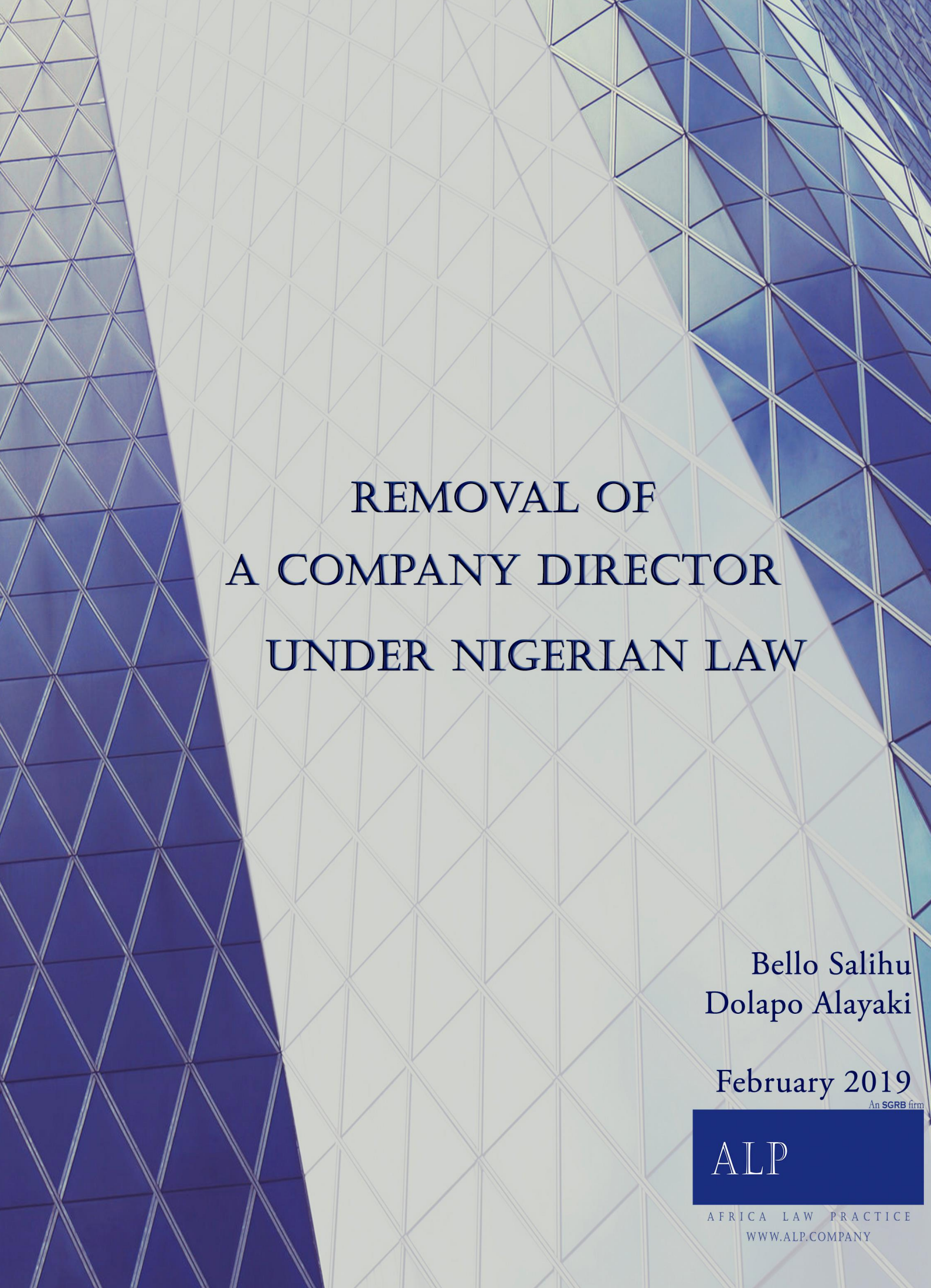

REMOVAL OF A COMPANY DIRECTOR UNDER NIGERIAN LAW

Bello Salihu
Dolapo Alayaki

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Introduction

Both at civil and common law jurisdictions, the concepts of separate legal personality and tenure of the individuals appointed to manage and conduct the affairs of a company have remained the subject of intense academic and judicial discourse. This paper critiques and examines the practical effect of the legal personality of an incorporated entity within the context of the desire for the corporate entity's affairs to be managed and directed by natural persons. While the artificial corporate personality may endure for a considerable length of time from formation to winding-up/liquidation, the tenure of the natural persons (particularly directors) appointed to oversee the affairs of a company are usually specific. In this paper seeks to evaluate the decisions of Nigerian courts on the regime that regulates the appointment, conduct and removal of directors before the expiration of their term.

Qualification and duties of directors

A famous English case *Salomon v Salomon & Co.*[1] broke the ground in the now famous area of company law with respect to the recognition of a company as separate and distinct from its promoter(s), shareholders and directors. In strict legal parlance, a company is a '*separate legal person',* and it can sue and be sued. It can also hold land.[2] Although it attains maturity (and perhaps majority) at birth, a company still relies on natural persons to control and or direct its affairs.[3]

One of the organs through which a company acts is its Board of Directors and under the Companies and Allied Matters Act ("CAMA"), every company must have at least two directors.

A director is defined as a person duly appointed by the company to direct and manage its business[4].

The acts of a director are valid notwithstanding any defect that may afterwards be

[1] [1897] AC 22
[2] See section 37 of the Companies and Allied Matters Act Cap. C20 LFN 2004 (CAMA), note 2, *supra*
[3] See Fairline Pharmaceutical Industries Ltd., & Anor. V. Trust Adjusters Nig. Ltd., (2012) LPELR-20860 (CA)
[4] Section 244 (1) of CAMA

discovered in his appointment or qualification.[5] The law imposes certain duties on directors which can be summarized as follows;

i. To act within their powers;
ii. To act in the best interests of the company;
iii. To exercise reasonable care, skill and diligence;
iv. To exercise independent judgment;
v. Not to accept benefits from third parties;
vi. Duty to avoid conflicts of interest; and they must
vii. Declare an interest in a proposed transaction or arrangement.[6]

Infants (under 18), lunatics or persons of unsound mind, and those disqualified by CAMA are exempted from holding board positions. The capacity to act as a director is not in perpetuity; and directors may be removed in several ways.

Removal of Directors – The applicability or lack thereof of Section 262 CAMA.

Generally, a company may remove a director even before the expiration of his term. The exercise of this discretion/power is notwithstanding anything in the company's Articles or in any agreement, contract of employment or Conditions of Service. This can be done by an ordinary resolution with special notice (i.e. 21 days). The director in such a situation must be notified and has a right to be heard on the resolution at the meeting.

In **Iwuchukwu v Nwizu**[7] the Appellant, whose employment took effect from 1 May 1979, was employed by Dave Engineering Company Limited (the 2nd Respondent) as a Special Assistant to the Managing Director – Mr. David C. Nwizu, (the 1st Respondent). In November of the same year, the Appellant was appointed a member of the Board of Directors of the 2nd Respondent. His appointment entitled him to an annual allowance of ₦3,000 (Three Thousand Naira). In what appeared like a termination clause, the letter of appointment stated that *"The Company in its best interest reserves the right, at all times, to determine the continuity of the directorship of any member of the board".*

[5] Section 260 of CAMA
[6] See generally Section 279-287 of CAMA
[7] (1994) 7 NWLR Pt. 357 P. 379.

By another letter of 12th January 1980, the Appellant was appointed Executive Director of the 2nd Respondent. This appointment was due to "*a recent re-organization in the Company*". A year later on 18th March 1981, the Appellant was appointed as a director of Dave Agricultural Development Project Limited ("Dave Agric"), a subsidiary of the 2nd Respondent. The Appellant was subsequently re-deployed to Dave Agric as manager in charge of poultry project. A paragraph in the formal letter of re-assignment read as follows;

> "***As a result of this reassignment, your executive directorship and Board Membership in Dave Engineering Co. Limited are hereby terminated …"***

No meeting was held and no resolution was passed. This letter was followed by unfriendly exchanges between the Appellant and the 1st Respondent. It subsequently culminated into the letter terminating the Appellant's employment with Dave Engineering Company Limited (2nd Respondent). As a result of the Appellant's displeasure, he commenced the action that led to this appeal challenging the validity of his removal as a (executive) director. He also sought an order mandating the 1st Respondent (Mr. Nwizu, the Managing Director) to restore his entitlements legally due to him as a (executive) director.

The Supreme Court reversed the decision of the Court of Appeal and held (*inter alia*) that while the appointment of the Appellant as a Special Assistant could be lawfully terminated in the manner stated in his letter/contract of employment, the same could not extend to his appointment as a director. In the opinion of the court, removal from office of a director is governed by a procedure stipulated by law. The Respondents were unable to substantiate the fact that a special meeting of the company was held as there was no proof that a notice of the meeting was issued and served on the Appellant. As a result, the removal was irregular because it did not follow the proper procedure. Judgment in this case was delivered on 15th July 1994. Barely six months after the Supreme Court's decision in the Nwizu case, the High Court of Lagos State in **Omenka v Morison Industries Plc** also reached a similar decision.

In **Longe v First Bank Plc**[8]**,** the Respondent (First Bank) contended that the director was validly removed because he had already been suspended. In allowing the appeal with costs, Oguntade JSC speaking for the majority, held as follows;

[8] (2010) 6 NWLR Pt. 1189 P. 1

> ***In the final conclusion, this appeal must be allowed. It is meritorious. The judgment of the court below is set aside. The removal of the plaintiff as Managing Director/Chief Executive of the defendant without notice to him to attend the meeting at which the decision was taken is a clear violation of Section 266 (1) and (2) of the Companies and Allied Matters Act; and such violation must attract the penalty prescribed by law under Section 266(3). The said meeting is under the law invalid. I so pronounce it. I declare that the removal of the plaintiff is not in accordance with the law. The plaintiff must be deemed to still be the Managing Director/Chief Executive of the defendant.***[9]

The decision of the Court of Appeal in **Cadbury Nigeria Plc v Oni**[10] may have provided further insight as to the disposition of Nigerian courts in that regard. The decision however failed the test of jurisdiction on further appeal to the Supreme Court.

The ***Oni*** case is an offshoot of the Cadbury financial scandal of 2006. Investigation was commissioned at the end of which the Securities and Exchange Commission (SEC) through its Administrative Proceedings Committee ("APC") sanctioned both the company and its directors. The decision of the APC was published on 8th April 2008.

Mr. Oni was at the material time the Managing Director and Chief Executive Officer of Cadbury Nigeria Plc ('Cadbury'). He was first employed by Cadbury in 1977. By a letter of 11th December 2006, Mr. Oni was summarily dismissed from office as Managing Director and Chief Executive Officer of Cadbury. His dismissal was on account of a judgment exercised by the management of the company in the face of a design and production crisis which challenged the company between 2002 and 2003[11]. As the MD/CEO of Cadbury, Mr. Oni had grown to become a respectable figure in the Nigerian corporate community and was voted Nigeria's most respected CEO in 2006.

Mr. Oni challenged his dismissal on the grounds (*amongst others*) that no valid meeting of the Directors of Cadbury was held at which the decision contained in the letter referred to above was taken. On that basis, he averred that the said letter was invalid and

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[9] Oguntade JSC coincidentally was on the Court of Appeal panel that decided the Nwizu and the Omenka cases.

[10] (2012) LPELR – 19821 (CA)

[11] See Statement published by C.A Candide-Johnson Esq, SAN, counsel to Olubunmi Oni dated 14th April 2008

wrongful. He also contested the fact that he did not receive notice of the relevant Board Meeting. He sought several reliefs including that his dismissal be declared as wrongful, unlawful and a repudiatory breach of his contract of employment. The learned trial judge[12] granted the relief. Dissatisfied, Cadbury appealed the decision.

In challenging the trial court's decision, Cadbury contended that the decision *'is wrong in law and that it turns corporate governance on its head'*. It was further submitted on behalf of Cadbury that the decision is a licence to CEOs of quoted companies to deliberately manipulate their public accounts to the detriment of the investing public and that no rational system of law can tolerate such accounting fraud, still less endorse and eulogise it, in the way the lower court had done. Mr. Oni cross-appealed (albeit unsuccessfully) in relation to other reliefs sought which were not granted by the trial court, the issues raised in his cross-appeal are however not material to the present discourse.

In determining Cadbury's appeal however, the Court of Appeal held (*inter alia*) that Cadbury was in breach of its Articles of Association with respect to removal of directors. The content of the articles in question is *impari materia* with the provisions of section 262 of CAMA.

The Court of Appeal in dismissing the appeal stressed the mandatory nature of the provisions of sections 262 and 266 (1) of CAMA to the effect that, a director liable to be removed is entitled to be given a notice of the meeting at which his removal is to be effected. Relying on the Longe case, the court held further that it is not the requirement of the law that such director about to be removed must be present at the meeting as he may receive the notice and refuse to show up at the meeting. What the law punishes in the opinion of the court is the failure to give such notice.

Conclusion

The foregoing line of decisions can only go to strengthen company law practice in Nigeria and preserve and protect the office of directors under the law. Although the decision in the ***Longe*** case was a product of the consideration of Sections 262 and 266 of CAMA, it is important to state that the sections are mutually exclusive. Section 262 deals exclusively with the procedure for the removal of a director before the expiration of his term of office. The director concerned must receive a copy of the special notice

[12] Phillips J. (later CJ)

of the resolution to the director concerned and the right of the director to make representation are incidental to the removal procedure. This is in contrast with the wording and intent of section 266 which specifically regulates directors' Notice of Meeting and the repercussion of failure to give such notice.

Essentially therefore, it is not all cases of removal of director (under section 262) that would involve the application of section 266. What the law requires for the removal of a director under section 262 is an ordinary resolution and not a board resolution. An ordinary resolution(s) is passed at general meetings of a company which of course would not require the issuance and or service of a notice of directors' meeting.

The provisions of CAMA regarding the removal of directors and service of directors' notice of meeting are sacrosanct. It is no doubt a means by which the law seeks to keep the excesses of companies in constant check, in relation to the office of a director. A proposition to the contrary would in accordance with the dictum of Oguntade JSC in the ***Longe*** case, be a clear encouragement to bodies governed by CAMA to circumvent the applicability of the provisions of CAMA by first suspending a director without notice before removing him again without notice so that they could claim in a later litigation in court that the earlier suspension robs the director concerned of the right to notice as given by section 266 of CAMA.[13]

Bello Salihu
Partner
bsalihu@alp.company

Dolapo Alayaki
Associate
dalayaki@alp.company

[13] See page 35 of the report.