

Procedures for the Removal of Managing Directors in Nigeria: Any Need for Duality of Approach under the Companies and Allied Matters Act?

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Abstract

This paper discusses the distinction between the mode of removing directors who are appointed for a term of office and directors who rose through the ranks from a junior staff. The paper argues that there is no reason for the maintenance of the distinction that allows the former to enjoy greater protection of the law than the latter, and canvasses that the distinction should be obliterated from our company law and practice, as it is not contained in the Companies and Allied Matters Acts.

Keywords: appointment, Companies and Allied Matters Act, managing directors, Nigerian law, removal

1. Introduction

The removal of a Managing Director of a registered company in Nigeria has been the subject of controversy over the years. This is notwithstanding that the provisions of the Companies and Allied Matters Act (CAMA)¹ does not lend credence to the controversy that has appeared both in practice and in judicial opinions.

In the first place, there is no provision in the CAMA dealing with the removal of managing directors. As a result, in the absence of any provision in the articles of association of a company, the valid removal of a person from the office of a director effectively terminates his position as a managing director. Under this circumstance, it is the terms that governed the contract of the managing director as a director that would be the contractual basis for the liability of the company to the managing director for wrongful removal. In *Yalaju-Amaye v. Associated Reg. Engineering Contractor Ltd*, the Supreme Court held that the appointment of a managing director is governed by CAMA and that a managing director ceases to be so if he ceases to be a director because he is a director who is appointed as a managing director.² Accordingly, the fact that the status of a managing director is inextricably tied to that of a director makes it possible to resort to the procedures laid down for the removal of directors in ascertaining the validity of the removal of a managing director.

In practice, different types of contractual arrangements may underlie the appointment of a director: he may be named in the articles of the company; he may not have been named in the articles but appointed under a separate contract; or he may be elevated from a junior staff to the position of a director without any specific contract reflecting his directorate status beyond his initial contract of service as a junior or senior staff of the company. This position was acknowledged by the Supreme Court in *Iwuchukwu v. Nwizu*, as follows:

There are times when the articles ...give directors or the company the power to appoint executive, special or alternate directors. In practice, the 'executive' or 'special' director as an employee of the company whose status has been raised to that of a director but who continues

¹ Cap. C26 Laws of the Federation of Nigeria, 2004

² [1990] 4NWLR (Pt. 145) 422, 443

essentially as such employee, e.g, a sales director.³

The underlying contractual relation between a director and the company has been relied upon in many cases to avoid the rigorous procedures specified for the removal of directors under Nigerian company law. The problem is exacerbated in cases where, (for instance) though an employee had risen to the position of a managing director, the only explicit contractual relations he has with the company is that which governed his employment as a junior staff. For all that contract may be worth, it may require the issuance of a one month notice or salary in lieu for a proper determination. In practice, when seeking to get rid of such a managing director, the company may simply issue a one-month notice to terminate the original employment and thus terminate the directorship which tenure was not secured by a separate agreement. But where the managing director's directorate status is secured by contract, it is difficult to validly terminate the directorship by a simple notice of termination.

The problem of resorting to terminating a managing director's appointment as a staff of the company or his directorship in order to frustrate his position as a managing director is not entirely wrong; it is not wrong when the directorship is properly determined according to law, neither is it peculiar to Nigeria.

In the English case of *Southern Foundries Ltd v. Shirlaw*,⁴ the respondent, who was a director, was appointed managing director for ten years. He was subsequently removed from the office of a director and *ipso facto* ceased to be managing director. He brought an action for damages for breach of agreement on the basis of his ten years contractual tenure as managing director.

It was stated in the company's articles that a managing director should, "subject to the provisions of any contract between him and the company be subject to the same provisions as to ... removal as the other directors of the company". It was further provided that a managing director would cease to hold that office upon ceasing to be a director. The articles also gave the company the power to remove a director before the expiry of his tenure and that the appointment as managing director stood terminated if he ceases to be a director.

The English House of Lords held that the company was in breach as it was an implied term of the agreement by which the respondent was appointed managing director, that he would not be removed from his office as a director during the term of years for which he was appointed managing director. Lord Atkin categorically emphasized that there was a duty on the company not to alter the basis of his appointment as managing director during the tenancy of the agreement. In his words:

If a person enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an obligation on his part to do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.⁵

It is useful to state that this case was decided on the basis of the provisions of the articles of the company and on the general principles of the law of contract. The case stands for the rule that an additional contract of managing directorship may condition the actions that the company may take in relation to the directorate status of a person during the tenancy of a fixed tenure as a managing director.

It is essential to bear in mind the similarities between the provisions in the articles of the company which the House of Lords interpreted in *Southern Foundries Ltd v. Shirlaw* and the relevant provisions of CAMA. Nevertheless, it is not very clear whether this position is maintainable under the CAMA in view of the fact that CAMA give companies the right to terminate the appointment of directors (even when appointed for life) upon following the specified procedure of the law. It does appear from the totality of the provisions of the CAMA on removal of directors, that the right of a company to remove a director under the CAMA cannot be fettered beyond the observance of the provisions in section 262. The validity of the removal can only have relevance to the assessment of damages and not to security of tenure against the wishes of the company.

It is therefore safe to argue that under the CAMA, the removal of a person as a director *ipso facto* terminates his appointment as a managing director, irrespective of any contract guaranteeing his tenure as managing director. As a result, the siamese nature of the office of a director and managing director works in one direction only in view of the fact that the removal of a person as a managing director does not necessarily affect his tenure as a director unless this was expressly indicated by the company. Similarly, a managing director appointed by the

³ [1994] 7 NWLR (Pt. 357) 379, 396

⁴ (1940) AC 701

⁵ *Ibid*, 717

articles of the company may resign his appointment without resigning his directorship. According to Emiola,⁶ where a managing director resigns his position of directorship, it will automatically mean resignation of the post of managing director.

Despite the lack of a definite endorsement of this position in either the 1968 Companies Act or in CAMA, there are case law evidence to show that the contract of service of employees who later became directors/managing directors have severally been relied upon by company managements under the regime of the Acts to draw a distinction between the procedures for the removal of directors appointed as such in the articles of the company and those who were employed as junior employees of the company but rose through the ranks to become directors. As the writers shall show later, there have also been some judicial endorsements of this position. The effect of the dichotomy is that those appointed in the article of a company enjoy more protection than those who rose through the ranks, notwithstanding that there is actually no distinction on that basis on their functions, liabilities and responsibilities as directors. In the writers' view, this has created double standards in practice without any real legal justification.

In this brief contribution, the writers examined the statutory rules relating to the removal of managing directors as well as the relevant case law on the point but finds no justifiable reason why the tenure of a director should enjoy more protection under the CAMA than that of a co-director, who may even be the managing director of the same company, merely on the basis of the mode of appointed. To fully do this, the writers shall rely on the rules governing the procedures for removing directors. The writers argue that the provisions of CAMA governing the removal of directors are broad enough to cover all directors, irrespective of the mode of their appointment and urge the Supreme Court to leave nothing to doubt in eliminating whatever vestige of that dichotomy might remain in case law when the opportunity presents itself.

2. Who is a Managing Director?

The juristic nature of the personality of a corporate body⁷ makes it inescapable for individuals to act for it, represent it and make decisions concerning how it should be run. Persons entrusted with the management of a company are called the company's directors.⁸ They are defined in section 244 of the CAMA, as "persons duly appointed by the company to direct and manage the business of the company". They are "appointed to act as one of a board, with power to bind the company when acting as a board but having otherwise no power to bind them".⁹ It is thus a requirement under Nigerian company law that every company must have at least two directors.¹⁰ These directors are however allowed to choose a managing director from one of their members under section 64 of the CAMA. The managing director is therefore a delegate of the board of directors, from where he derives his powers.

A managing director is also a director in his right, so that rights and duties attaching to the office of director are part of the privileges and obligations of a managing director. Thus, in the case of *Amaye v A.R.E.C. Ltd*,¹¹ it was held that a managing director is just another director but only with extra responsibility. A managing director is the chief executive of the company; he is charged with the responsibility of overseeing the day to day administration of the company, co-ordinating executive policies and directing its operational activities.¹² As stated by the court in *Olawepo v. S.E.C*,¹³ the business of the company is managed by the board of directors through board meetings and general meeting. The managing director exercises such powers in the everyday running of the company. A director who is not a managing director participates in running the company through the board and general meetings.¹⁴

A managing director is therefore a member of the board of directors who has been singled out for additional responsibilities in the day to day running of the company outside the board room but on behalf of the board. He

⁶ Emiola, A (2001). *Nigeria Company Law*. Ogbomosho. Nigeria: Emiola Publishers, p. 322

⁷ Section 37 CAMA

⁸ Section 245(1) CAMA

⁹ *Iwuchukwu v. Nwizu*, *supra*, (n.3), p. 396

¹⁰ Section 246(1) CAMA

¹¹ *Supra*, (n. 2); *Olufosaye v. Fakorede* (1993) 1 NWLR (Pt.272), 947, *Leonard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd* (1915) AC 705, *Haldana and Tesco Supermarket Ltd v. Nattras* (1972) AC 153

¹² *Iwuchukwu v. Nwizu*, *supra*, (n 3), 386

¹³ [2011] 16 NWLR (Pt. 1272) 122 CA 146

¹⁴ *Ibid*

is the directing mind and the *alter ego* of a company, through which the company acts.¹⁵

3. Appointment of a Director

By the provisions of section 247 and 248, the number of directors could be appointed in writing by the subscribers of the memorandum of association of a company or appointed by members at the annual general meeting of the company. Sections 246 – 261 CAMA¹⁶ govern the operation of appointment of company directors in Nigeria. The appointment of the first directors of a company is thus regulated by CAMA.¹⁷

The power to appoint or reject subsequent directors rests with the company in general meeting as provided for by the company's articles of association.¹⁸ The procedure of appointing a director is usually stated in the articles of association of the company. The articles of the company usually authorize the existing directors to replace a director who has resigned, died, retired or is removed. The board of directors can recruit new members subject to the shareholders' confirmation at the general meeting of the company.¹⁹ A subsequent director can be appointed only where a casual vacancy exists.

The articles of association of a company may vest such powers in the hands of shareholders in the general meeting. In the absence of express stipulation on the appointment of directors in a company's articles, the power to appoint directors is exercisable by shareholders of the company in general meeting by an ordinary resolution. Where the company's articles expressly state that it is the members in general meeting that can appoint directors, the board of directors cannot validly appoint directors.²⁰

The tenure of a director's appointment can be unlimited subject to section 259, which requires directors to vacate their position and offer themselves for re-election. Usually at the annual general meeting, resolutions for re-election of directors must be put to vote for each director.

A director may be appointed in the articles of the company or by contract. It could also happen that an employee rose to become a director from an initial junior position, without either being named in the articles or having a separate contract. The rise of such an employee may just be seen as normal promotion from one rank to another. Though there may be no status differences between the different sets of directors, the substratum of their directorate status are different. When a director is named in the articles, just like first directors, his appointment is secured by a service contract²¹ and where he has a separate contract, both the general provisions of the articles and his contract would combine to form the terms of his employment. On the other hand, a director that rose through the ranks may have his rights determined in line with the general provisions of the articles and the contract of service he entered into as a junior employee of the company; he may not have a separate contract reflecting his directorate status. The writers shall return to this later.

The corollary of the point already made that the office of a managing director is based on the holder of that office first being a director, is that the rule relating to the appointment of a director is equally relevant to the appointment of a managing director. As earlier mentioned, a managing director is a delegate of the board of directors. The CAMA has a two-prong approach to the issue as two sections touch directly and indirectly on the point. It is fitting to begin with section 64, which is an enactment on delegation to committees and managing director. Subsections (a) and (b) of the section stipulate that the board of directors may: (a) "exercise their powers through committees consisting of such members of the body as they may think fit"; or they may "(b) from time to time, appoint one or more of their body to the office, of managing director and may delegate all or any of their powers to such managing director". This provision was again made in section 263(5), under which:

The directors may delegate any of their powers to a managing director or to committee consisting of such member or members of their body as they think fit and the managing director or any committee so formed shall in the exercise of the power so delegated, conform to any regulations that may be made by the directors.

It is arguable from these provisions that a managing director has no settled functions, though he may wield enormous powers in the affairs of the company, depending on the degree of items delegated to him. His powers

¹⁵ *Longe v. F.B.N, Plc* (2010) 6 NWLR 1, 43

¹⁶ See section 244 and generally, part IX of CAMA

¹⁷ Section 247 ; *Longe v. F.B.N, Plc, supra*, (n. 15)

¹⁸ Section 248 CAMA; *Longe v. F.B.N, ibid*

¹⁹ Section 249

²⁰ *James v. Carmel Co.* (1882) Ch.D. 183, 187

²¹ Section 247 CAMA

would invariably extend to both matters expressly delegated and those powers incidental thereto.

4. Disqualification for Directorship

The corollary of the position of the law that a managing director is first a director, is that the disqualification criteria that applies to the directors also applies to a managing director because once a person is not eligible to be a director of a company, which is the first hurdle to be passed as a requirement for the position of managing director, he cannot be a managing director of a company. Section 257 specifies persons disqualified from holding office as directors to include:

- (a) an infant, that is a person under the age of 18 years
- (b) a lunatic or person of unsound mind
- (c) a person disqualified under section 253, 254 and 258 of this Act.
- (d) a corporation other than its representative appointed to the board for a given term.²²

In consequence, anyone falling into any of these categories is automatically not qualified to hold the office of a managing director.

5. Removal of Managing Director of a Company

Here again, it is fitting to first discuss it from the viewpoint of removal of directors. Subject to the provisions of the articles of association of a company, the contract appointing a director may provide for the removal of the director. The first point to be made is that by section 255, a life director is removable before the expiry of his tenure under section 262, irrespective of the terms of his appointment. Also, that right to remove a director at any time does not absolve the company from the payment of compensation to the affected director for wrongful termination as the director's right to compensation or damages for loss of office is guaranteed by law.²³

The most crucial provision to the removal of directors is in section 262(1) and (6) of CAMA. For its importance, section 262(1) provides as follows:

A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in the articles or in any agreement between it and him...²⁴

This is supplemented by subsections 2-6, which specify the steps attendant on section 262(1).

These provisions, which are similar to section 175 of the 1968 Companies Act, govern the removal of directors under the CAMA. It is clear from the provisions that a director is removable only after complying with the requirements of notice and ordinary resolution of shareholders. This is seen in section 262(3) which provides that where notice is given of an intended resolution to remove a director under this section, the company must inform the director concerned, and he may require the company to circulate a statement by him in his defence to members and if it is too late, the representation shall be read at the meeting. In other words, a director cannot be summarily removable under the CAMA. To this requirement of notice, the Supreme Court held in *Longe v FBN*, that section 266 provides three defences, viz:

- (a) The removed director was given the notice of meeting
- (b) The person involved has ceased to be a director of the company; and
- (c) The person involved is disqualified under section 257 of CAMA from getting the notice.²⁵

There should ordinarily be no doubt as to the unlawfulness of removing a director without complying with the procedures of section 262(1), irrespective of the manner of the director's appointment. In *Longe v. FBN, Plc*,²⁶ for instance, the removal of the Managing Director/Chief Executive without the service of reasonable notice on him was held to be null and void for non-compliance with the CAMA. In the case, following an improper grant of loan to a customer, the appellant was suspended from office by the respondent's Board of Directors. His directorship was subsequently terminated without giving him notice of the meeting. More particularly, it was held in *Awoyemi v. Solomon*²⁷ that the common law right to remove the servant is not a valid plea for the removal of a director because removal of director is governed by statute.

²² Section 257

²³ Section 262(6) CAMA

²⁴ A director for life may be validly removed under this section. See also the dictum of Adeyeye, JSC in *Longe v. FBN, Plc, supra* (n 15), 61

²⁵ *Ibid*, 30-31

²⁶ *Ibid*

²⁷ (1976) F.R.L.R 165; *C.C.B v. Onyekwulu* [1999]10 NWLR.(Pt. 623) 452, 460-461

However, and as earlier mentioned, there are case law indications to the effect that certain directors do not fall within the ambit of section 262(1) and that such directors should be susceptible to termination under the second limb of section 262(6). The distinction they draw between the two provisions lie in whether a director was named in the articles of the company or was appointed a director on the basis of a contract between him and the company, or whether he rose through the ranks to become a director through promotions. Subsection (1) applies to the first two categories while subsection (6) applies to the latter. The first two categories are said to be governed by section 262(1) and the latter by section 262(6). For the avoidance of doubt, subsection (6) provides:

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

Indeed it would appear from an examination of the provisions of subsection (1) of section 262 that importance is placed on the phrase “period of office” over the word “director”. By this term, the Act appears to have circumscribed the provisions to directors who have been appointed for a term of office, so that the operative word in the subsection is “term of office” and not the word “director”. If this line of observation is followed, it would mean that the only plausible interpretation of subsection (1) is that it protects the “term of office” of directors whose terms are either stated in the articles of the company or in a contract with it, to the exclusion of directors who have no fixed tenure of office. It would therefore have no application to all “directors”. In fact, in *Iwuchukwu v. Nwizu*,²⁸ the Court of Appeal had suggested that this distinction is the basis of the second limb of section 262 (6).

This distinction culminates in the rule that where a person is removed as a director and consequently as a managing director, except he had a contract with the company regarding his status as managing director, his remedy would be assessed based on any prior contract he had with the company. The class of directors adversely affected by this distinction is usually those who were not appointed into the company as directors but as junior staff who subsequently rose through the ranks to become directors – the basis for appointing them as managing directors. The only subsisting contract of employment they may have with the company is that by which they were employed as junior staff.

This is also emphasized in the facts which a managing director whose employment has been terminated is expected to plead. In *Morohunfolu v. Kwaratech*²⁹ the court identified the facts that an employee ought to plead before the court as follows:

- (1) that he is an employee of the company;
- (2) how he was appointed and the term and conditions of his appointment;
- (3) Who can appoint and remove him;
- (4) The circumstances under which his appointment can be terminated;
- (5) That his appointment can only be terminated by a person or authority other than a company;

In addition, the employee (plaintiff) must plead his letter of appointment and his contract of service to show that there exist a contract of employment and how to put an end to the relationship of master and servant between him and the company. Indeed, without the contract of service, it will be insufficient to establish that there existed a master and servant relationship between the parties. Once it is established that the terms are followed as stated in the contract of service, the company can terminate the contract with its servants at any time and for any reason whatsoever.³⁰ The implication of this is that the removed managing director may have only his initial employment contract to plead. If that is all he pleads, that is all the court should be concerned with. This makes his position precarious in comparison with directors who were appointed for a term of office.

The Supreme Court also appears to have placed its imprimatur on this distinction in *Yalaju-Amaye v. Associated Reg. Engineering Contractor Ltd*, where it held that:

...there is generally the relationship of master and servant between the managing director 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

²⁸ (n. 3)

²⁹ [1990] 4 NWLR (Pt.145)506, 225-226

³⁰ See *Odiase v. Auchu Polytechnic* [1988] 4 NWLR (Pt.546) 447 at 492

the company and any other contract supplemental thereto. Thus a valid determination of his contract of service would depend on the terms of such contract of service.³¹

The distinction being highlighted came to the fore in the case of *Iwuchukwu v. Nwizu*,³² a case based on section 175(1) and (6) of the Company Act 1968, which is *impairi materia* with sections 262(1) and (6) of CAMA. In the case, the appellant was appointed as a Special Assistant. He subsequently rose through the ranks to the position of an executive director and a member of the board of the company. He was subsequently reassigned to the position of a manager and his executive directorship and board membership in the company were terminated, without observing the procedural requirements of obtaining the votes of members. The trial court held that this termination was wrongful on the ground that the votes of members were not obtained. In other words, the trial court reasoned that the procedures for removing directors under section 262(1) applied to the appellant, as plaintiff, notwithstanding that he was not appointed a director on the basis of a separate contract from his initial contract of service.

The Court of Appeal took a different view, when the matter went on appeal. The court held that the removal was lawful as the company had no duty of obtaining the votes of members, since the removed director had no tenure to protect as a director and that his relationship with the company remained governed by the original contract by which he was appointed. The judgment of the court as read by Ogundare JCA is of particular interest here. According to him:

Throughout the hearing, the respondent did not produce a separate contract governing his appointment as executive director. I am satisfied from the totality of the evidence before the lower court that the respondent was not more than an employee who had been promoted and whose contract of employment as regards its termination is as stated in exhibit 16 [his original letter of appointment]. When an employee like the respondent has been lucky to get accelerated promotion, he does not for that reason alone cease to be an employee. He earned salary per annum. He reported daily for work in the office.... I agree ... that the respondent remained all through a servant and that the contract of employment was determinable by three months' notice as stipulated in exhibit 16.³³

Regarding section 175 of the 1968 Act (now 262), the erudite Justice opined:

I am of the view that the effect of section 175(6) of the Companies Act, above, is to make necessary for the ordinary resolution to be passed where the person to be removed as a director is subject to an agreement which makes it possible for him to be removed notwithstanding the provisions of section 175(6). The respondent in this case was not a director appointed for any fixed term so there can be no question that he was being removed 'before the expiration of his office' he was put on the board of the 2nd defendant at the sole wish of the latter. He derived the position by virtue of his employment. If the employment came to an end by determination, as in this case, the respondent would ... without further ado, lose his position as a member of the 2nd appellant's board.the simple question is – was the respondent a director who had an employment contract with the 2nd appellant which said contract stipulated how the employment could be determined? If He was, then he came within the ambit of section 175(6) of the Act and it would not matter that his name had been registered with the registrar of companies...³⁴

A careful read of the view of the Court of Appeal would reveal that the court placed a high premium on the phrase "tenure of office" over "directors", to the effect that an employee who does not have a "term of office" as a director cannot rely on sections 175(1) or 262(1) of the 1968 Act and CAMA respectively. Rather, that such a director would have to fall back on his initial contract of employment with the company as a junior staff, notwithstanding that he had risen to the position of a director.

This reasoning does not however correlate with the full gamut of the provisions of section 175 (now 262 of the CAMA). This, no doubt, accounts for why the Supreme Court overruled the Court of Appeal decision in the case. In overruling the Court of Appeal, the Supreme Court however failed to categorically put an end to the reasoning of the Court of Appeal. This view is gathered from the reasoning of the Supreme Court that:

Where the article... or a contract of employment of a director does not expressly specify or

³¹ (n 2), 444

³² (n 3)

³³ *Ibid*, pp. 317-318

³⁴ *Ibid*, p. 398

fix the duration of the director's appointment as to make section 175(1) of the Companies Act 1968, applicable to his removal and where the contract of employment and articles of association are silent over the issue of removal of the company director, the director can only be removed by a different procedure similar to that of section 175(1)...this is by the calling of a general meeting and the passing of an ordinary resolution removing the director.³⁵

On the whole, the Supreme Court merely overruled the conclusion reached by the Court of Appeal by holding that the removal was unlawful for failure of the company to obtain the resolution of its members. Indeed, the reasoning of the Supreme Court that the appointment of the appellant as an executive director could have been terminated by "a different procedure similar to that of section 175(1)", was an implicit endorsement of the view that section 175 of the 1968 Act (now 262 of the CAMA) did not apply to the case of the appellant. What legal obstacle was there to prevent the Supreme Court from holding that the provisions of section 175 was directly applicable to the case of the appellant instead of holding that section applied to him by analogy?

While the decision of the Supreme Court geared towards eliminating this unhealthy distinction, its reasoning that a director who has no separate contract could be removed by "a different procedure similar to that of section 175(1)" (now 262(1) failed to categorically address the issue. The court could have simply broadly interpreted section 262(1) and applied it to the case, rather than importing the concept of "a different but similar procedure" without showing the law that underlies and justifies the "similar procedure". Intriguingly, many years after *Iwuchukwu v. Nwizu*, the Supreme Court was yet prepared to hold in *Yalaju-Amaye v. Associated Reg. Engineering Contractor Ltd*,³⁶ (a case decided under section 262 CAMA), that, aside the managing director being able to rely on the articles of association of a company and any other contract supplemental thereto, a valid determination of his contract of service would depend on the terms of such contract of service.³⁷ By implication, if the contract of service of an employee who rose through the ranks to become a managing director specified a one month notice or salary in lieu as the valid procedure for determination, going by *Yalaju-Amaye v. Associated Reg.*, the determination of such a contract of service would effectively determine the position of the employee as a managing director. This brings us back to the basics, notwithstanding the decision of the court in *Iwuchukwu v. Nwizu* – a mere motion without movement.

This ought not to be. Once a director is appointed, even though he is neither named in the articles nor has a separate contract, provided he has been duly appointed within the contemplation of section 244 and his name has been filed at the Corporate Affairs Commission, his removal should be governed by the provisions section 262(1). Since the law takes cognizance of the status as the director from when his name is filed; from then onwards, his directorship should be undone only by a procedure specified by law.

6. Conclusion

So far, this paper has examined the law and practice relating to the removal of managing directors in Nigeria. This could not have been done without discussing the law applicable to directors, since the status of a managing director is dependent on that of a director. The problem highlighted in this work is the unwholesome practice of hiding under the guise of a contract of service specifying a less rigorous procedure for removal to remove a managing director who had risen through the ranks as a junior officer to the position of a managing director. The paper also highlights the fact that this distinction has also been forcefully applied in Nigeria and that though the Supreme Court intervened to eliminate the distinction, there yet remain vestiges of it even in the reasoning of the Supreme Court in the case in which the court sought overruled the distinction.

The writers' core argument therefore is that, given that the distinction is nowhere contained in the CAMA, section 262 could be and should be permissively applied to cover all directors in respect of whom the necessary filings had been done at the CAC. As a consequence, notwithstanding the mode of his appointment, the removal of a managing director should be subject to the procedures of notice and veto of shareholders in the general meeting of the company, by virtue of section 262(1) and not by "a procedure similar" to the one prescribed in section 262(1). A director who is saddled with the onerous task of running a company should equally be worthy of all the statutory protection that comes with the office.

The writers however appreciates the difficulties that the freedom of contract and the general law of contract of employment poses to the view that all directors should be removable by the same procedures. It is thus important

³⁵ *Ibid*, p. 403

³⁶ (n. 2)

³⁷ (n 2), 444

to understand that section 262(1) governs the removal of directors qua directors and not the determination of the employment of a director, not as a director but as a member of staff under a contract of service that is not governed by CAMA but by the law of contract. In *Southern Foundries Ltd v. Shirlaw*,³⁸ for instance, the court was able to deal a situation where the substratum of a person's managing directorship is taken off in order to obliterate his basis for being a managing director and therefore technically determine the appointment as a managing director, by resting upon a contract guaranteeing his tenure as a managing director. Hence, the court found it implied in the managing directors' contract with the company that the company would not terminate the appointment that underlay his managing directorship during the pendency of the agreement.

Indeed, while advocating that all directors be removed on the basis of section 262(2), the writers are not naïve about the existence of a subsisting contract that allows the appointment of an employee who has become a managing director to be determined other than by section 262(1). The writers expect the courts to hold that when an employee has been elevated to the position of a director, that the modes of determination contained in his earlier contract with the company as a junior staff would no longer be relevant to the determination of his appointment.

It equally behooves on those who are appointed managing directors to insist, while the going is yet good, on a contractual confirmation of the appointment in order to avoid a situation where the company may want to humiliate them as part of the scheme to get rid of them without doing them the honours of the provisions of section 262(1). Again, if for no other thing, there is a limit to which the legislature, and more so, courts are willing to venture into the province of freedom of contract and this becomes very relevant at the point of assessing damages. In assessing damages, the managing director with a separate contract is surely better off than one who has no contract with the company as a managing director; he may only be entitled payment on *quantum meruit*.

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³⁸ (n. 4)