

SUPREME COURT OF NIGERIA
FRIDAY 14TH DECEMBER, 2012. SC. 7/2006
**CORAM:- I. T. MUHAMMAD, J. A FABIYI, M. U. PETER-
ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC**

POWER HOLDING COMPANY
OF NIGERIA PLCAPPELLANT
AND
MR. I. C. OFFOELO RESPONDENT

STATUTES - NEPA Act - Application - S. 4 para. 9 of the Act empowered NEPA to make exhibit A - And any lawful action taken by NEPA in relation to its staff must be related to the Act (H1)

STATUTES - Contract - Statutory employment - Since exhibit A is found to be made pursuant to the NEPA Act - Appointment of staff therein must attract statutory flavour (H2)

CONTRACTS - Statutory employment - Notice of retirement - Respondent is entitled to three months notice before retirement - As required by exhibit A (H3)

CONTRACTS - Statutory employment - Retirement - Communication of retirement to respondent amounts to nullity - Since it was not done in accordance with regulations in exhibit A (H4)

STATUTES - Contract - Statutory employment - Status - Mere creation of employer by statute - Does not elevate its employment to statutory flavour - As employee's appointment must be linked with the statute (H5)

CONTRACTS - Statutory employment - Retirement - Propriety - Retirement of respondent by appellant is a premature one - And same shall be null and void (H6)

COURTS - Issues - Determination - Court is to adjudicate between parties - In relation to their competing legal interest - And never to engage in mere academic discourse (H7)

FACTS

Plaintiff/respondent was until his purported retirement, a staff of defendant/appellant (a statutory corporation for electricity generation, distribution and sale in Nigeria). Respondent stated that contrary to exhibit A i.e. conditions of service with appellant, he was orally informed of his retirement by an Administrative Officer of appellant. He further stated that no formal notification of his retirement was communicated to him and that appellant had been threatening to evict him from his official accommodation. Hence, he filed this action at the High Court of Lagos State, claiming inter alia that his employment with appellant is still valid and that the purported retirement is void, since it is in violation of the said exhibit A and the Civil Service rules of Nigeria.

In its defence, appellant contended that it is not obliged to provide residential accommodation to respondent. It further contended that by the condition of service, an employee can be retired after attaining 45 years of age. Appellant made a counter-claim of the sum of N150,000 per annum (being cost for rent of the place being occupied by respondent) till possession is finally given up. In his judgment, the learned trial Judge dismissed respondent's claim and appellant's counter-claim. Dissatisfied, respondent appealed to the Court of Appeal Lagos Division. The court allowed the appeal and granted the reliefs sought. Aggrieved, appellant filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

"[a] Whether the respondent's employment had a statutory flavour, and in particular:

i] Whether the Appellant's contract of employment stemmed from a statute.

ii] Whether the lower court was right in inferring a special relationship between the Appellant and the Respondent on the strength of section 4 of the National Electric Power Authority Act Cap. 256 LFN 1990, which does not make express provisions regulating the employment of retirement, etc - nor was incorporated in the conditions of service regulating the relationship between the parties.

[b] flowing from the above, is the respondent entitled to re-

cover anything at all in terms of reliefs, having regard to the parties pleading and evidence."

HELD (Unanimously dismissing the appeal per MUHAMMAD JSC)

STATUTES - NEPA Act - Application

1. The above provisions of section 4 and paragraph 9 of the Schedule to the NEPA Act are what in my view, can be regarded as the connection, the link, the nexus and or the authority which empowers the NEPA to make Exhibit A. Thus, Exh. A, has the force of law i.e. the NEPA Act which establishes the NEPA as contained in Cap. 256 of the Laws of the Federation 1990. Any lawful action taken by the NEPA particularly in relation to its staff or servants must thus, be related to the Act. And, any unlawful or illegal action taken by the Authority which goes contrary to the provisions of the Act must be declared null and void to the extent of its inconsistency or contrariness.

Although the retirement letter from the appellant to the respondent (Exh. F) is silent on the authority upon which the former relied to issue that letter to the latter, it is clear that the officer who signed it (an Assistant General Manager (Personnel) of the appellant) was acting on behalf of the appellant. That of course was why he copied Exh.F to various organs of the appellant as mentioned at the left foot of the Exhibit. (p. 4016 G)

Contract - Statutory employment

2. I am in agreement with the court below that by sections 73 and 74 (1) of the Evidence Act, the trial court was under duty to take judicial notice of the foregoing provisions and should have found that the conditions of service governing respondent's appointment were made pursuant to the NEPA Act. And once Exh. A is found to be made pursuant to a statute such as the NEPA Act, appointment of staff made therein must attract statutory flavour.

It is to be noted my Lords, that in matters of termination of appointment of an employee whose employment is regulated by a statute directly or by Rules, Regulations, bye-laws etc, made pursuant to a statute, the service contract is said to enjoy statutory flavour which covers it with legal protection much more than that of ordinary master and servant relationship. In other words, the employee is invested with a legal status higher than the ordinary one of master and servant and his employment enjoys statutory flavour. (p. 4018 A/F)

CONTRACTS - Statutory employment - Notice of retirement
3. Exhibit F required the respondent to retire from the appellant's service. As seen earlier, Exh. F informed the respondent that his retirement was with "immediate effect" and that his entitlements would be computed and paid to him accordingly. The provisions made for retirement of appellant's employees (as set out above) have not provided for retirement with immediate effect or payment of entitlements in lieu of notice. All that Exh. A requires is that all established employees shall be put on three months notice before the retirement takes effect. The respondent pleaded and testified that by his gradual promotion from Assistant Technical Officer (ATO) to Area Commercial Officer, his appointment placed him in a Senior Management Post. This was not found to be controverted and or discredited by the appellant at trial stage. The respondent was thus entitled to be put on the three months' notice, I must agree with the lower court, here and again, that the appellant did not follow the provisions of the Act in terminating the appointment of the respondent. (p. 4018 B)

CONTRACTS - Statutory employment - Retirement
4. The respondent in my view, is justified in his defence that he was not communicated the retirement. Even if he was, I think the communication was not done in accordance with the Regulation as contained in exhibit A. Proper communication of a message in law has its importance. Where there is a failure to communicate (a break in communication or lack of communication) the whole purpose of the message is completely de-

feated. If any step or action is taken by the issuing authority in spite of the fact of non-communication (non-service), the step or action taken goes to naught and amounts to a nullity in law. I am as well, unable to agree with the learned trial judge, as did also by the learned Justices of the court below, that the failure of the appellant to give appropriate notice would not affect the validity of the respondent's retirement. This would appear to me to be a cloistered kind of legal reasoning by the learned trial judge which I am not ready to accept. (p. 4019 B)

Contract - Statutory employment - Status

5. Now just for the sake of emphasis, I need only to reiterate the position of the law which has for long been settled in a litany of cases that the mere fact that an employer is a creation of statute or that it is a statutory corporation or that the government has shares in it does not elevate its employment into one of statutory flavour. Rather, there has to be a linkage or nexus between its employee's appointment with the statute creating the employer or corporation. (p. 4019 E)

CONTRACTS - Statutory employment - Retirement - Proprietary

6. Finally on this issue I am in complete agreement with Uwaifo JSC (now retired) in his observation in the case of PHMB v. EJITAGHA (2000) FWLR (Pt.9) 1510, wherein he said:

"To force a public servant into retirement, that is, before he gets to his retirement age, is an unusual action against him in his career."

There is no doubt that the retirement of the respondent by the appellant was a premature retirement which is capable of crippling the respondent. I have no hesitation in declaring the said retirement to be null and void and of no legal effect whatsoever. Appellant's issue (a) (i) and (ii) are resolved against the appellant and in favour of the respondent. (p. 4019 G)

COURTS - Issues - Determination

7. A court of law is enjoined to adjudicate between parties in relation to their competing legal interests and never to en-

gage in a mere academic discourse, no matter how erudite or beneficial it may be to the party raising it or even to the public at large.

It is trite also that a court of law does not act in vain.

(p. 4020 E)

B

NOTABLE POINT OF INTEREST

FABIYI JSC

1. Stare decisis – Binding nature

- C I completely agree with the position taken by the court below. I commend it for towing the path of honour by complying with the doctrine of *stare decisis*. That is how it should be. The doctrine postulates that a point of law that has been settled by a superior court should be followed. There is sense in it to avoid confusion. It is not proper to refuse to follow the decision of a superior court where same is apt. A lower court should tow the line, as it were. (p. 4022 B)

REPRESENTATION

- E C. A. N. Nwokeukwu for the appellant
Osuala Emmanuel Nwagbara with Uche Ugwuegbu, M. O. Izukchukwu, for the respondent

CASES REFERRED TO

- F Olarewaju v. Afribank (Nig.) Plc (2001) 13 NWLR (Pt.731) 691
Nitel v. Ikero (1994) 1 NWLR (Pt.320) ration 5
Olaniyan v. University of Lagos (1985) 2 NWLR (Pt.9) 599
Shitta-Bey v. Public Service Commission (1981) SC 40
Fakuade v. OAUTHMB (1993) 5 NWLR (Pt.291) 47
G lyase v. UBTHMB (2000) 2 NWLR (Pt.643) 45
Bello v. Eweka (1981) 1 SC 101
Isievwori v. NEPA (2002) 7 SCN 323
Odugbemi v. Nigerian Broadcasting Corporation (1974) NCL 452
Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt.106)
H 652
Bakare v. Lagos State Civil Service Commission (1992) 10 SCNJ 173
Eperokun v. University of Lagos (1986) 4 NWLR (Pt.34) 160

Adelaja v. Alade (1999) 6 NWLR (Pt.608) 544

Nwobosi v. ACB Ltd (1995) 6 NWLR (Pt.404) 658

Ezenya v. Okeke (1995) 4 NWLR (Pt.388) 142

STATUTES REFERRED TO

NEPA Act Cap. 256 LFN 1990, s. 4(1), 15(2) and 24

Pension Act Cap. 346 LFN 1990, s. 4(1)(2)

LEAD JUDGMENT BY MUHAMMAD JSC

According to the amended Statement of Claim, the plaintiff at the Lagos State High Court of Justice, holden at Lagos (the trial court) is an Electrical Technologist and was employed by the defendant on 1/2/66 as an Assistant Technical Officer. He has served in various parts of the country since his employment until his last posting to Benin Zonal Office in April, 1987 as an Area Commercial Officer. The defendant, on the other hand, is a statutory Corporation engaged in the generation, distribution and sale of electricity in Nigeria and elsewhere, with its headquarters at Marina, Lagos. The plaintiff averred that by the conditions of his employment and by virtue of his grade as a Principal Technical Officer and serving as an Undertaking Manager since 1974, he was entitled to provision of residential accommodation. The plaintiff averred that he was allocated a 3 bedroom flat at No. 155 Idowu Street, Olodi Apapa, Lagos for which, as a tenant, he was paying rent to the defendant. He averred further, that while in Benin, he was not given 'accommodation' but a routine temporary accommodation given to every staff on posting to a new area. This routine accommodation, he averred, was taken away from him by the defendant through a letter Ref No.26/41/vol. 1/87/1554 dated 3/8/87. So, plaintiff accommodated himself in Benin while working for then defendant from August, 1987. Plaintiff averred further that sometime in 1989, he received a letter from the defendant Ref No. 201/S.9/3615/89 dated 8/3/89 advising him that he was to be paying the sum of N300.00 with effect from 15/3/89 on his residential premises as economic rent and that the said sum had been deducted from his salary from March, 1989.

In his further averments, the plaintiff stated that in the first week of September, 1991, while on a routine visit to the defendants headquarters, he was orally informed by the defendant's Adminis-

trative Officer in charge of Benin Zonal Office, one Mr. Peters, that he (plaintiff) had been retired from the services of the defendant with effect from 1st September, 1991, and his salary stopped. He confirmed this from his Benin Office although no formal notification of his retirement was communicated to him and that up till the time of filing this case, no retirement benefit or gratuity had been paid to him. As at September, 1991, plaintiff was 49 years of age and had put in a total of 26 years in the service of the defendant and that his purported retirement runs contrary to the Articles of the Civil Service Rules of the Federal Republic of Nigeria. He could not reasonably be expected to secure another good employment at age 53.

Plaintiff averred further that sometime in January, 1994, the defendant served on his wife a letter Ref No. NEPAX23304/PTD/6/109/94 asking the plaintiff to vacate his residential premises at No. 155 Idowu Street, Olodi Apapa, Lagos. That since serving the said letter the defendant had embarked on a series of visits to his residential premises asking him to vacate and threatening to throw him out without a court's order. And on 24/6/94, the defendant's staffers numbering about 10 junior staffers led by one Mr. Okon, Principal Manager, Administration, at Ikeja Office, and a Police man came to plaintiff's premises and attempted ejecting the plaintiff but for the resistance of the members of the plaintiffs family and the timely intervention of neighbours. Plaintiff avers that the defendant has sworn to eject the plaintiff by force of self-help and that the defendant has breached the terms of employment between the plaintiff and the defendant.

The plaintiff made the following claim against the defendant:

1. *"A Declaration that the plaintiff's employment with the defendant is still valid and subsisting."*
2. *A Declaration that the purported retirement of the plaintiff from the services of the defendant is null void and of no effect as it contravenes (sic) the civil service rules of the Federal Republic of Nigeria."*
3. *A Declaration that the letter ref: No. NEPA/23304/FTD.6/109/94 dated 14/1/94 and served on the plaintiffs wife is not a Quit Notice and is therefore null and void as it contravenes sections 16 and 17 of the rent control and recovery of residential premises Edict 1976."*

4. *A Declaration that the resort by the defendant to self/help and without a court order by attempting to eject the plaintiff from his residential premises at No. 155 Idowu Street, Olodi Apapa, Lagos on 24-6-94 and the threat to eject the plaintiff by the same process by end of July 1994 is unlawful, intimidatory, unconstitutional, malicious and void.* B

5. *An injunction restraining the defendant, their (sic) servants, or agents from ejecting the plaintiff without the duty process of law and from committing further acts of illegality, intimidation and malice against the plaintiff in respect of the plaintiffs tenancy at No. 155, Idowu Street, Olodi Apapa, Lagos.* C

6. *The sum of N1m representing general damages for trespass on the plaintiff's premises on 24/6/94 and for breach of contract of employment.*

7. *An Order reinstating the plaintiff into the service of the defendant."* D

In its Statement of Defence, the defendant, except where it specifically admitted, denied each and every statement of fact in the plaintiffs statement of claim. The defendant averred further, that as a matter of policy, the defendant is not obliged to provide residential accommodation for the plaintiff and that it was as a result of the plaintiffs refusal to vacate the defendant's quarters despite several demands at No. 155, Idowu Street, Olodi, Apapa when he was transferred to Benin that compelled the defendant to demand Economic rent in March 1989. Other facts known to the defendant are: that the plaintiff was formally retired from the employment in 1991 as a result of re-organization and he was formally notified of his retirement by a letter dated 29th July, 1991 and by that reason he was no longer entitled to monthly salary. That by the condition of service of the defendant, an employee can be retired after attaining the age of 45 years. That the defendant had never been in breach of terms of employment with the plaintiff and never attempted forceful ejection of the plaintiff. The defendant averred that the plaintiff is not entitled to any claim and the action be dismissed as being frivolous, vexatious and an abuse of the process of court. Finally, the defendant made a counterclaim of the sum of N150,000.00 per annum being cost for the rent and occupation of 3 bedroom flat and appurtenances at No. 155, Idowu Street, Olodi, Apapa, Lagos from 1st September, 1991 E F G H

till possession is finally given up to the defendant. Defendant asked for special and general damages.

Learned counsel for the plaintiff filed a reply to the Statement of Defence including his defence to the counter claim.

At the end of the proceedings, the Learned trial judge dismissed the plaintiff's claim and the defendant's counter claim. Dissatisfied, the plaintiff as appellant at the Court of Appeal Lagos Division (court below) filed his Notice of Appeal. The court below allowed his appeal and obliged him all the reliefs he claimed except relief No. 6. Dissatisfied, the defendant/respondent and appellant herein, filed its appeal to this court.

The parties before this court filed and served their respective briefs of argument. On the hearing date, learned counsel for the respective parties, each, adopted his brief of argument with prayers for either allowing or dismissing the appeal.

Learned counsel for the appellant set out the following issues for determination, viz:

"[a] Whether the respondent's employment had a statutory flavour, and in particular:

i] Whether the Appellant's contract of employment stemmed from a statute.

ii] Whether the lower court was right in inferring a special relationship between the Appellant and the Respondent on the strength of section 4 of the National Electric Power Authority Act Cap. 256 LFN 1990, which does not make express provisions regulating the employment of retirement, etc, nor was incorporated in the conditions of service regulating the relationship between the parties.

[b] flowing from the above, is the respondent entitled to recover anything at all in terms of reliefs, having regard to the parties pleading and evidence."

Learned counsel for the respondent formulated the following issues:

"Whether, taking the totality of the respondent's case into consideration, the judgment of the Court of appeal should not be upheld."

In his submission, the learned counsel for the appellant set out the guidelines in determining the relationship, rights and liabilities

of the parties to a contract of service or employment. He also mentioned some 3 categories of contracts: that of Master and Servant; that one where the servant holds an office at the pleasure of public servant in Civil Service simpliciter and where the employment is governed by a statute. Several cases were cited in support including *Olarewaju v. Afribank (Nig.) Plc* (2001) 13 NWLR (Pt.731) 691 at 705; *Nitel v. Ikero* (1994) 1 NWLR (Pt.320) ration 5. Learned counsel submitted that in master/servant relationship, termination of service of the employee is at will and at best it can only give rise to a claim for damages when found to be wrongful. He cited the case of *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt.9) 599. In contract of service having legal or statutory flavour, such is protected by both statute and the court by providing wider gamut of remedies to an employee where he is unlawfully terminated. The case of *Shitta-Bey v. Public Service Commission* (1981) SC 40 and some other cases were cited. Learned counsel defined what a contract of service with statutory flavour is and argued that the mere fact that an employer is a creation of statute or is a statutory corporation or the government has shares in it does not elevate such employment into one with statutory flavour. He cited the cases of *Fakuade v. OAUTHMB* (1993) 5 NWLR (Pt.291) 47 at 63; *Iyase v. UBTHMB* (2000) 2 NWLR (Pt.643) 45 at 58; etc. In making reference to the court below's judgment the learned counsel for the appellant made submissions to the effect that the court below by interpreting the conditions of service as being statutory in nature and required strict compliance for the exercise of any valid termination, could only be correct if there was a clear, direct and unambiguous nexus or relationship between the conditions of service and a statutory provision of the contract of employment which is protected or governed by statute and that statutory flavour is not inferred. He cited several cases in support including *Idomiboye-Obu v. NNPC* (2003) 1 SC (Pt.1) 40; *Fakuade v. OAUTHMB* (supra). Learned counsel submitted further that for the court below to premise its conclusion on S.4(1) of the NEPA Act while the respondent was relying on S.4(1) of the Pension Act, that the employer was empowered by statute to provide for terms and conditions of service could amount to a direct affront to a line of consistent pronouncements of this court, which would fly in the face of established precedents and would serve no other purpose than

create confusion. None of the said provisions of S.4(1) of the NEPA Act expressly states the procedures guiding the conditions of service in terms of appointment, discipline, termination of the Corporation as a blanket provision was given to NEPA that it could use its discretion and make bye-laws. This, learned counsel argued, did not necessarily prohibit in any way the drawing of terms and conditions of service by NEPA with a conclusion as was done by NEPA in the instant cases. He submitted that contract with statutory flavour is targeted at a certain category of employees usually the management cadre and it was impossible to ascertain that the respondent belongs to such category as there was no evidence on that. Further, the letter of employment of the respondent did not incorporate the statutory or bye-law conditions of service. That it is unfair and repugnant to foist a willing servant on an unwilling employer.

On his issue No.2, the learned counsel for the appellant submitted that by obliging the respondent all but relief No.6, in connection to the termination of his employment, the court below, granted unauthorized remedies particularly declaratory remedies i, ii, iii and iv. He cited several cases including *Bello v. Eweka* (1981) 1 SC 101 at 102; *Isievwori v. NEPA* (2002) 7 SCN 323. He concluded that as the contract of service is devoid of any statutory flavour, the declaratory reliefs prayed for by the respondent ought not to be available to him and an order of specific performance (re-instatement) of the contract of employment cannot be made against the appellant. Learned counsel urged this court to allow the appeal and set aside the decision of the court below in its entirety.

Learned counsel for the respondent argued the two issues of the appellant in one issue. He set out in the first place the three different ways of bringing an employee's employment to an end before it runs full cycle by the employer, as stated by this court in the case of *Psychiatric Hospital Management Board v. E. O. Ejitagha* (2000) FWLR (Pt.9) 1510. Learned counsel submitted that where the contract goes beyond master and servant relationship, there must be special conditions precedent which the employer has to fulfill before exercising the right to hire and fire at will and that damages are not enough compensation. Learned counsel for the respondent submits that the lower court was right when it held that the contract of service between the respondent and the appellant had statutory flavour.

In trying to justify his submission that the respondents employment is one with statutory flavour, the learned counsel argued that the appellant was set up by the National Electric Power Authority (NEPA) Act, Cap. 256 LFN, 1990 which brings the employer within those set-up by statute. He made reference to section 4 of that Act which deals with staff recruitment and that paragraph 9 part III thereof entitled the Board to make bye-laws with the approval of National Council of Ministers, to provide for matters connected with appointment, promotion and discipline of the officers and servants of the authority. The respondent, it is submitted, was appointed pursuant to this provision. Learned counsel for the respondent submitted further that the respondent occupied the position of Area Commercial Officer, a Senior Management position in the appellant's establishment becoming an established staff and had put in 26 years in service thereof.

It is the submission of learned counsel for the respondent that the Pension Act, Cap. 346, LFN, 1990, has consolidated the pension provisions contained in the civil service of the Federal Republic of Nigeria and those contained in the Conditions of Service of organizations, authorities and corporations declared as Public Service Institutions by the Pension Act under second schedule thereof, whose established staff (officers) enjoy Special Status by virtue of the provisions of the said Act which makes their service governed by the Civil Service Rules. On retirement age(s) of officers in service covered by the Pension Act, learned counsel cited and quoted several sections of the Pension Act. He also made reference to the Second Schedule of that Act.

Learned counsel for the respondent submitted that by virtue of his position as a Senior Management Staff (Area Commercial Officer), the respondent was an established staff and a Public Officer to whose contract of service all the conditions as contained in appellant's conditions of service apply and also by virtue of the combined provisions of paragraph 9 of Part III of the Schedule to the NEPA Act and Section 4, 15(2) and 24, as well as Second Schedule of the Pension Act, making his contract of service to be one with statutory flavour. Learned counsel submitted further that the case cited by the appellant in support of the proposition that the mere fact that an employer is a creation of statute or a statutory Corporation or that the govern-

ment has shares in it does not elevate an employment into one of statutory flavour. Thus, such cases as Fakuade v. OAUTHMB (1993) 5 NWLR (Pt.291) 47; Iyase v. UBTHMB (2000) 2 NWLR (Pt.643) 45 at 58; UMTHMB v. Dawa (2001) 16 NWLR (Pt.739) 424, and several others cited are distinguishable from the case of the respondent as the two sets of cases are guided by different legal rules and principles. The only case which is on all fours with the respondent's case is PHMB v. Ejitagha (2000) FWLR (Pt.9) 1510 and this court is asked to treat respondent's case in the same way as the case of Ejitagha because of similar facts. Learned counsel at the end, urged this court to dismiss the appeal and affirm the court below's judgment as the respondent's case is about premature retirement and not about ordinary termination or dismissal from employment under any guise.

The document that triggered the dispute between the parties herein is Exh. 'F'. This exhibit is the "retirement" letter which proceeded from the appellant to the respondent. It reads in part:

"RETIREMENT

Consequent upon the on-going re-organisation in the National Electric Power Authority, I am directed to inform you of your retirement with immediate effect. You are therefore required to hand in all the Authority's property in your possession including your identity card.

Your entitlements will be computed and paid to you accordingly.

May I seize this opportunity to express Management's appreciation of your contributions to NEPA during your tenure of office in the Authority.

Sgd.

*Istifanus Zabadi,
Assistant General Manager (Personnel)"*

This letter was written on the 29th July, 1991 addressed to Mr. I. C. Offoelo (the respondent through the AGM (Sales) Benin Zone and copied to various units of the Authority.

As stated earlier in this judgment, the respondent as plaintiff at the trial court claimed to have been employed by the appellant in 1966 as an Assistant Technical Officer. The appellant was by then known and addressed as Electricity Corporation of Nigeria (ECN). Respondent grew up through the ranks and that his last post in Benin

was the Area Commercial Officer of the appellant. By that letter of retirement (Exh. F), respondent claimed that the appellant as defendant, had breached the terms of employment between the plaintiff and the defendant in that at the time of the retirement, the respondent had neither attained the statutory retirement age of 60 years nor put in a statutory maximum service years of 35 in continuous employment of the appellant. Respondent stated in his testimony that by virtue of his post as Area Commercial Officer which is a Senior Management Post, he was entitled to accommodation, car advance from 1974. He tendered a condition of service which was admitted and marked Exh. "A". Exhibit 'A is titled: *"CONDITION OF SERVICE OF EMPLOYEES OF NATIONAL POWER AUTHORITY."*

The definition chapter (Chapter 1) thereof defined the condition(s) as "Regulations" and "Authority" means the National Electric Power Authority established under National Electric Power Authority Decree No. 24 of 1972. An employee therein means any person employed by the Authority and a Senior Employee means a person in the Service of the Authority's grade levels 07 to 17. There is a finding by the learned trial judge that it is not in dispute that the plaintiff was employed by the defendant since 1966 and that the conditions of contract of employment are as contained in Exhibit A. (See p. 127 of the printed Record of Appeal). The learned trial judge went to cite and quote the provisions of Clause 131.01 Chapter 13 page 125 of Exhibit A. The learned trial judge later came to the conclusion that the plaintiffs employment with the defendant was validly terminated by his retirement vide Exhibit F in accordance with Clause 131.01 of Exh. A.

There is a finding by the court below, however, that the trial court failed to take into consideration of Exhibit A vis-à-vis some provisions of the NEPA Act. The court below stated, inter alia, as follows:

"In the instant case where the lower court failed to take into consideration that Exh. A had evolved by virtue of section 4 and paragraph 9 of the Part III in the Schedule (sic) to the National Electric Power Authority Act, thereby giving appellant's employment some statutory flavour, it inexonerably reached a perverse decision which an Appellate court would be right to interfere with."

As seen above, it is the finding of the court below that there

is a connection between Exh. A and the National Electric Power Authority Specific reference was made to section 4, paragraph 9 of Part III of the Schedule to that Act. What are these provisions? Permit me, my Lords, to set them out seriatim, herein below:

B *“4. The Board shall, subject to the provisions of this Act, have power:-*

a) to appoint such other officers and servants of the Authority as it may determine

C *b) to pay its officers and servants such remuneration and allowances as the Board may with the approval of the Minister determine; and*

D *c) as regards any officers or servants in whose case it may determine so to do, to pay to or in respect of them such pensions and gratuities or to provide and maintain for them such super-annuation schemes (whether contributory or not) as the Board may determine and subject as aforesaid the transitory and supplemental provisions relating to officers and servants of the Authority set out in Part III of the Schedule to this Act shall apply accordingly.”*

E Part III of the Schedule to the NEPA Act makes provisions relating especially to those staff on established bodies of their former places of work but who are now working with the NEPA either on transfer or secondment to enjoy security of tenure of their offices in no less favourable conditions as were applicable to them in their former places of work. Further, that part of the Schedule takes care F generally of the appointment, promotion and discipline of the officers and servants of the Authority. Paragraph 9 of that part provides as follows:

G *“9. The Board may with the approval of the National Council of Ministers by bye-laws make provisions for matters connected with the foregoing, and also in relation to the appointment, promotion and discipline of the officers and servants of the Authority.”*

H ***The above provisions of section 4 and paragraph 9 of the Schedule to the NEPA Act are what in my view, can be regarded as the connection, the link, the nexus and or the authority which empowers the NEPA to make Exhibit A. Thus, Exh. A, has the force of law i.e. the NEPA Act which establishes the NEPA as contained in Cap. 256 of the Laws of the Federation 1990. Any lawful action taken by the NEPA par-***

particularly in relation to its staff or servants must thus, be related to the Act. And, any unlawful or illegal action taken by the Authority which goes contrary to the provisions of the Act must be declared null and void to the extent of its inconsistency or contrariness.

Although the retirement letter from the appellant to the respondent (Exh. F) is silent on the authority upon which the former relied to issue that letter to the latter, it is clear that the officer who signed it (an Assistant General Manager (Personnel) of the appellant) was acting on behalf of the appellant. That of course was why he copied Exh.F to various organs of the appellant as mentioned at the left foot of the Exhibit.

When it comes to the disciplinary measures to be taken against any of the staff of the appellant, Exh. A, in Chapter 3 provides for various disciplinary steps, such as: termination, dismissal, serious misconduct etc. None of these was applicable to the respondent. The title of Exhibit F reads: "RETIREMENT". Exhibit A treats retirement under Chapter 13. The Chapter classifies retirement of staff and or servants of the appellant into two: (a) retirement after attaining the age of 45 years and (b) compulsory retirement. There are two paragraphs under this Chapter:

"131.01 - Retirement after attaining the age of 46 years.

All established employees shall, on three months notice, at any time after attaining the age of 45 years

i. have the option to retire or

ii. be liable to be called upon by the Authority to retire.

131.02 - Compulsory Retirement.

An employee will be required to retire from the service on attaining the age of 55 years provided that, if it is in the interest of service, the Authority may defer his retirement for one or more periods of year subject to a Certificate of medical fitness at the beginning of each extension."

A post script is made as an addendum to this Chapter which reads as follows:

"with effect from 1st April, 1977, the compulsory retiring age is 60 years, (see Headquarters Circular No.23/78 dated 14th April, 1978)."

I am in agreement with the court below that by sections 73 and 74 (1) of the Evidence Act, the trial court was under duty to take judicial notice of the foregoing provisions and should have found that the conditions of service governing respondent's appointment were made pursuant to the NEPA Act. And once Exh. A is found to be made pursuant to a statute such as the NEPA Act, appointment of staff made therein must attract statutory flavour.

Exhibit F required the respondent to retire from the appellant's service. As seen earlier, Exh. F informed the respondent that his retirement was with "immediate effect" and that his entitlements would be computed and paid to him accordingly. The provisions made for retirement of appellant's employees (as set out above) have not provided for retirement with immediate effect or payment of entitlements in lieu of notice. All that Exh. A requires is that all established employees shall be put on three months notice before the retirement takes effect. The respondent pleaded and testified that by his gradual promotion from Assistant Technical Officer (ATO) to Area Commercial Officer, his appointment placed him in a Senior Management Post. This was not found to be controverted and or discredited by the appellant at trial stage. The respondent was thus entitled to be put on the three months' notice, I must agree with the lower court, here and again, that the appellant did not follow the provisions of the Act in terminating the appointment of the respondent.

It is to be noted my Lords, that in matters of termination of appointment of an employee whose employment is regulated by a statute directly or by Rules, Regulations, bye-laws etc, made pursuant to a statute, the service contract is said to enjoy statutory flavour which covers it with legal protection much more than that of ordinary master and servant relationship. In other words, the employee is invested with a legal status higher than the ordinary one of master and servant and his employment enjoys statutory flavour. See Iyase v. UBTHMB (2000) 2 NWLR (Pt.643) 45; Uwangbenebe v. Nigerian Palm Produce Board (1986) 3 NWLR (Pt.29) 490; Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40; Odugbemi v. Nige-

rian Broadcasting Corporation (1974) NCL 452; Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt.106) 652; Bakare v. Lagos State Civil Service Commission (1992) 10 SCNJ 173; Eperokun v. University of Lagos (1986) 4 NWLR (Pt.34) 160; Olaniyan v. University of Lagos (1985) NWLR (Pt.9) 599.

The respondent in my view, is justified in his defence that he was not communicated the retirement. Even if he was, I think the communication was not done in accordance with the Regulation as contained in exhibit A. Proper communication of a message in law has its importance. Where there is a failure to communicate (a break in communication or lack of communication) the whole purpose of the message is completely defeated. If any step or action is taken by the issuing authority in spite of the fact of non-communication (non-service), the step or action taken goes to naught and amounts to a nullity in law. I am as well, unable to agree with the learned trial judge, as did also by the learned Justices of the court below, that the failure of the appellant to give appropriate notice would not affect the validity of the respondent's retirement. This would appear to me to be a cloistered kind of legal reasoning by the learned trial judge which I am not ready to accept.

Now just for the sake of emphasis, I need only to reiterate the position of the law which has for long been settled in a litany of cases that the mere fact that an employer is a creation of statute or that it is a statutory corporation or that the government has shares in it does not elevate its employment into one of statutory flavour. Rather, there has to be a linkage or nexus between its employee's appointment with the statute creating the employer or corporation.

Finally on this issue I am in complete agreement with Uwaifo JSC (now retired) in his observation in the case of PHMB v. EJITAGHA (2000) FWLR (Pt.9) 1510, wherein he said:

"To force a public servant into retirement, that is, before he gets to his retirement age, is an unusual action against him in his career."

There is no doubt that the retirement of the respon-

dent by the appellant was a premature retirement which is capable of crippling the respondent. I have no hesitation in declaring the said retirement to be null and void and of no legal effect whatsoever. Appellant's issue (a) (i) and (ii) are resolved against the appellant and in favour of the respondent.

Appellant's issue (b) is on whether the respondent is entitled to recover anything at all in terms of the reliefs having regard to the parties pleadings and evidence.

It appears that all the arguments put forward by the learned counsel for the appellant were made on the basis that the contract of service between the appellant and the respondent is that of ordinary master and servant. It has now been established by the court below and this court, beyond any peradventure, that the contract of service between the appellant and the respondent is one with statutory flavour. Thus, any further discussion or consideration of the matter in dispute under the guise or principles of ordinary master and servant relationship would yield no positive result. It will become moot, academic and an exercise in futility. I am not ready to embark on such a worthless exercise. **A court of law is enjoined to adjudicate between parties in relation to their competing legal interests and never to engage in a mere academic discourse, no matter how erudite or beneficial it may be to the party raising it or even to the public at large.** See: *Union Bank v. Edioseri* (1988) 2 NWLR (Pt.74) 93; *Julius Berger Nig. Ltd v. Femi* (1993) 5 NWLR (Pt.295) 612; *Adelaja v. Alade* (1999) 6 NWLR (Pt.608) 544 at p.563; *Nwobosi v. ACB Ltd.* (1995) 6 NWLR (Pt.404) 658 at p.681; *Ezenya v. Okeke* (1995) 4 NWLR (Pt.388) 142; *Onyeneye v. Oduqbesan* (1972) 4 SC 244; *Bakare v. ACB Ltd.* (1986) 3 NWLR (Pt.26) 47; *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt.67) 797; *NIDB v. Fenibo Nig. Ltd.* (1997) 2 NWLR (Pt.489) 543 at p.559; *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506 at p.566; *Titiloye v. Olupo* (1991) 7 NWLR (Pt.205) 519 at p.534; *Ukejianya v. Uchendu* (1950) 13 WACA 45.

It is trite also that a court of law does not act in vain. See: *Iweka v. SCOA* (2000) 3 SC 21 at p.29. I find issue (b) to have no relevance to this appeal and it is accordingly struck out.

In the final result, this appeal lacks merit and it is hereby dismissed. I affirm the judgment of the court below. The appellant shall

pay costs of this appeal in the sum of N100,000.00 (One Hundred Thousand Naira Only) to the respondent.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - I. T. Muhammad JSC. I agree with all the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed. B

I wish to observe in passing that where the terms and conditions of a contract of service are created by statute, same must be complied with when the contract is being brought to an end. If there is failure to act in the right direction, the court would declare the termination as null and void and pronounce the employment as valid and subsisting. An employment is said to be clothed with statutory flavour if the appointment is protected by statute. See: *Eperokun v. University of Lagos* (1986) 4 NWLR (Pt. 34) 160; *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt. 9) 599. C

The Court of Appeal placed total reliance on the decision of this court in the case of *Psychiatric Hospital Management Board v. E. O. Ejitaga* (2000) FWLR (Pt. 9) 1510 at 1519 where requisite conditions to be put in view have been laid down as follows :- E

(1) The Board must have requested the employee to retire from service as provided by section 2 (1) of NEPA Act, Cap 256, LFN 1990. F

(2) The respondent must have attained the age of 45 years.

(3) The respondent must be given three months notice in writing that the Board requires him to retire.

The facts and circumstance of the above authority are on all fours with those of this case. The Court of Appeal with due regard for the doctrine of *stare decisis* found that the respondent's employment is governed by Exhibit A which contains the conditions of employment made pursuant to paragraph 9 of Part 111 of the Schedule to the National Electric Power Authority Act, Cap 256 LFN, 1990 and as such, clothed with statutory flavour. It was found that the respondent could not be shown the way out without full compliance with the relevant provisions of the said Exhibit 'A'. G H

Exhibit F, the letter of retirement served on the respondent

did not comply with the 3rd condition stipulated in PHMB v. Ejitagha (supra). The Court of Appeal rightly found that notice of retirement was not properly brought to the notice of the respondent and as such, inchoate. Same rendered Exhibit F invalid in bringing the contract between the parties to an end.

B I completely agree with the position taken by the court below. I commend it for towing the path of honour by complying with the doctrine of *stare decisis*. That is how it should be. The doctrine postulates that a point of law that has been settled by a superior court should be followed. There is sense in it to avoid confusion. It is not proper to refuse to follow the decision of a superior court where same is apt. A lower court should tow the line, as it were. See: Royal Exchange Assurance Nig. Ltd. v. Aswani Textiles Ind. Ltd. (1991) 2 NWLR (Pt. 176) 639 at 672; Atolagbe v. Awuni & Ors. (1997) 7 SCNJ 1 at pages 20, 24 and 35.

D For the above remarks and more especially the detailed reasons adumbrated in the lead judgment which I hereby adopt, I too feel that the appeal should be dismissed. I order accordingly and endorse all the consequential orders contained therein; inclusive of that relating to costs.

PETER-ODILI JSC, CFR

F This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on 22/7/05 granting the respondent the reliefs he claimed as per his originating processes save plaintiff's 6th prayer.

G The appellant (defendant at the trial stage) counter-claimed for the sum of N150, 000.00 per annum for the use and occupation by the respondent of the appellant's 3-bedroom flat and its appurtenances situate at No. 155 Idowu Street, Olodi Apapa Lagos from 1/9/99 until possession was given up. The appellant also counter-claimed special and general damages against the respondent. The trial judge H dismissed the respondent's claim as well as the appellant's counter claim.

On appeal to the Court of Appeal, the Court of Appeal held that the contract of employment between the instant appellant and the instant respondent had statutory flavour and thereafter set aside

the decision of the trial court, and obliged the respondent of all the reliefs claimed in the originating processes, save relief number vi

The appellant through their counsel on the date of hearing being 2/10/12 adopted the brief settled by Okorie Kalu Esq in which were framed two issues for determination, viz:

(a) Whether the respondent's employment had a statutory flavour, and in particular:

i) whether the appellant's contract of employment stemmed from a statute.

ii) whether the lower court was right in inferring a special relationship between the appellant and the respondent on the strength of section 4 of the National Electric Power Authority Act Cap 256 LFN 1990, which does not make express provisions regulating the employment of the respondent especially in matters of discipline, removal, retirement, etc nor was incorporated in the conditions of service regulating the relationship between the parties.

(b) Flowing from the above, is the respondent entitled to recover anything at all in terms of reliefs, having regard to the parties pleading and evidence.

Learned counsel for the respondent adopted the brief of the respondent settled by Osuala E. Nwagbara Esq and in it was formulated a single issue as follows:

Whether, taking the totality of the respondent's case into consideration, the judgment of the Court of Appeal should not be upheld.

The sole issue of the respondent capturing all the issues crafted by the appellant which are really clumsy, would be utilized.

Learned counsel for the appellant stated that contracts have been identified by the Supreme Court as falling into three categories namely:

(a) Master and Servant

(b) Where a servant holds an office at pleasure or public servant in civil service simpliciter

(c) Employment that is governed by statute. *Olawaju v. Afribank (Nig) PLC* (2001) 13 NWLR (Pt. 731) 731 at 705; *In NITEL v Ikaro* (1994) 1 NWLR (Pt. 320); *Union Bank Ltd v Ugboh* (1991) 1 NWLR (Pt. 167) 369 at 387 - 388.

That in master/servant relationship, the termination of service of the employee is at will and at best it can only give rise to a claim for

damages when found to be wrongful. That an employer of an employee whose appointment has statutory flavour has no right to terminate his appointment at will because the employee does not hold the appointment at the pleasure of such an employer. He referred to the case of *Olaniyan v University of Lagos* (1985) 2 NWLR (Pt. 9) 599.

B Mr. Nwokeukwu, learned counsel for the appellant further submitted that the implication of contract of service having legal or statutory flavour that they are protected both by statute and by the court as a wider gamut of remedies is available to an employee where the termination of his employment is found unlawful to wit declaratory C reliefs (especially) as to the validity and subsistence of employment albeit at the discretion of the court and the equitable relief of specific performance in which a re-instatement of the employee would be ordered. He cited *Shitta -Bay v Public Service Commission* (1981) 1 D SC. 40; *Olaniyan v University of Lagos* (supra); *Udo v. C.S.N.C.* (2001) 14 NWLR (Pt. 732) 116 at 163 - 164.

That an employment is said to be protected by statute when the appointment and termination are governed by statutory provision and in circumstances where the procedure for employment and E discipline of an employee are clearly spelt out. He further stated that a contract with statutory flavour is targeted at a certain category of employees, usually in the management cadre. That statutory flavour is not inferred and must be expressly created by statute or incorporated into the contract of employment existing between the parties. F He referred to *Idoniboye- Obu v NNPC* (2003)1 SC. (Pt. 1) 40; *Fakuade v OAUTHMB* (1993) 5 NWLR (Pt. 291) 47 at 63; *lyase v UBTHMB* (200) 2 NWLR (Pt. 643) 45 at 58.

G Mr. Nwokeukwu for the appellant said the respondent does not belong to the management cadre contemplated for those within a statutory flavour relationship of employment.

For the appellant was further contended that the contract of service of the respondent is not of statutory flavour but merely that of master/servant relationship and the reliefs the respondent is entitled to having regard: H

1. To the applicable principles in the common law principles guiding the relationship of master/servant
2. The reliefs available in such instance, and
3. The ones pleaded and proved having regard to the evi-

dence and pleadings before the court.

He cited *Vince v National Docklabour Board* (1956) 1 ALL ER; *Bello v Eweka* (1981) 1 SC 101 at 102; *Godfrey Isievwore v National Electric Power Authority* (2002) 7 SCNJ 323; *Chukwuma v Shell Petroleum* (1993) 4 NWLR (Pt. 289) 512 at 539; *Shell Petroleum Dev. Co v Lawson -Jack* (1998) 4 NWLR (Pt. 545) 249. B

For the respondent, Mr. Nwagbara on his behalf stated that this court has since the case of *Psychiatric Hospital Management Board v E. O Ejitagha* (2000) FWLR (Pt. 9) 1510 recognised that there are three different ways of bringing an employee's employment to an end before it runs full cycle, by the employer that these are: C

1. By ordinary termination of such employment by the employer with or without complying with the terms of the employment contract.

2. By dismissal of the employee by the employer with or without complying with the terms of the employment contract. D

3. By pre-mature retirement whereby an employer invites the employee to retire prematurely albeit involuntarily.

Mr. Nwagbara went on to contend that where the employee central attitude of this court to a dispute arising therefrom has been hinged on the age long common law principle that generally a court cannot force an employee. That the courts have always recognised the right of the employer to hire and fire at will and in holding to this age long principle of law, the court is guided by two factors being: E

(a) In the case of master and servant contract of employment, termination of service or dismissal from service by the master is at will, and when found to be wrongful can only be remedied by ascertainable damages. He cited *Imoloame v. WAEC* (1992) 9 NWLR (Pt. 265) 303. F

(b) In every case where there is contention that the contract goes beyond mere master and servant contract of employment, the court have upon invitation inquired whether there are special conditions precedent which the employer has to fulfill before exercising the right to hire and fire at will. That where these special conditions exist, the courts have always held that damages are not enough compensation. And that all the conditions precedent to the employer's right to hire and fire must be fulfilled before the exercise of such right. He referred to *Psychiatric Hospital Management Board v. E. O.* G H

Ejitagha (2000) FWLR (Pt. 9) 1510 Shitta-Bay v Public Service Commission (1981) 1 S. C. 40; Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599; UMTHMB v. Dawa (2001) 16 NWLR (Pt. 739) 424.

B He said the Lower Court was right when it held that the contract of service between the respondent and the appellant had a statutory flavour. The reasons being that the appellant was set up by the National Electric Power Authority Act (NEPA Act) Cap 256 Laws of the Federation of Nigeria 1990, which fact brings the respondent within the condition of an employer set up by statute. That the respondent being appointed pursuant to the provision of the NEPA ACT and therefore comes within the condition requiring express provision regulating the employment of the staff. Also Exhibit A, the conditions of service governing respondents employment derived from D paragraph 9 of Part III of the schedule to the NEPA Act, the third condition in what employment under statute. Mr. Nwagbara further stated that respondent occupied the position of Area Commercial officer, a senior management position in the appellant Establishment had become an established staff thereof having put in 26 years of E service and was 49 years old at the time the appellant purportedly retired him prematurely and so the fourth condition was made.

He canvassed the position that the Pensions Act, Cap 346 Laws of the Federation 1990 has consolidated the pensions contained in the civil service of the Federal Republic of Nigeria and those contained in the conditions of service of organizations, authorities and corporations declared as Public Service Institutions by the Pensions F Act under SECOND SCHEDULE thereof, whose established staff (officers) enjoy special status by virtue of the provisions of the said G Act which make their service governed by the Civil Service Rules. That the Pensions Act is only a consolidating statute. He stated that under Section 24 the Pensions Act defines OFFICER to mean a person employed in the established grades of the public service and does not include officers on temporary or contract appointment.

H Mr. Nwagbara of counsel stated for respondent that appellant is number 40 in the list of organizations declared Public Service under Second Schedule of the Pension Act. He said the power of the appellant to make regulations pertaining to staff appointment, promotion and discipline is exercisable by the Board as delegated power

by virtue of the provisions of Section 2 of the NEPA Act.

Learned counsel for the respondent said that Exhibit A the appellant's Conditions of Service in Chapter 13 paragraph 131.01 used the word established in relation to employees and that the word "established" was defined by the Court of Appeal in Kwara State Independent Electoral Commission v Peoples Democratic Party (2005) ^B ALL FWLR (Pt. 277) 980.

That from the above the respondent is an established employee and a Public Officer to whom contract of service conditions apply by virtue of the NEPA Act and Sections 4, 15(2) and 24 as well as Second Schedule of the Pension Act and the conclusion being that the contract of service of the respondent has statutory flavour. ^C

The main question raised in this appeal and even in the two courts below is whether or not the respondent's contract of service had statutory flavour. ^D

In answer to this question I shall have recourse to some of the earlier views of this court in the matter. Iguh JSC in the judgment in Idoniboye-Obu v. NNPC (2003) FWLR (Pt. 146) 959 at 992 stated:

"Two of the vital ingredients that must co-exist before a contract of employment may be said to import statutory flavour include the following: ^E

- 1. The employer must be a body set up by statute;*
- 2. The stabilizing statute must make express provisions regulating the employment of the staff of the category of the employee concerned especially in matters of discipline"* ^F

In a similar vein and in the same case of Idoniboye-Obu v NNPC (supra) at 1004, Niki Tobi JSC cited with approval, the opinion of Karibi-Whyte JSC in Imoloame v WAEC (1992) 9 NWLR (Pt. 265) 303, added another feature in these words. ^G

"There is an employment with statutory flavour when the appointment and termination is governed by statutory provisions....It is accepted that where the contract of service is governed by the provisions of statute or where the conditions of service are contained in regulations derived from statutory provisions, they invest the employee with a legal status higher than the ordinary one of master and servant. They accordingly enjoy statutory flavour." ^H

From the above guides already set by this court, the legislations creating or governing the appellant would be placed on record

so as to see if the appellant is one of those institutions or establishment that are within the ambit of statute and their activities especially in relation to employment are to be termed to be with statutory flavour or governed by those statutes. It is in that light that I shall quote certain sections of the National Electric Power authority, (the original
 B appellant which has now been succeeded by the Power Holding Company), (Act NEPA ACT) Cap LFN 1990 and also the pensions Act with reference to the Civil Service of the Federal Republic of Nigeria Rules.

C Section 4 of the NEPA Act provides as follows:

“The Board may with the approval of the National Council of Ministers by bye-laws make provisions for matters connected with the foregoing and also in relation to the appointments, promotion and discipline of the officers and servants of the authority.”

D The conditions of service governing respondent’s employment derived from Paragraph 9 of Part III of the Schedule to the NEPA Act. The respondent occupied the position of Area Commercial Officer, a Senior Management position in the appellant’s establishment and had put in 26 years of service and was 49 years at the
 E time the appellant retired him.

The matter of this retirement is to be considered in the context of the Pensions Act, Cap 246 laws of the Federation of Nigeria 1990 which Act consolidated the person’s provisions contained in the Civil Service of the Federation and those contained in the conditions of service of organizations, authorities and corporations declared as Public Service Institutions by the Pensions Act under the SECOND
 F SCHEDULE whose established staff or officers enjoy special status by virtue of the provisions of the said Act which have provided that
 G their service is governed by the Civil Service Rules.

Section 4 of the Pensions Act provides thus:

“4(1) Every officer shall retire upon attaining the age of sixty years, so however that for officers retiring on or before 31st March 1977, the compulsory retiring age shall be fifty-five years”

H *“(2) the Minister may require an officer to retire from the service at any time after he has attained the age of forty-five years subject to three months notice in writing of such requirement being given.”*

Section 24 of the Pensions Act aforesaid defines “Officer” to

be a person employed in the established grades of the public service but does not include officers on temporary or contract employment.

Then Section 15(2) of the Pensions Act provides that:

*“15(2) In addition to any declaration made under any other enactment service in any of the organizations listed in the **SECOND SCHEDULE** to this Act is hereby declared to be civil service for the purpose of calculating qualifying service under this Act”*

In keeping with section 15(2), the appellant is number 40 in the list of organizations declared Public Service under Second Schedule of the Pensions Act.

Section 2 of the NEPA Act provided for the power of the appellant to make regulations pertaining to staff appointment, promotion and discipline being exercisable of the Board as delegated power.

Having set out these legislations without doubt applying to the parties, I shall quote verbatim the summation of the Court of Appeal, per Dattijo Muhammad JCA (as he then was) who anchored the lead judgment.

The Appellate Court, where the trial court had neither failed nor partially or incorrectly evaluated the evidence and the exercise bordered on the credibility of witness, is in no position to carry out the evaluation exercise and possibly interfere with the trial court's decision. See *Gindu v Kitta* (1999) 12 NWLR (Pt.629) 21 CA & *Kulobo v. Ikuomola* (1999) 12 NWLR (Pt. 629) 146 SC.

Again, where the trial Court had arrived at its decision either after it had taken irrelevant facts or circumstance into consideration or omitted such facts or circumstance in its consideration, the court's eventual decision being perverse opens itself to being interfered with by the appellate Court. See *Akpan v. Utin* (1996) 7 NWLR (Pt. 463) 634 SC and *Akinsanya v. Soyemi* (1980) 8 NWLR (Pt.560) 49 CA.

In the instant case where the lower court failed to take into consideration that Ex. A had evolved by virtue of S.4 and paragraph 9 of the Part HI in the Schedule to the National Electric Power Authority Act, thereby giving appellant's employment some statutory flavour, it inexonerably reached a perverse decision which an appellate Court would be right to interfere with. Having wrongly decided that appellant's employment had correctly been determined, the lower court's consequential orders following such a wrong determination

of the crucial issue cannot certainly be right. I so hold. Having found that appellant's employment has statutory flavour and same has been wrongly terminated by the respondent, the natural and unavoidable inference is that appellant's employment subsist. Appellant is entitled to all the reliefs he claimed except the 6th relief that has not been proved. Regarding this head of claim, the Lower Court is right in holding that appellant being in occupation and the person in de facto possession of the residential accommodation situate at No. 155 Idowu Street, Olodi-Apapa, Lagos can maintain an action for trespass against the whole world except the respondent being the owner of same. Respondent remained de jure possession of its property even though not in actual physical occupation of same. See *Anyabunsi v. Ugwunze* (1995) 6 NWLR (Pt. 401) 255; *Ayoola v. Yahaya* (2005) 7 NWLR (Pt.923) 122 and *Dabo v Abdullahi* (2005) 7 NWLR (Pt. 923) 181 at 212 SC.

From the foregoing, it stands clearly that the lower court was wrong to have held, since Ex. F, the letter determining appellant's employment had not been issued in strict compliance with what the terms of his employment, Ex. A provided and Ex. A being a contrivance pursuant to an enactment, that appellant was validly retired by the respondent. He was not. The purpose of a notice envisaged under Ex. A was to notify the appellant of the fact of his retirement. The fact of notification ceases to be a major issue as Ex. F had not been validly issued in the first place. You talk of notice only of a valid process which for reasons already recounted Ex. F was not. Appellant given the nature of his employment and same having been unlawfully determined is entitled to re-instatement.

In sum, the three issues formulated by the appellant are resolved in his favour. The appeal has merit and same is allowed."

To bring this appeal in proper view, I shall briefly make a recap of the facts. The plaintiff as per his pleadings and evidence inclusive of the relevant documents put forward that during the first week of September 1991 while on a routine visit to the defendant/appellant headquarters was orally informed by the Administrative officer in charge in Benin that he, respondent had been retired from the services of the appellant with effect from 1st September, 1991 and the plaintiffs salary stopped. That he had put in 26 years of service and was only 49 years of age. Respondent said with the action of the

appellant have breached the terms of his employment including the fact that he was not 60 years of age and had not put in a statutory maximum service years of 35 in continuous employment of the appellant. Also the fact that he was not even notified of the purported retirement of his service.

The appellant's reaction is that he, respondent was in 1991 after the appellant's committee on re-organisation recommended the respondent alongside other staff for retirement. That by the condition of service of the respondent, an employee of the appellant can be retired after attaining the age of 45 years.

It is clear that the poser at this point is whether the respondent's employment had statutory flavour and could only be determined in strict compliance with his conditions of service, Exhibit A. This Ex. A had no provision for the payment of three months salary in lieu of notice which payment the appellant had called on the respondent to accept pursuant to Ex.F the retirement letter.

Taking a cue from the case of Psychiatric Hospital Management Board v E. O Ejitagha (2000) FWLR (Pt. 9) 1510 which seems to share similar features with the case in hand and therefore the opinion of this court would be instructive for our purpose.

In that case the respondent was a Chief Executive Officer (Accounts) on grade level 13 at the Psychiatric Hospital Uselu, Benin City attached to the University of Benin Teaching Hospital (UBTH). His employment was governed by the Psychiatric Hospital Management Board Act 1979 (formerly Decree No. 92 of 1979). The third schedule to the said Act lists hospital under the control and management of the appellant Board of which this Psychiatric Hospital, Uselu is included as attached to UBTH. The UBTH is listed in the schedule to the Pensions Act, 1979 (formerly Decree No. 92 of 1979) and stated as Public Service under that Act, thus making the respondent a civil servant.

The respondent was dismissed from appellant's service which dismissal was set aside in court and was reinstated to his office by order of the court which declared his dismissal null and void. That was on 12th September, 1990. Three months later the appellant by a letter dated 4th December, 1990 summarily and compulsorily retired the respondent from its service. Again, the respondent contested this retirement in the Benin High Court praying for its nullification which

court dismissed his claim. The Court of Appeal allowed his appeal and the appellant went to the Supreme Court which dismissed the appeal held thus -

“In order to validly retire a serving officer under Section 4 (2) of the Pensions Act the affected officer must:

- B *i. Have attained the age of forty-five years*
- ii. Be given three months notice in writing of such requirement being given and that such a request*
- iii. Have been authorized by the Minister himself or by delegated as required by law”.*

C From this road map what is thrown up is that for a compulsory retirement of an employment which is covered by the provisions of Section 4(2) Pensions Act, Cap 346 LFN 1990 the three conditions stated above must be completely in existence as there is
D need for strict compliance. Therefore payment of three months notice in lieu of notice does not fulfill this requirement imposed by law. The situation is all the more critical considering the conditions of service which the appellant had a disregard for and did not honour. The lack of respect for the statutes governing the employment of the respondent as shown by the appellant cannot be tolerated and this
E court must in the strongest terms show its abhorrence to such an action by an agency of the state which ought to be a beacon of light in the application of the Rule of Law. An employee in service albeit a senior civil servant as the respondent, statutorily protected and covered cannot be hustled out of office on the imagined power of a
F superior officer or officers who should know better. I rely on the cases of Psychiatric Hospital Management Board v. E. O Ejitaga (supra) which effectively settled the concern not only that case but has
G been a guide in this appeal at hand.

From the foregoing and the well articulated reasoning in the lead judgment of my learned Presiding Justice, Ibrahim Tanko Muhammad JSC, I too dismiss this appeal and affirm the judgment and orders of the Court of Appeal.

H I abide by the consequential orders in the lead judgment.

AKA 'AHS JSC

The respondent in this appeal was the plaintiff in the High Court

of Lagos State in *Suit No. LD 3361/ 94* wherein he claimed certain reliefs among which was a declaration that his purported retirement from the services of the defendant is null and void as contravening both the Civil Service Rules of the Federal Republic of Nigeria as well as the terms of the service contract between the plaintiff and the defendant and asked for an order for his reinstatement. B

He was employed by the then Electricity Corporation of Nigeria (ECN) as an Assistant Technical Officer in 1966 and rose to the position of Area Commercial Officer in 1991 when he was compulsorily retired from service by a letter dated 29th July 1991. At the time of his retirement he was aged 49 years. He instituted the action in 1994 seeking among other things a nullification of his retirement from service. The defendant/appellant counter-claimed and asked for: C

"1. N150,000.00 (one hundred and fifty thousand naira only) per annum being cost for the use and occupation of 3-bedroom flat D and appurtenances at No. 155, Idowu Street, Olodi Apapa, Lagos from 1st September, 1991 till possession is finally given up to the defendant

2. Special and general damages".

The parties called evidence. In its judgment which was delivered on 1/2/2002, the High Court dismissed the plaintiffs case in its entirety as well as the defendant's counter-claim for special and general damages. The Court ordered the plaintiff to pay N3,600 (Three Thousand, Six Hundred Naira) per annum to the defendant for the use and occupation of the 3-bedroom flat and appurtenances situate at No. 155, Idowu Street, Olodi, Apapa. Lagos from 1st September, 1991 until he gives up vacant possession to the defendant. F

The plaintiff was dissatisfied with the judgment and appealed against it to the Court of Appeal (herein referred to as the lower court) which allowed the appeal and reversed the judgment of the trial court. The respondent felt dissatisfied with the judgment of the lower court and consequently appealed to this Court. During the pendency of the appeal in this Court the appellant brought an application filed on 23/9/2011 which was granted on 2/10/2012 changing the name of the appellant from National Electric Power Authority to Power Holding Company of Nigeria (PHCN) Plc. G

My learned brother I. T. MUHAMMAD JSC made available to me the draft of the judgment. He has addressed the main issue in H

contention in this appeal which deals with the status of the respondent's employment which I wish to comment on for purposes of emphasis. As aptly defined in the judgment of the lower court.

"A contract of employment is said to have statutory flavour where such a contract is governed by provision of a statute, regulations or conditions of employment derived from either statute or regulations. See: Olaniyan vs University of Lagos (1985) 2 NWLR (Part 9) 509; Federal Civil Service Commission vs Laoye (1989) 2 NWLR (Part 106) 652 and Fakuade vs O. A. U. T. H. (1993) 5 NWLR (Part 291) 47". See pages 175-176 of record of appeal.

In paragraphs 16 and 23 of the statement of claim the plaintiff/respondent had pleaded as follows:-

"16. The plaintiff avers that as at September, 1991 he was only aged 49 years and had put in a total number of 26 years in the service of the defendant and that his purported retirement runs contrary to the articles of the Civil Service rules of the Republic of Nigeria.

2.3 The defendant has breached the terms of employment between the plaintiff and the defendant

(a) Fact of stoppage of the plaintiff's salary without just cause and without formal communication of same to the plaintiff.

(b) Purported retirement of the plaintiff from the service of the defendant when the plaintiff had neither attained the statutory retirement age of 60 years nor put in a statutory maximum service years of 35 in continuous employment of the defendant.

(c) Fact of lack of formal communication of the purported retirement of the plaintiff from the service of the defendant".

The defendant/appellant did not join issue with the plaintiff/respondent as regards the effective period of notice for retirement when it was pleaded in paragraphs 7 and 10 of the Statement of Defence as follows:

"7. The defendant denies paragraphs 16 and 17 of the statement of claim and further states that by the condition of service of the defendant, an employee of the defendant can be retired after attaining the age of 45 years. The defendant shall at the trial rely on the relevant page of the condition of service.

10. The defendant specifically denies paragraph 23 of the statement of claim and put the plaintiff to the strictest proof of same. The

defendant states that it has never been in breach of terms of employment the plaintiff and that the plaintiff was formerly (sic) retired from its employment, the defendant had never attempted forceful ejection on the plaintiff'.

The lower court found that Exhibit 'A' contained the terms and conditions of employment of the plaintiff/respondent and it was made pursuant to paragraph 9 of Part III of the Schedule to the National Electric Power Authority Act Cap. 256 of the Laws of the Federation of Nigeria 1990 consequently the employment had statutory flavour and the employer will not be allowed to, whimsically determine the employment. The employer must comply with the laid down rules; otherwise the action taken to determine the employment will be declared a nullity. See: *Eperokun vs University of Lagos* (1986) 4 NWLR (Part 34) 160 and *Olaniyan vs University of Lagos* Supra. Clauses 131.01 and 131.02 13 of Exhibit 'A' provide as follows:

"131.01 All establishment employees shall on three months notice, at any time after attaining the age of 45 years -

(i) have the option to retire

(ii) or be liable to be called upon to retire.

131.02 Compulsory Retirement.

An employee will be required to retire from the service on attaining the age of 55 years provided that, if it is in the interest of service, the authority may defer his retirement for one or more periods of years subject to a certificate of medical fitness at the beginning of each extension".

By circular No. 23/78 dated 14th April, 1978 which was back dated to 1st April 1977, the compulsory retiring age was raised to 60.

In view of the fact that the respondent was 49 years of age when he was retired, the appellant could lawfully terminate the employment by giving the respondent three months notice of retirement as stipulated in clause 131.01 of Exhibit 'A'. The three months notice could be dispensed with if disciplinary action leading to dismissal was taken. The fact that in the course of the employment the respondent was queried, given a warning letter and his promotion deferred for two years will not justify his being laid off without being given the three months' notice. The failure by the appellant to adhere strictly to clause 131.01 of Exhibit 'A' rendered the retirement of the respondent a nullity. The lower court rightly allowed the ap-

peal and ordered the reinstatement of the respondent to his job.

It is for this reason and the fuller reasons contained in the judgment of my learned brother, I. T. MUHAMMAD JSC that I too dismissed the appeal and abide by the order made on costs.

B

ARIWOOLA JSC

C I had the opportunity of reading the draft of the lead judgment just delivered by my learned brother Tanko Muhammad, JSC, and I agree entirely with his reasoning and conclusions. I adopt same as mine. I subscribe to the order of my learned brother on costs in the said lead judgment.

D

E

F

G

H