to attend as a Director is valid and lawful (as the court below held) or is invalid and unlawful (as the plaintiff contends).”

HELD (Unanimously dismissing the appeal per SALAMI JCA)

Appointments - Executive Director

1. The evidence before the learned trial Judge which the trial court accepted was that appellant was an executive director of the company at

the time when he was appointed the managing director. The submission of the learned senior counsel for appellant that he was a director at the time of his appointment as the managing director of the respondent flies on the face of the evidence before the court below and this court. An appellate court will therefore not lightly disturb the finding of facts of a trial court unless it is perverse. This court will therefore not hold that the appellant held two separate and distinct positions. The appellant's submission that he could not be suspended as a director is misconceived. I agree with learned senior counsel for respondent that the appellant was never appointed a director under Companies and Allied Matters Act. He was a working director and as a working or executive director he was appointed a managing director; on his appointment as a managing director he relinquished the position of the executive director which he had hitherto held and has probably been given to another senior staff of the respondent. Executive Directors head departments in the bank and appellant could not have been managing director and chief executive concurrently with being an executive director. This much the appellant himself admitted under cross-examination. (p.1017 C)

Status of Executive Directors and the Managing Director

2. It is settled that executive directors are mere senior managers appointed by the Board under the Articles of Association for convenience and interest of running the company.

The respondent's board, in the instant case, consists of two classes of directors, executive and non-executive. The non-executives are directors appointed directly under sections 247, 248 and 249 of the Companies and Allied Matters Act, Cap. 59. The second tier of directors is not employees of the company as they do not have contract of employment and do not draw salaries. The remuneration paid to them are in the nature of fees or allowances fixed at the Annual General Meeting by resolution and draw or earn it only when and if they attend meeting of Board of Directors. Their appointments, duties, powers and removal are provided for in the Companies, and Allied Matters Act. They are not usually required to report for duty at the office and their functions, being of part time nature, they

could be engaged in some other endeavour which could be full or part-time.

I agree with the learned senior counsel for respondent that appellant falls within modern day executive directors who are employees and devote their whole time and attention to the work of their employer to the exclusion of any other paid jobs. They are employed by the bank to attend to the daily running and management of the company. Each of them has a contract of service with his employer and earns salaries. Their appointments, powers, duties, rights, discipline and tenure are regulated by the Articles of Association of the respondent particularly Articles 105-108 as well as their respective contracts of service. Unlike directors, they do not retire by rotation and their remuneration is determined by the Board of Directors.

The appellant, in the instant appeal, unlike the appellant in *Yaladu-Amaye's* case (supra), was appointed, on each occasion, either as executive director or Managing Director/Chief Executive by the board of directors of respondent and was consequently its employee. He had two different contracts of service to each of the two offices which he held not concurrently, with respect to the learned senior counsel for appellant, but consecutively respectively under exhibits V and A. Each of the contracts provided for his salary which was fixed by the Board. (pp. 1018 C/1019G)

STATUTES - Company law - Directors - Clear words

3. It is trite that where the words of a statute are clear and unambiguous, it should be given its literary and ordinary grammatical meanings. Article 105 makes it clear that it provides for two separate and distinct offices, viz office of the managing director and the office of executive director. I am strengthened in this view by the words "one or more person or persons" if the article envisages only one position namely that of managing director, it would be absurd to use the words "more person or persons" holding a single position of the managing director. It is therefore reasonable, to avoid absurdity, to construe the article to provide for a managing director to which one person would be appointed and the executive directors to head the specialized units or departments of the respondent.

The interpretation placed on these provisions by the appellant in his brief is respectfully erroneous. It is not the intendment of Article 105 of the respondent's Articles of Association that the appellant remained as an executive director on his appointment as managing director as it is being B contended by the appellant.

The appellant's misapprehension of the article stems from his reading Article 105 of respondent's Article of Association as if it were the repealed Article 106 in the First Schedule in Table A of the repealed Companies Decree, 1968 which provides thus:-

C *"The directors may from time to time appoint one or more of their body to the office of Managing Director for such period and on such terms as they think fit."*

This article allowed the board of directors to appoint one of their D members as the managing director. It follows that under Article 106 of First Schedule in Table A of Companies Decree, 1968, a person to be appointed a managing director must himself be a sitting director as he ought to come from amongst the directors. He was consequently E permitted to retain his directorship along with his present status. The meaning of that article, which is, in any case, repealed, cannot be imported or read into Article 105 of respondent's Article of Association. The qualification under Article 105 for being a managing director or an F executive director no longer includes being a director; all that is required for the two offices are "person or persons of proven relevant ability or experience." (p. 1021 B)

MASTER & SERVANT - Suspension - Dual capacity - Proof

G 4. The appellant was employed an executive director by way of promotion by virtue of exhibit V. He was subsequently promoted as Managing Director/Chief Executive by virtue of exhibit A. The two documents were made pursuance of the power of the Board of Directors under Article 105 H of the Articles of Association of the First Bank of Nigeria Plc. The two positions do not run concurrently but consecutively: The former appointment terminates on the elevation of its holder to the position of a managing director. One is strengthened in this view by the inference that could be

drawn from proviso to paragraph 1.00, of exhibit V, appellant's letter of appointment as an executive director. I recite same immediately hereunder:-

“Provided however that in the event of a serving Executive Director becoming the Managing Director/Chief Executive, his period of total service as Managing Director/Chief Executive shall begin to run from the date of his appointment as Managing Director/Chief Executive without taking into consideration the number of years he served as Executive Director.”

It is crystal clear from the above that the appellant never enjoyed dual capacity. His employment as Executive Director terminated on his appointment to the office of Managing Director/Chief Executive and his mantle as Executive Director was given to another. His period of total service as Executive Director ended on his appointment as the Managing Director. There is nothing on record to show that he continued to earn the salary and allowances of the Executive Director on his appointment as Managing Director/Chief Executive of the respondent. In any case, there is no evidence on record that the two positions were held together by appellant. The burden was on him. The burden of proof is on the party who asserts or who will fail if no evidence on the issue is produced.

It will not be in accord with common sense, with respect, to sustain the contention of the appellant, that on his appointment as the Managing Director/Chief Executive of respondent he retained his position as the Executive Director thereby creating the hybrid image of a bat - neither a bird nor a mammal. He was conceding that he was suspended and at the same time contending that he remained a member of the Board of Directors who was entitled to a notice. Appellant cannot approbate and reprobate: *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248, 269. In any case, when the appellant was suspended in his capacity as the Managing Director/Chief Executive of the respondent by the directors, a body that could equally have suspended him as an executive director of the respondent it would be reasonable to infer that he was also suspended from the latter position if truly that appointment still subsisted. It will be a matter of course.

(p. 1022 E)

Suspension - From holding office of the Managing Director

5. I am unable therefore to subscribe to the submission, on behalf of appellant, in his brief of argument, that even if the suspension of the appellant as the managing director were lawful and valid, such suspension could only affect the exercise of his executive functions. I am unable to understand the purport of this submission but in as much as he gained membership of the board on the platform of his being the Managing Director of the respondent, his function at all time was executive. The function of the appellant included attending board meetings from where he received his instructions and report back to the Board. The consequence of appellant's suspension does not allow for mundane submission bordering on splitting the hair. The concomitant of the appellant's suspension is suspension and cessation of the appellant's contract of employment as well as right and privileges, duties and powers attached to the position including attendance at the respondent's meetings be it board or otherwise. (p. 1025 A)

Fair hearing - Suspension and termination of servant

6. The appellant was suspended and eventually removed because it became necessary to do so in the interest of the respondent's business. It is a desperate situation which demands drastic action. It cannot wait for legal finesse such as fair hearing or natural justice. That can wait! The interest of the respondent's business is of paramount consideration and the appellant will not be entitled to hearing prior to the suspension. The principle of fair hearing, at this stage, at least, is shut out. In such circumstance, the long line of authorities are to the effect that the principle of natural justice is kept in abeyance. See *Lewis v. Heffer & Sons* (1978) 3 All ER 254. At page 364, Lord Denning exposed the legal situation thus:-

“Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending inquiries. Suspicion may rest on him; *and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice*

of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something may be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply". (p. 1025 E)

Memorandum & Articles of Association - Effect of

7. I agree with the submission of the learned senior counsel for respondent which respectfully is made ex cautela abundanti that the provisions of section 41 of the Companies and Allied Matters Act put the effect of memorandum and Articles of Association beyond doubt. The section makes the memorandum and Articles of Association of a company to have the effect of a contract under seal between the company and its members and officers and between the members and officers. It reads as follows:-

“41. Subject to the provisions of this Act, the Memorandum and Articles when, registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the Memorandum and Articles, as altered from time to time in so far as they relate to the company, members or officers as such.”

In the result, the exercise of a right, privilege or power conferred by the articles cannot be challenged or questioned on the authorities. The power can only be taken away by an amendment or alteration of the articles to remove the power, privilege or right so donated to the company. The power is exercisable by the company through its directors. It cannot be withdrawn except by alteration of the articles through special resolution. Aside from this procedure, the company itself cannot deny the directors of the exercise of the power. (p.1027 D)

Directors - Judicial precedents - Distinguishing

8. The appellant made a mountain out of a mole hill on the strength of

Yalaju-Amaye's case (supra). That case on the facts and the law are not on all fours. Firstly, Article 106 of the First Schedule of Table A of Companies Act, 1968 and Article 105 of the Article of Association of First Bank of Nigeria Plc. are not in pari materia as demonstrated earlier in this judgment. Article 106 along with the Companies Act, 1968 which gave it live was repealed on the inception of the Companies and Allied Matters Act, Cap. 59 of the Laws of the Federation, 1990. Yalaju-Amaye's case recognizes the fact that a person, irrespective of his description who has a contract of service with the company is an employee and found that Yalaju-Amaye was a director and an employee in the absence of contract of service between him and the first respondent. Yalaju-Amaye was a director in his own right who was so designated by the Articles of Association of that respondent company. He was not only a director but also the founder and promoter of that first respondent company. Yalaju-Amaye who was appointed a director as well as managing director in the Articles of Association was allegedly removed as managing director on the strength of a purported oral resignation. Yalaju-Amaye can only be removed from these positions by alteration of the Articles of Association. It is clear on authorities that a power exercisable under the Articles of Association can only be changed or altered by a special resolution. But the appellant in the instant appeal was an employee who was appointed a managing director by the Board of Directors of respondent under Article 105 of the respondent's Articles of Association. The appellant was made or appointed a managing director by the directors exercising their power under Article 105 of First Bank of Nigeria Plc., Articles of Association. The same article empowers the directors to revoke any appointment made by them. (p. 1029 G)

Appointment - The Board that has power to appoint

9. The power to remove is amply provided for in Article 105 of the company's Articles of Association. The hand of the Board to enforce the provisions of Article 105 is further strengthened by the provision of section 41(3) of the Companies and Allied Matters Act (supra). The provisions of the Articles of Association and the Act are clear and leave no

one in doubt. In case I am wrong to state that the power of the first respondent's board to remove the appellant is manifestly provided for under the S. 41(3) of the Companies and Allied Matters Act, it will be necessary to consider the validity of the Golden Rules of Capitalism upon which the learned trial Judge fell.

It appears that the axiom, the power to appoint is the power to remove, is supported by Interpretation Act. Section 11(1) of the Interpretation Act, Cap. 192 of the Laws of the Federation of Nigeria, 1990 provides as follows:-

"11(1) where an enactment confers a power to appoint a person either to an office or to exercise any functions, whether for a specific period or not the power includes:-

(a) ...

(b) power to remove or suspend him."

It follows from the above that the removal of the appellant by the respondent's board which appointed him is covered by the above provision. The invocation of the principle of the power to 'hire' is the power to 'fire' by the learned trial Judge is supported by the statutory provisions. The directors of the respondent employed or appointed him; that body, therefore, has reciprocal power to remove him. The Articles of Association, to my mind, is a subsidiary legislation made pursuant to Companies and Allied Matters Act. The appointment made by the board pursuant to Article 105 of the respondent's Articles of Association has the force of legislation. In case I am wrong, the provisions of section 41(3) of the Act give force or cover of all enactment to the Article of Association. The appointment by the board of directors under Article 105 has the effect of one made under an enactment. He can, therefore be removed or suspended by the board. (p. 1031 D)

Directors - Removal of - Notice of Board meetings

10. The appellant is not contesting his removal on the facts. He has conceded to the facts of this case. But he is challenging the legitimacy of the board meeting at which the decision to revoke his appointment was taken on account that as a director he was not given notice of the meeting,

contrary to section 266 of Companies and Allied Matters Act. It is common ground that he was suspended at the material time, which he is not contesting. Moreover, it is clear that being a managing director who could be suspended and was on suspension, he was not entitled to the notice of the meeting. Further on this point, being a director appointed by the directors, under Article 105 of the Article of Association, he was not a director appointed under the Companies and Allied Matters Act and that his working directorship was not within the contemplation of S. 266(1) of the Companies and Allied Matters Act, therefore, was not entitled to the notice envisaged under section 266(1) of the Act which provides thus:-

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

(2) There shall be given 14 days notice in writing to all directors entitled to receive notice unless otherwise provided in the articles.

(3) Failure to give notice in accordance with subsection (2) of this section shall invalidate the meeting.” (Italics mine)

The appellant as observed earlier is disqualified to attend the meeting and was consequently not entitled to the notice of the meeting. He was disqualified by reason of his suspension by the board of directors under Article 105 read in conjunction with the provisions of section 41(3) of the Companies and Allied Matters Act.

The appeal is unmeritorious. It lacks merit and is dismissed by me. (p. 1032 D)

NOTABLE POINT OF INTEREST

SALAMI JCA

1. Reply brief - Principle thereof should not be breached

I wish respectfully to observe that the appellant’s reply brief went contrary to the principle governing writing of a reply brief. There is a demand for a reply brief when an issue of law or, argument in the respondent’s brief deals with fresh point, it should therefore be restricted or devoted strictly to proffering answer to the new points raised in the respondent’s brief. It is not the intention of Order 6 rule 5 which provides

for a reply brief, to allow the appellant to re-argue or re-open his appeal all over again under the pretext of writing a reply brief by merely re-emphasizing argument already contained in the appellant's brief. It is therefore clear that where there is no fresh point raised in the respondent's brief, appellant's reply brief would not only be unnecessary but also B uncalled for and an unwholesome waste of the time of the respondent and the court. See Supreme Court's observation in *Olafisoye v. Federal Republic of Nigeria* (2004) 4 NWLR (Pt. 864) 580, 644 per Niki Tobi, JSC.

REPRESENTATION

Professor S. A. Adesanya, SAN (with him, T. E. Williams, SAN and J. O. Okeaya-Inneh) for the Appellant.

Chief R. O. A. Akinjide, SAN (with him, Chief T. Olojo, Abayomi Akinjide, B. O. Lawson [Miss], Kenneth Obisike, O. V. Nwachukwu [Miss], Victor D Nwabueze and U. S. Anyasor [Miss]) for the Respondent.

CASES REFERRED TO

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|--|---|
| Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799 | E |
| Adelaja v. Oguntayo (2001) 6 NWLR (Pt. 710) 593 | |
| Imoloame v. W.A.E.C. (1992) 9 NWLR (Pt. 265) 303 | |
| Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248 | |
| Etim v. Ekpe (1983) 1 SCNLR 120 | F |
| Akinmoju v. State (2000) 6 NWLR (Pt. 662) 608 | |
| Fatoyinbo v. Williams (1956) SCNLR 274 | |
| Bakare v. A.C.B. Ltd. (1986) 3 NWLR (Pt. 26) 47 | |
| Ebba v. Ogoto (1984) 1 SCNLR 372 | |
| Ojomo v. Ijeh (1987) 4 NWLR (Pt. 64) 216 | G |
| Okafor v. Idigo (1984) 1 SCNLR 481 | |
| Olafisoye v. F.R.N. (2004) 4 NWLR (Pt. 864) 580 | |
| Onwuama v. Ezeokoli (2002) 5 NWLR (Pt. 760) 353 | |
| Owhoeri v. Ikanone (1994) 1 NWLR (Pt. 322) 605 | H |
| Oyenuga v. Provincial Council of University of Ife (1965) NMLR 9 | |

STATUTES & RULES REFERRED TO

Companies Act 1968, 1st Schedule to Table A, Article 106
Companies and Allied Matters Act, Cap. 59, L.F.N., 1990, ss. 41, 266,
B 247, 248 and 249
Evidence Act, Cap. 112, L.F.N., 1990, s.136
Interpretation Act, Cap. 192, L. F.N., 1990, ss. 10 and 11
Court of Appeal Rules, 2002, O. 6 r. 5

BOOKS REFERRED TO

Nigerian Company Law and Practice by Olakunle Orojo, 3rd Edn., p. 296
Status and Duties of Company Directors, 1977 by Prof. G. A. Olawoyin,
University of Ife Press, p. 17, para. 2

LEAD JUDGMENT BY SALAMI JCA

The plaintiff caused a writ of summons, dated 4th July, 2002,
claiming eight reliefs, comprising four declaratory reliefs, an order for an
E injunction and three other damages in the alternative to be issued from the
Federal High Court.

Pleadings were filed and exchanged. The claims of the plaintiff
which eventually went to trial were adumbrated on the statement of claim
F as follows:-

*“(i) A declaration that the defendant’s Board of Directors cannot
lawfully hold any meeting of the said Board without giving notice thereof
to the plaintiff and accordingly all decisions taken at any such meeting is
unlawful, invalid, null and void and incapable of having any legal
G consequence;*

*(ii) A declaration that in particular the decision of the defendant’s
Board of Directors held on the 13th of June, 2002 to revoke the plaintiff’s
appointment as Managing Director/Chief Executive is wrongful, unlaw-
H ful, invalid, null and void and incapable of having any legal consequence;*

*(iii) A declaration that any purported implementation of the said
decision made on the 13th of June, 2002 (including any appointment to
the office held by the plaintiff in the defendant company) is ineffective,*

unlawful and null and void;

(iv) An order of injunction restraining the said defendant from giving effect or continuing to give effect to any of the decisions of the Board mentioned in claims (i) and (ii) hereof without first complying with the mandatory procedural requirements stipulated in section 266(3) of B CAMA;

(v) A declaration that the plaintiff is entitled to remain in the premises allocated to him by the defendant including the enjoyment of all associated services until the expiration of a reasonable time from the date of any lawful and valid termination of his contract of service with the defendant;

(vii) Interest on the said sum of N136,614,584.00 at the rate of 21% per annum or at such other rate of interest as the court only adjudged to be fair and just;

(viii) In further alternative to claims the sums of N804,885,117.00; US\$207,306.00 and £359,100.00 being special damages suffered by him as a result of the wrongful termination of his appointment.”

The plaintiff, at the hearing, testified on his own behalf and tendered six documents. The defence called five witnesses in addition to producing twenty-four documents in evidence.

Learned trial Judge ordered written addresses to be made by learned senior counsel for both parties. Consequently, the defendant presented an amended address while the plaintiff filed a written address. In addition, there were defendant’s written rejoinder and the plaintiff’s reply to the defendant’s joinder. The plaintiff in his written address dated 19th May, 2003 abandoned three of the claims which are (vi), (vii), (viii), being reliefs for special damages and interest thereon, and applied that they be struck out. The learned trial Judge, after painstakingly and fairly reviewing the evidence and the submissions of the learned senior counsel representing the parties, in a reserved and well considered judgment, concluded as follows:-

“In the circumstance, I hold that the just and appropriate order to make and I so do is grant leave to plaintiff to abandon reliefs (vi) - (viii) and the said reliefs are struck out.

In the light of the foregoing claims (i) to (v) are respectively dismissed and claims (vi) to (viii) struck out.

I award N10,000.00 costs in favour of the defence.”

The plaintiff was unhappy with the decision and being dissatisfied
B has appealed to this court on a notice of appeal containing eight grounds of appeal.

In compliance with the procedure and practice of this court, briefs of argument were settled and exchanged by both parties at appellant’s, respondent’s and appellant’s reply briefs.
C

At the hearing of the appeal, learned senior counsel for plaintiff, (hereinafter referred to as appellant) Professor Adesanya, adopted and relied on appellant’s and appellant’s reply briefs prepared by Chief F. R. A. Williams (SAN), of the blessed memory. The learned senior counsel for
D defendant (hereinafter referred to as respondent) Chief Richard Akinjide adopted and relied on the respondent’s brief. The two learned senior counsel elaborated on their respective briefs of argument.

I wish respectfully to observe that the appellant’s reply brief went
E contrary to the principle governing writing of a reply brief. There is a demand for a reply brief when an issue of law or, argument in the respondent’s brief deals with fresh point, it should therefore be restricted or devoted strictly to proffering answer to the new points raised in the
F respondent’s brief. It is not the intention of Order 6 rule 5 which provides for a reply brief, to allow the appellant to re-argue or re-open his appeal all over again under the pretext of writing a reply brief by merely re-emphasizing argument already contained in the appellant’s brief. It is
G therefore clear that where there is no fresh point raised in the respondent’s brief, appellant’s reply brief would not only be unnecessary but also uncalled for and an unwholesome waste of the time of the respondent and the court. See Supreme Court’s observation in *Olafisoye v. Federal Republic of Nigeria* (2004) 4 NWLR (Pt. 864) 580, 644 per Niki Tobi, JSC
H and *Ikine v. Edjerode* (2001) 18 NWLR (Pt.745) 446, 461 per Ejiunmi, JSC. This is not only a typical example of the benediction being longer than mass but also in fragrant disregard of respondent’s right to reply.

The appellant, in his brief of argument formulated the following

four issues for determination in his brief of argument:-

(i) Whether for the purpose of deciding the entitlement or otherwise of the plaintiff to the reliefs claimed by him in this action, it was necessary for the court below to embark on the trial of allegations of negligence, gross misconduct and irregularities made against the plaintiff in the statement of defence (as the court below did) or whether such trial as B
aforementioned was unnecessary and irrelevant (as the plaintiff contends).

(ii) Whether the plaintiff was entitled to be given notice inviting him to attend the meeting of the Board of Directors of the defendant bank held on the 13th day of June, 2002 (as the plaintiff contends) or whether he was not entitled to be invited to attend the said meeting by reason of the fact that he was “*suspended effective from April 22, 2002*” (as the court below held). D

(iii) Whether in so far as he holds the office of a Director of the defendant company, the relationship between the plaintiff and the defendant is that of employer and employee (as the court below held) or otherwise as the plaintiff contends. E

(iv) Whether or not any decision of the Board of Directors of the defendant bank made at a meeting of the said Board after the 22nd of April, 2002 to which the plaintiff was not invited to attend as a Director is valid and lawful (as the court below held) or is invalid and unlawful (as the plaintiff contends). F

The respondent herein in its brief of argument also identified the following five issues:-

“1. *Whether the relationship between the appellant and the respondent is that of employer-employee (as the court below held) or otherwise (as the appellant contends).* G

2. *Whether the Board of Directors of the respondent has power to suspend the appellant as Executive Director or Managing Director and if the answer is in the affirmative what are the legal consequences of the suspension?* H

3. *Whether the appellant was entitled to receive notice of respondent’s Board meeting after his suspension on April 22, 2002?*

4. *Whether the respondent's Board of Directors has power to dismiss the appellant as Executive Director and/or Managing Director/Chief Executive.*

B 5. *Whether all of the facts of appellant's negligence, gross misconduct and irregularities pleaded in the respondent's statement of defence and carefully considered by the trial Judge are relevant and necessary for the proper and fair determination of the dispute between the appellant and respondent."*

C Learned senior counsel for respondent related respondent's issue 1 to appellant's issue 3; respondent's issue 2 is matched to paragraphs 4.4 and 4.5 of the appellant's brief which incidentally still form parts of appellant's issue 3. Issue 3 in respondent's brief is married to the appellant's issue 2, respondent's issue 4 is related to appellant's issue 4 and D the respondent's issue 5 is tied to appellant's issue 1.

In arguing issue 1, learned senior counsel for appellant in the r appellant's brief contended that reliefs (i) and (ii), which are recited, as the appellant's most important claims and the remaining three claims were E ancillary to the recited claims. It was then submitted that those three reliefs would be granted ex debito justitiae once the aforementioned two claims are granted. Learned senior counsel then submitted that none of the facts which he considered to be necessary for the decisions of the principal F questions in this appeal was in any serious dispute. It was further submitted that the real matter in controversy in this court and the court below are the legal consequences of those facts. He then narrated appellant's position on the facts to the effect that apart from the facts G stated in the next paragraph of his brief all the facts alleged in the evidence of the defendant's witnesses at the trial of the present action or in the statement of defence touching on misconduct, negligence, irregularities or H illegalities in the discharge of the plaintiff's duties of his office and upon which the court below largely based its judgment are facts which may be necessary in a sister action. They were not relevant to the trial of the appellant's case, learned senior counsel declared. There is substance in this submission.

The main issue calling for determination in this appeal hinges on the

power of the respondent's Board of Directors to suspend the appellant. To this end, it was conceded by the appellant in his brief as follows:-

"It is to be noted that the question raised concerns the office of the plaintiff as a Director only. It is irrelevant to a consideration of the answer to that question to consider whether or not the suspension of the plaintiff in relation to the exercise of his executive functions as Managing Director was lawful or valid."

My understanding of the above quoted passage is that the learned senior counsel for appellant conceded that the appellant was, in his capacity as Managing Director, lawfully and validly suspended.

The evidence before the learned trial Judge which the trial court accepted was that appellant was an executive director of the company at the time when he was appointed the managing director. The submission of the learned senior counsel for appellant that he was a director at the time of his appointment as the managing director of the respondent flies on the face of the evidence before the court below and this court. An appellate court will therefore not lightly disturb the finding of facts of a trial court unless it is perverse. Cyprian Onwuama v. Louis Ezeokoli (2002) 2 SCNJ 271, (2002) 5 NWLR (Pt. 760) 353; Ebba v. Ogodo & Ors. (1984) 4 SC. 84, (1984) 1 SCNLR 372; Okafor v. Idigo (1984) 1 SCNLR 481; Benmax v. Austin Motor Co. Ltd. (1955) 1 All ER 326, 327; Montgomerie & Co. Ltd. v. Wallace-James (1904) AC 73; Fatoyinbo v. Williams (1956) 1 FSC 87, (1956) SCNLR 274. **This court will therefore not hold that the appellant held two separate and distinct positions. The appellant's submission that he could not be suspended as a director is misconceived. I agree with learned senior counsel for respondent that the appellant was never appointed a director under Companies and Allied Matters Act. He was a working director and as a working or executive director he was appointed a managing director; on his appointment as a managing director he relinquished the position of the executive director which he had hitherto held and has probably been given to another senior staff of the respondent. Executive Directors head departments in the bank and appellant could not have been managing director and chief**

executive concurrently with being an executive director. This much the appellant himself admitted under cross-examination by Chief Akinjide.

“Question:

B This is the document you signed before you became Managing Director.

Answer:

This was signed when I was appointed Executive Director

Question:

C This was your last post before you were appointed Managing Director.

Answer: Yes

It is settled that executive directors are mere senior managers appointed by the Board under the Articles of Association for convenience and interest of running the company. In *Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd.* (1990) 2 NSCC 462, 475; (1990) 4 NWLR (Pt. 145) 422 at 444 it was observed on the status of a managing director as follows:-

The Court of Appeal stated the general rule and the usual position that there is *generally the relationship of master and servant between the managing director or and his company. As an employee, there is usually a contract of service between him and the company.* The Managing Director relies on his tenure on the Articles of Association of the company and any other contract of service supplemental thereto. Thus, a valid determination of his contract of service will depend on the terms of such contract of service. *No such contract of service was proved.*” (Italics mine)

G See *Eaton v. Robert Limited* (1988) 1 CR 302, 304 where it was held that the evidence required to establish that a director is employed by or employee of a company is as follows:-

H “Evidence is required to establish that a director is employed by a company. Any descriptive term such as managing director or technical director may provide the first indication of employment. Obviously the position of a properly appointed managing director or the so-called working director who draws a weekly wage is one which is more likely

to present an arguable case for contract of employment. *In this context, the most pertinent question is whether or not there was an agreement to employ a person as a managing director which should either be an express contract or minuted at a Board Meeting or noted by Memorandum in writing. This is not conclusive. It may then have to be ascertained whether remuneration is by way of salary or by way of Directors' fees ...* Finally there is important *consideration of the functions performed by the director.* Was he merely acting in a directorial capacity or was he under the control of the Board of Directors ...”

Olakunle Orojo in his book Nigerian Company Law and Practice 3rd Edition at page 296 stated the position of law as follows:-

“Sometimes the articles 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. sales director. His status is usually limited by the articles but he may eventually be elevated to full directorial status.” (Italics mine)

Finally on the distinction between full directorial status and working director, Prof. G. A. Olawoyin also in his own book titled “Status and Duties of Company Directors”, 1977, University of Ife Press, page 17 at paragraph 2 thereof stated thus:-

“... a Director who hardly goes to office or place of business of his company merely attends occasional board meetings can hardly be called an employee of that company even by any stretch of imagination. *But it would not, it is thought, be unreasonable to regard a full time Director or present day Executive Director who devotes his whole time and attention to work of his company to the exclusion of any other paid job, as an employee ...*” (Italics mine)

The respondent’s board, in the instant case, consists of two classes of directors, executive and non-executive. The non-executives are directors appointed directly under sections 247, 248 and 249 of the Companies and Allied Matters Act, Cap. 59. The second tier of directors is not employees of the company as they do not have

contract of employment and do not draw salaries. The remuneration paid to them are in the nature of fees or allowances fixed at the Annual General Meeting by resolution and draw or earn it only when and if they attend meeting of Board of Directors. Their appointments, duties, powers and removal are provided for in the Companies, and Allied Matters Act. They are not usually required to report for duty at the office and their functions, being of part time nature, they could be engaged in some other endeavour which could be full or part-time.

I agree with the learned senior counsel for respondent that appellant falls within modern day executive directors who are employees and devote their whole time and attention to the work of their employer to the exclusion of any other paid jobs. They are employed by the bank to attend to the daily running and management of the company. Each of them has a contract of service with his employer and earns salaries. Their appointments, powers, duties, rights, discipline and tenure are regulated by the Articles of Association of the respondent particularly Articles 105-108 as well as their respective contracts of service. Unlike directors, they do not retire by rotation and their remuneration is determined by the Board of Directors.

The appellant, in the instant appeal, unlike the appellant in Yaladu-Amaye's case (*supra*), was appointed, on each occasion, either as executive director or Managing Director/Chief Executive by the board of directors of respondent and was consequently its employee. He had two different contracts of service to each of the two offices which he held not concurrently, with respect to the learned senior counsel for appellant, but consecutively respectively under exhibits V and A. Each of the contracts provided for his salary which was fixed by the Board. Article 105 which provides for appointment, tenure and removal of managing directors and executive directors reads as follows:-

“The Directors may from time to time appoint one or more person or persons of proven relevant ability and experience to the offices of

Managing Director who is to be the *Chief Executive of the company and Executive Directors for such period and on such terms as they think fit and subject to terms of any agreement entered into in any particular case and may revoke such appointment but without prejudice to any claim he may have for damages for breach of contract.*" (Italics mine) B

It is trite that where the words of a statute are clear and unambiguous, it should be given its literary and ordinary grammatical meanings. See *Adelaja v. Oguntayo* (2001) 6 NWLR (Pt.710) 593; *Kim v. Emefo* (2001) 4 NWLR (Pt.702) 147. **Article 105 makes it clear that it provides for two separate and distinct offices, viz office of the managing director and the office of executive director.** I am strengthened in this view by the words "one or more person or persons" if the article envisages only one position namely that of managing director, it would be absurd to use the words "more person or persons" holding a single position of the managing director. It is therefore reasonable, to avoid absurdity, to construe the article to provide for a managing director to which one person would be appointed and the executive directors to head the specialized units or departments of the respondent. The interpretation placed on these provisions by the appellant in his brief is respectfully erroneous. It is not the intentment of Article 105 of the respondent's Articles of Association that the appellant remained as an executive director on his appointment as managing director as it is being contended by the appellant. C D E F

The appellant's misapprehension of the article stems from his reading Article 105 of respondent's Article of Association as if it were the repealed Article 106 in the First Schedule in Table A of the repealed Companies Decree, 1968 which provides thus:- G

"The directors may from time to time appoint one or more of their body to the office of Managing Director for such period and on such terms as they think fit."

This article allowed the board of directors to appoint one of their members as the managing director. It follows that under Article 106 of First Schedule in Table A of Companies Decree, 1968, a person to be appointed a managing director must himself be a H

sitting director as he ought to come from amongst the directors. He was consequently permitted to retain his directorship along with his present status. The meaning of that article, which is, in any case, repealed, cannot be imported or read into Article 105 of respondent's Article of Association. The qualification under Article 105 for being a managing director or an executive director no longer includes being a director; all that is required for the two offices are "person or persons of proven relevant ability or experience". It follows that appellant was not a director appointed as a managing director. He was an executive director, a fact he admitted in evidence, immediately before he was appointed the managing director. He testified to this effect in his evidence-in-chief as well as cross-examination. The submission of the appellant that he was a director and managing director and there is no provision in the Companies and Allied Matters Act to suspend the plaintiff as a director may be ingenious but not candid. It is not candid because there is no shred of evidence on the record supporting the claim that appellant was ever a director of respondent. There is no provision in the Companies and Allied Matters Act for appointment of executive director. It is therefore not surprising that the same Act has no provision for suspension or discipline of an executive director. A situation adequately covered by Article 105 already recited earlier in this judgment.

The appellant was employed an executive director by way of promotion by virtue of exhibit V. He was subsequently promoted as Managing Director/Chief Executive by virtue of exhibit A. The two documents were made pursuance of the power of the Board of Directors under Article 105 of the Articles of Association of the First Bank of Nigeria Plc. The two positions do not run concurrently but consecutively: The former appointment terminates on the elevation of its holder to the position of a managing director. One is strengthened in this view by the inference that could be drawn from proviso to paragraph 1.00, of exhibit V, appellant's letter of appointment as an executive director. I recite same immediately hereunder:-

"Provided however that in the event of a serving Executive Director becoming the Managing Director/Chief Executive, his period

of total service as Managing Director/Chief Executive shall begin to run from the date of his appointment as Managing Director/Chief Executive without taking into consideration the number of years he served as Executive Director.”

It is crystal clear from the above that the appellant never B enjoyed dual capacity. His employment as Executive Director terminated on his appointment to the office of Managing Director/Chief Executive and his mantle as Executive Director was given to another. His period of total service as Executive Director ended on his C appointment as the Managing Director. There is nothing on record to show that he continued to earn the salary and allowances of the Executive Director on his appointment as Managing Director/Chief Executive of the respondent. In any case, there is no evidence on D record that the two positions were held together by appellant. The burden was on him. The burden of proof is on the party who asserts or who will fail if no evidence on the issue is produced. See S. 136 of the Evidence Act, Ojomo v. Ijeh (1987) 4 NWLR (Pt.64) 216, 230; Bakare v. ACB (1986) 3 NWLR (Pt. 26) 47, 57; Onobruhere v. Esegine (1986) E 1 NWLR ((Pt. 19) 799.

It will not be in accord with common sense, with respect, to sustain the contention of the appellant, that on his appointment as the Managing Director/Chief Executive of respondent he retained F his position as the Executive Director thereby creating the hybrid image of a bat - neither a bird nor a mammal. He was conceding that he was suspended and at the same time contending that he remained a member of the Board of Directors who was entitled to a notice. Appellant cannot approbate and reprobate: Ajide v. Kelani (1985) 3 G NWLR (Pt.12) 248, 269. In any case, when the appellant was suspended in his capacity as the Managing Director/Chief Executive of the respondent by the directors, a body that could equally have H suspended him as an executive director of the respondent it would be reasonable to infer that he was also suspended from the latter position if truly that appointment still subsisted. It will be a matter of course.

The next question is whether the Board of Directors could have suspended him. There is allegation of impropriety made against the appellant which required the Board of Directors to investigate. It is in accord with judicial decision and business practice to ask the officer being investigated to stay away from the place of work to permit unhindered investigation to be carried out and also to allow peace to reign at his place of work. The period of suspension will keep such person out of further mischief and provide his employer further time for reflection and rumination. There are both foreign and local judicial decisions approving suspension of an employee pending the final determination of his involvement in the accusation, in *University of Calabar v. Esiaga* (1997) 4 NWLR (Pt.502) 719, at 739-740 this court stated the meaning of suspending an employee from his employment:-

“The word suspension means a temporary privation or deprivation, cessation or stoppage of or from the privileges and rights of a person. The word carries or conveys a temporary or transient disciplinary procedure which keeps away the victim or person disciplined from his regular occupation or calling, either for a fixed or terminal period or indefinitely. The disciplinary procedure gives the initiator of the discipline a period to make up his mind as to what should be done to the person facing the discipline. Although in most cases, suspension results in a disciplinary action, it is not invariably so. There are instances when the authority decides not to continue with the matter. This could be because the investigations did not result in any disciplinary conduct.”

The English Court of Appeal in a case involving dismissal of a managing director, like in the instant appeal, by his employer considered the question of suspension in the case of *Boston Sea Fishing Co. v. Ansell* 1886-90 All ER 65 at 67 and concluded thus:-

“Mr. Ansell was dismissed, and I think his dismissal must be taken to date from that meeting on October 19, and not from the day in September when he was suspended by the board, because suspension is very different from dismissal. When a man is suspended from the office he holds, it merely amounts to saying, “So long as you hold the office, and until you are legally dismissed, you must not do anything in the discharge of the

duties which under your office you ought to do towards your employer.”
(Italics mine).

I am unable therefore to subscribe to the submission, on behalf of appellant, in his brief of argument, that even if the suspension of the appellant as the managing director were lawful and valid, such suspension could only affect the exercise of his executive functions. I am unable to understand the purport of this submission but in as much as he gained membership of the board on the platform of his being the Managing Director of the respondent, his function at all time was executive. The function of the appellant included attending board meetings from where he received his instructions and report back to the Board. The consequence of appellant’s suspension does not allow for mundane submission bordering on splitting the hair. The concomitant of the appellant’s suspension is suspension and cessation of the appellant’s contract of employment as well as right and privileges, duties and powers attached to the position including attendance at the respondent’s meetings be it board or otherwise.

The appellant is not contesting his suspension but for purposes of completeness and in the event of further appeal, I want to ask myself whether he ought to have been heard before his suspension. **The appellant was suspended and eventually removed because it became necessary to do so in the interest of the respondent’s business. It is a desperate situation which demands drastic action. It cannot wait for legal finesse such as fair hearing or natural justice. That can wait! The interest of the respondent’s business is of paramount consideration and the appellant will not be entitled to hearing prior to the suspension. The principle of fair hearing, at this stage, at least, is shut out. In such circumstance, the long line of authorities are to the effect that the principle of natural justice is kept in abeyance. See Lewis v. Heffer & Sons (1978) 3 All ER 254. At page 364, Lord H Denning exposed the legal situation thus:-**

“Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on

full pay pending inquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something may be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply.” (Italics mine)

Also in the case *The Shell Petroleum Development Company Ltd. v. Lawson-Jack* (1998) 4 NWLR (Pt.545) 249 this court observed as follows at pg. 270:-

“What it has done from the facts available was to set up an investigating panel to look into certain complaints bordering on alleged impropriety committed by one Mr. Ntuk Ntuk, a member of staff of the appellant company.

In the process the respondent was suspended from duty on full pay pending the investigation. He was the head of the department directly concerned with the allegation against Mr. Ntuk Ntuk.

A suspension of an employee is not an unusual procedure taken in order to facilitate such an investigation. The person affected can hardly complain, in the process, of not having been given a hearing; nor can he demand that the rules of natural justice should apply. The interest of the business of the defendant becomes paramount and the plaintiff is made to keep off the premises thereof until later.”

In the process, the respondent was suspended from duty on full pay pending the investigation. He was the head of the department directly concerned with the allegation against Mr. Ntuk Ntuk.

The case of *Malloch v. Aberdeen Corporation* (1971) 2 All ER 1278 at 1294, (1971) 1 WLR 1578, 1595 cited in the respondent, brief of argument is being referred to in connection with exclusion of requirement of natural justice and the nature of remedy available to a plaintiff. A plaintiff can only ask for, in pure master and servant cases, at the most damages,

Lord Wilberforce states as follows at the relevant pages of the reports:-

“The argument that once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of common law of contract inter partes so that principles of administrative law, including those of natural justice, have no part to play. The second relates to the remedy; it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful; no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both of these arguments.”

I agree with the submission of the learned senior counsel for respondent which respectfully is made ex cautela abundanti that the provisions of section 41 of the Companies and Allied Matters Act put the effect of memorandum and Articles of Association beyond doubt. The section makes the memorandum and Articles of Association of a company to have the effect of a contract under seal between the company and its members and officers and between the members and officers. It reads as follows:-

“41. Subject to the provisions of this Act, the Memorandum and Articles when, registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the Memorandum and Articles, as altered from time to time in so far as they relate to the company, members or officers as such.”

In the result, the exercise of a right, privilege or power conferred by the articles cannot be challenged or questioned on the authorities. The power can only be taken away by an amendment or alteration of the articles to remove the power, privilege or right so donated to the company. The power is exercisable by the company through its directors. It cannot be withdrawn except by alteration of

the articles through special resolution. Aside from this procedure, the company itself cannot deny the directors of the exercise of the power. In *Thomas Logan Limited v. Davis* (1911) 104 L.T. 914, 916 Warrington, J. stated thus:-

B *“It seems to me it turn upon this: Has the company or has it not delegated to the Board the particular duty of appointing a managing director? If it has - if that expresses the contract between the several shareholders among themselves - then the board are entitled to exercise the powers as delegated to them until it is taken from them in the only way in*
C *which it can be taken from them, by an alteration.”*

His Lordship proceeds at pg. 917 of the same report thus:-

“It seems to me, therefore, that if you take whole of these powers of the Directors together, the true construction to be placed upon the
D *articles is that the appointment of the managing director, and incidental to that, the fixing the period and the fixing the terms and fixing the remuneration was all left under the control of the directors; and if that is so, then that contract between the company and the share-holders, and*
E *between the shareholders among themselves, can only be altered by special resolution.”*

Also in *Salmon v. Quin & Axtens Limited* (1909) 1 Ch. 311 Farewell, L.J. had earlier expressed similar opinion on the nature of the Articles of Association and the powers of the board. At page 319 of the
F report he said that:-

“The articles forming this contract, under which the business of the company shall be managed by the board, contain a most usual and proper requirement, because a business does require a head to look after it, and
G *a head that shall not be interfered with unnecessarily. Then in order to oust the directors a special resolution would be required. The case is, in my view, entirely governed, if not by the decision, at any rate by the reasoning of the Lords Justices in Automatic Self-Cleansing Filter Syndicate Co v. Cuninghame (1) and Gramophone and Typewriter Ltd. v. Stanley. (2) I*
H *will only refer to one passage in Buckley, L.J.’s judgment in the latter case. (3) He says: “This court decided not long since, in Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame (1), that even a resolution*

of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals." That appears to me to express the true view.

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

The appellant made a mountain out of a mole hill on the strength of Yalaju-Amaye's case (supra). That case on the facts and the law are not on all fours. Firstly, Article 106 of the First Schedule of Table A of Companies Act, 1968 and Article 105 of the Article of Association of First Bank of Nigeria Plc. are not in pari materia as

demonstrated earlier in this judgment. Article 106 along with the Companies Act, 1968 which gave it live was repealed on the inception of the Companies and Allied Matters Act, Cap. 59 of the Laws of the Federation, 1990. Yalaju-Amaye's case recognizes the fact that a person, irrespective of his description who has a contract of service with the company is an employee and found that Yalaju-Amaye was a director and an employee in the absence of contract of service between him and the first respondent. Yalaju-Amaye was a director in his own right who was so designated by the Articles of Association of that respondent company. He was not only a director but also the founder and promoter of that first respondent company. Yalaju-Amaye who was appointed a director as well as managing director in the Articles of Association was allegedly removed as managing director on the strength of a purported oral resignation. Yalaju-Amaye can only be removed from these positions by alteration of the Articles of Association. It is clear on authorities that a power exercisable under the Articles of Association can only be changed or altered by a special resolution. But the appellant in the instant appeal was an employee who was appointed a managing director by the Board of Directors of respondent under Article 105 of the respondent's Articles of Association. The appellant was made or appointed a managing director by the directors exercising their power under Article 105 of First Bank of Nigeria Plc., Articles of Association. The same article empowers the directors to revoke any appointment made by them. It seems to me that the power of the Board of Directors of the respondent to remove anyone appointed by it is further strengthened by the provisions of section 41(3) of the Companies and Allied Matters Act which reiterates the right of the directors to enforce the power donated to them under the article to appoint or remove any director or other officer of the company. The section provide thus:-

“(3) where the memorandum or articles empower any person to appoint or remove any director or other officer of the company, such power *shall be enforceable* by that person notwithstanding that he is not a member or officer of the company.” (Italics mine)

It seems to me that the power to appoint person or persons of proven ability as executive or managing director as well as the power to revoke such an appointment conferred by Article 105 is now repeated in the Act. So the power given to directors to appoint and remove executive and managing directors transcends by virtue of section 41(3) of Companies and Allied Matters Act, Article 105. The finding of the learned trial Judge to the effect that:-

“... to remove from office any director or managing director in the case of the board exercising its duty whose conduct they disapprove. This is in consonance with the Golden Rule of Capitalism that the right to ‘Fire’ imports the right to ‘Fire’. See P. Sergeant Florence Ownership, Control and Success of large Companies 1961, p. 60. The Article of Association in Article 105 provides for appointment of managing, director/chief executive and revocation of their appointment.”

The power to remove is amply provided for in Article 105 of the company’s Articles of Association. The hand of the Board to enforce the provisions of Article 105 is further strengthened by the provision of section 41(3) of the Companies and Allied Matters Act (supra). The provisions of the Articles of Association and the Act are clear and leave no one in doubt. In case I am wrong to state that the power of the first respondent’s board to remove the appellant is manifestly provided for under the S. 41(3) of the Companies and Allied Matters Act, it will be necessary to consider the validity of the Golden Rules of Capitalism upon which the learned trial Judge fell.

It appears that the axiom, the power to appoint is the power to remove, is supported by Interpretation Act. Section 11(1) of the Interpretation Act, Cap. 192 of the Laws of the Federation of Nigeria, 1990 provides as follows:-

“11(1) where an enactment confers a power to appoint a person either to an office or to exercise any functions, whether for a specific period or not the power includes:-

(a) ...

(b) power to remove or suspend him.”

It follows from the above that the removal of the appellant by

the respondent's board which appointed him is covered by the above provision. The invocation of the principle of the power to 'hire' is the power to 'fire' by the learned trial Judge is supported by the statutory provisions. The directors of the respondent employed or
 B appointed him; that body, therefore, has reciprocal power to remove him. The Articles of Association, to my mind, is a subsidiary legislation made pursuant to Companies and Allied Matters Act. The appointment made by the board pursuant to Article 105 of the
 C respondent's Articles of Association has the force of legislation. In case I am wrong, the provisions of section 41(3) of the Act give force or cover of all enactment to the Article of Association. The appointment by the board of directors under Article 105 has the effect of one made under an enactment. He can, therefore be removed or
 D suspended by the board.

The appellant is not contesting his removal on the facts. He has conceded to the facts of this case. But he is challenging the legitimacy of the board meeting at which the decision to revoke his
 E appointment was taken on account that as a director he was not given notice of the meeting, contrary to section 266 of Companies and Allied Matters Act. It is common ground that he was suspended at the material time, which he is not contesting. Moreover, it is clear
 F that being a managing director who could be suspended and was on suspension, he was not entitled to the notice of the meeting. Further on this point, being a director appointed by the directors, under Article 105 of the Article of Association, he was not a director
 G appointed under the Companies and Allied Matters Act and that his working directorship was not within the contemplation of S. 266(1) of the Companies and Allied Matters Act, therefore, was not entitled to the notice envisaged under section 266(1) of the Act which provides thus:-

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

(2) There shall be given 14 days notice in writing to all

directors entitled to receive notice unless otherwise provided in the articles.

(3) Failure to give notice in accordance with subsection (2) of this section shall invalidate the meeting.” (Italics mine)

The appellant as observed earlier is disqualified to attend the meeting and was consequently not entitled to the notice of the meeting. He was disqualified by reason of his suspension by the board of directors under Article 105 read in conjunction with the provisions of section 41(3) of the Companies and Allied Matters Act.

The appeal is unmeritorious. It lacks merit and is dismissed by me. I affirm the decision of the learned trial Judge, Nwodo, J. There is order as to costs assessed at N10,000.00 to the respondent.

MUHAMMAD JCA

Having had the opportunity of reading the lead judgment of my learned brother, Salami, JCA before now, I am in complete agreement with him that this appeal completely lacks merit. I add my pen in dismissing the appeal in the terms his Lordship did, including the order on costs.

The real question in controversy between the parties, and at the court of trial, is whether the termination of appellant’s employment had proceeded on the basis of the Company and Allied Matters Act or otherwise. This question however, is determinable squarely from Article 105 of the respondent’s Articles of Association and section 41 of the Companies and Allied Matters Act. The latter provision defines the status and import of both the Memorandum and Articles of Association of persons corporate which the respondent is. Article 105 of the Articles of Association provides:-

“The Directors may from time to time appoint one or more person or persons of proven ability and experience to the offices of Managing Director who is to be the Chief Executive of the Company and Executive Directors for such period and on such terms as they think fit and subject

to terms of any agreement entered into in any particular case as and may revoke such appointment but without prejudice to any claim he may have for damages for breach of contract.”

The import of the foregoing clear and unambiguous provision is that the power to hire and fire the Managing Director and Chief Executive of the respondent company is vested in the Directors of the company. It is not necessary that a person so appointed must be one of the Directors who constitute a body for the purpose of appointing any person or persons of proven ability and experience to fill in the vacancy or vacancies of the Managing Director(s).

Section 41 of the Companies and Allied Matters Act only fortifies the sanctity of Article 105 of the respondent’s Article of Association when it provides as follows:-

“Section 41 - Subject to the provisions of this Decree; the memorandum and Articles when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and Articles, as altered from time to time in so far as they relate to the company, member or officers as such.”

It follows from the foregoing that powers of appointment or termination of appointment of the appellant pursuant to Article 105 of the Articles of Association of respondent as reproduced ceases to be in doubt.

Appellant has conceded the powers vested in the Directors of the respondent company as provided for by Article 105 of the Articles of Association. He appears vehement though, given section 266(1) of the Companies and Allied Matters Act that being a Managing Director his removal could only proceed after he had been served a notice in writing of the meeting wherein his removal was considered and effected. A reading of section 266(1) of the Companies and Allied Matters Appellant relied upon, readily betrays the fallacy of an appellant’s assumptions. The section reads:-

“Section 266(1) Every director shall be entitled to receive notice of the Directors’ meetings unless he is disqualified by any reason under the

Act from continuing with the office of director.

(2) There shall be given 14 days notice in writing to all directors entitled to receive notice unless otherwise provided in the articles.

(3) Failure to give notice in accordance with subsection (2) of this section shall invalidate the meeting.”

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The question to answer here is whether there was any reason which had disqualified the appellant from continuing with the office of director under the Act such as to justify the none service of the statutory notice on him.

Now, appellant has contended that the very collection of Directors vested with the power to appoint and remove under Article 105 of respondent's Article of Association, is incapable of suspending and proceeding thereafter to remove him from the office of Managing Director. He doubled his contention that he was only suspended as respondent's Managing Director and not the ordinary Director he continued to be after his suspension from the former office. This argument certainly underscores the import of Article 105 of respondent's Article of Association.

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It is truly unthinkable that the same directors in whom inhered the power of hiring and firing the appellant would be denied such other powers that are necessarily incidental to the primary power of hiring and firing. From common sense and on the authorities, that is untenable. Appellant must be reminded outrightly of the provision of section 10(2) of the Interpretation Act, which provides:-

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“10(2) An enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that Act to be done or are incidental to the doing of it.”

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Again Warrington, J. in Thomas Logan Ltd. v. Davis (1911), 104 LT 917 stated that these incidental powers constitute an imperative. He said:-

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“It seems to me, therefore that if you take whole of these powers of the Directors together, the true construction to be placed upon the articles is that the appointment of the Managing Director and incidental to that,

the fixing of the period, and the fixing of the terms and fixing the remuneration, was all left under the control of the directors and if that is so, then that contract between the company and the share holders, and between the share holders among themselves can only be altered by special resolution.”

Applying the above statutory provision as enunciated in the foregoing principle to the instant case, it follows that by Article 105 pursuant to which appellant was appointed, the same body of directors that effected his appointment retained the powers of discipline, and if need be removal of the appellant. The argument that after his suspension from the exalted position of the Managing Director/Chief Executive of the respondent, which appellant does not contest, he reverts to his position of a Director though seemingly ingenious is, in reality, nonsensical. Appellant’s conduct in the discharge of his function, as the Managing Director was considered untoward. His suspension from the office in respect of which his conduct was being questioned related to appellant’s person. Appellant contends that the suspicion over his conduct could only be lawfully resolved if he participated in the process. It cannot be so. Exhibits ‘V’ and ‘A’ are the instruments of appointment of the appellant to the two offices. His appointment into the office of a director does not dovetail into the higher office of the Managing Director of the respondent. The significance of exhibits ‘V’ and ‘A’ is that he is an employee of the respondent. Once the relationship between the two is that of a master and servant and appellant being a servant effectively suspended as respondent’s Managing Director and, who had ceased to be a Director because of his elevation to the higher office of the Managing Director, appellant was not entitled to any notice of meeting and was rightly removed from office. Appellant could have been, without suspension, outrightly removed from office after all. See *Oyenuga v. Provisional Council of University of Ife* (1965) NMLR 9; *Union Bank of Nigeria v. Ozigi* (1994) 3 NWLR (Pt 333) 385; and *Malloch v. Aberdeen Corporation* (1971) 2 All ER 1278 at 1294.

Finally, it appears to me that appellant’s effort is directed at establishing that his removal from office was not only wrongful but unlawful. The removal was wrongful because it had offended section

266(1) of the Companies and Allied Matters Act. Where a person's employment had not been determined under or pursuant to any legislation, the propriety or otherwise of his removal cannot be considered in relation to such non-existing legislation. And if his case rests on the premise of a particular legislation and the facts in support of the case does not support the contention, the case then crashes irretrievably. Where as in the instant case, therefore, appellant averred that his removal was not only wrongful but unlawful and the facts relied upon do not show that his removal had been by virtue of section 266(1) of the Companies and Allied Matters Act but rather pursuant to Article 105 of the respondent's Articles of Association, appellant's case then fails completely- See Shell Petroleum Development Company v. Lawson Jacks (1998) 4 NWLR (Pt.545) 249 and Imoloame v. West African Examination Council (1992) 9 NWLR (Pt.265) 303. I so affirm.

I adopt the more succinct and detailed reasons advanced in the lead judgment in finding the appeal devoid of any merit. I dismiss the appeal and abide by the consequential orders made in the lead judgment.

OGUNBIYI JCA

From the situational indication of the appeal before us, the appellant while he held the office of 'Executive Director' or 'Managing Director' was at all material times an employee of the respondent. This is evident on the authority in the case of Eaton v. Robert Eaton Ltd. (1998) 1 CR 302 at 304, also the publications, "Status and Duties of Company Directors" by Prof. G. A. Olawoyin (1977) University of Ife Press, at P. 17 paragraph 2 and "Nigerian Company Law and Practice" by Olakunle Orojo, 3rd Edition (1992) at p. 296. Consequent to the foregoing and in the light of the appellant's employee status, he is subject therefore to disciplinary measures such as suspension by the respondent as his employer. In other words in the same way a master has an inherent right of suspension over his servant, so also the Board of Directors has inherent and/or implied powers to suspend the appellant.

The plaintiff/appellant rests his claim that he was entitled to attend

the meeting on the provisions contained in section 266(1), (2) and (3) of the C AMA and the reproduction which state as follows:-

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

(2) There shall be given 14 *days* notice in writing to all directors entitled to receive notice unless otherwise provided in the articles.

(3) Failure to give notice in accordance with subsection (2) of this
C section shall invalidate the meeting.” (underline mine).

The phrase underlined in subsection (2) supra envisages and presupposes that there could be some directors who might not be given notice by reason that they are not “*entitled to receive notice.*” With the contractual effect of section 41 of the Companies and Allied Matters Act
D same is firmly binding and subsisting between the company, its members and officers. The appellant was in my humble view under a wrong notion that he occupied dual positions. With the appellant’s suspension as a
E Managing Director/Chief Executive, he has certainly been caught up by the provision of section 266(2) of CAMA. In other words, he cannot claim the benefit thereof for the reason that he is not within the category of directors entitled to receive notice. The appellant was on board only by virtue of his office as Managing Director/Chief Executive. It follows therefore that his
F functions and duties on the Board were purely executive which in the circumstance included attending Board meetings. With the suspension of his employment, every duty and function in connection with that office became affected and accordingly suspended.

The relevant authorities in point are: University of Calabar v. Esiaga
G (1997) 4 NWLR (Pt.502) 719 at p. 723; and Boston Sea Fishing Co. v. Ansell (1886 - 90) All ER Rep 65. By the provision of Article 105 of the First Bank of Nigeria Plc. Memorandum and Articles of Association, as well as the powers inherent by statute, the respondent’s Board has powers
H to dismiss the appellant.

Further still, the determination of whether or not the appellant was entitled to notice of the meeting of June 13, 2002, which was made out as an issue, was sequel to the consideration made on facts giving rise to

respondent's motive for the failure to give such notice. Relevant authorities to buttress are; - Jolayemi v. Olaoye (1999) 10 NWLR (Pt.624) 600 at 602; Akinmoju v. State (2000) 6 NWLR (Pt.662) 608 at 612 and Owhoeri v. Ikanone (1994) 1 NWLR (Pt.322) 605 at 608. The lower court did make findings on these facts. As rightly submitted by the respondent's B counsel therefore, where the trial court carries out its duty and makes findings of facts, the appellate court rarely interferes. Relevant authority to buttress the proposition has been well enunciated in the case of Tsokwa Motors (Nig.) Ltd. v. U.B.N. Ltd. (1996) 9 NWLR (Pt.471) 129 at 139; C also the case of Owhoeri v. Ikanone (1994) 1 NWLR (Pt.322) 605 at 608. In other words, and with the document exhibit 'R' having been admitted in the circumstance at hand, it would no longer be within the legal sphere for the court's refusal to give full-effect to the contents of the said exhibit. Any objection by the appellant at this stage is without more very belated. D A document tendered by consent and admitted ought to be given full legal effect. Relevant in support is the case of V.S.T. Co. Ltd. v. Xtodeus Trading Co. (1993) 5 NWLR (Pt.296) 675 at 695; also Chief Bruno Etim & Ors. v. Chief Okon Udo Ekpe & Anor. (1983) 1 SCNLR 120 at 131 - E 133.

From the deductive indication of the matter at hand, and relating same to Article 105 of the Articles of Association under reference, it is clear that there are two separate and distinct offices envisaged. The article F for instance reads as follows:-

"Executive and Managing Directors. The Directors may from time to time appoint one or more person or persons of proven relevant ability and experience to the offices of Managing Director who is to be the Chief G Executive of the company and Executive Director for such period and on such terms as they think fit"

The foregoing provision is clear to the effect that the person to be appointed Managing Director need not be a Director. The two offices are also distinct and not one and same fused into each other. As rightly H submitted by the respondent's counsel, in my humble view, the appellant did not and could not have two capacities in his employment as Managing Director/Chief Executive. The plaintiff/appellant was not in the circum-

stance entitled to be given notice inviting him to attend the meeting of the Board of Directors of the defendant bank held on the 13th day of June, 2002, as he was not entitled as of right to be invited to attend the said meeting.

B In the result and having regard to the deliberations by my learned brother Salami, JCA, I completely agree with the clear reasonings arrived at in his lead judgment and consequent to which I also agree that this appeal is without merit. It is accordingly dismissed, while the decision of the
C learned trial Judge is hereby affirmed. I also abide by the orders made as to costs.

Appeal dismissed.

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