

# REDEFINING THE BOARDROOM:

HOW ODU'A INVESTMENT COMPANY  
LIMITED V. MRS BOLANLE OGUNTOLA  
CHALLENGES THE TRADITIONAL  
STATUS OF NON-EXECUTIVE DIRECTORS

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*Corporate Governance & Regulatory Compliance Insights*



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## 1. Introduction

The position of a Non-Executive Director (NED) on the Board is likened to that of a consultant, providing independent services/oversight and strategic direction to executive management in the Company<sup>1</sup>. However, the recent decision of the Court of Appeal in *Odu'a Investment Company Limited v. Mrs. Bolanle Oguntola*<sup>2</sup> raises critical concerns about the legal position of NEDs, by challenging the traditional status of NEDs and classifying them as employees. In this case, the Court affirmed that the National Industrial Court (NIC) has jurisdiction to adjudicate disputes between a NED and the Company, on the grounds that a NED qualifies as an employee of the company.

This decision represents a fundamental change in Corporate Governance jurisprudence globally, and in Nigeria, as it potentially re-characterises the status of Non-Executive Directors beyond that envisaged under the Nigerian Code of Corporate Governance, 2018, and good corporate governance practices.

This paper reviews the legal status of Non-Executive Directors (NEDs), highlighting their rights and responsibilities, as well as the court with jurisdiction in disputes between a company and its NEDs. It also analyses the procedure for removing directors under Section 288 of the Companies and Allied Matters Act (CAMA), 2020, examining key statutory requirements such as shareholder resolutions, special notices, and directors' rights to respond, as addressed in the case. Additionally, the review references *First Bank of Nigeria v. Longe (2015)*, emphasising the importance of strict compliance with legal procedures in the removal of directors.

## 2. Brief Summary of Facts

The appeal challenges the decision of the National Industrial Court (NIC), Ibadan Division, delivered on January 13, 2022. In this case, Mrs Bolanle Oguntola (the Respondent) had an affiliation with Ekiti State Government, which led to her appointment as a Non-Executive Director

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1 Principle 6, NCCG 2018

2 CA/IB/469/2022



(NED) of Odua Investment Company Limited (the Appellant). Her appointment letter was dated April 18, 2018, and signed by the Group Managing Director, Mr Adewale Raji. By her letter of appointment, her tenure was set to run from April 19, 2018, to April 18, 2022. However, in another letter dated November 19, 2018, also signed by Mr Raji, the Company withdrew her appointment on the basis that the Ekiti state government had withdrawn Mrs Oguntola's earlier nomination, thereby resulting in her removal from the position of NED in the company.

Aggrieved by the abrupt termination, Mrs. Oguntola filed a suit at the National Industrial Court (NIC), claiming wrongful removal as a director, and seeking damages. In addition to filing the defence, Odua Investment contested the court's jurisdiction, arguing that the matter fell under the exclusive jurisdiction of the Federal High Court per Section 251(1)(e) of the 1999 Constitution, and not the National Industrial Court.

The NIC dismissed this objection and upheld that it had jurisdiction. Subsequently, the NIC entered Judgment in favour of Mrs Oguntola, holding that the Company failed to follow due process regarding her removal under the Companies and Allied Matters Act. On appeal, the learned justices of the Court of Appeal upheld the decision of the NIC on both the issue of jurisdiction and the wrongful removal of Mrs Oguntola as a NED.

### **3. Scope of Jurisdiction of the National Industrial Court and the Federal High Court in relation to disputes between a Company and Non-Executive Director**

Jurisdiction is a pivotal issue that goes to the root of any matter before a court. Its essential nature was highlighted in the case of *Ohakim v Agbaso (2010) Vol. 189 LRCN*, page 73, where the Supreme Court opined that:

Jurisdiction is the lifeblood of any adjudication without which no proceeding, however brilliantly conducted by the Court or Tribunal can be valid.



*Section 254C of 1999 Constitution of the Federal Republic of Nigeria* (Constitution) as amended establishes the National Industrial Court of Nigeria and clothes the NIC with exclusive jurisdiction over civil causes and matters relating to labour, employment, trade unions, industrial relations, and workplace issues, including disputes over salaries, wages, and other entitlements. Conversely, *Section 251(e) of the 1999 Constitution* confers exclusive jurisdiction on the Federal High Court (FHC), to entertain matters arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act.

It follows from the above that the NIC will only assume jurisdiction where the matter borders on employment; however, where it relates to matters arising from CAMA, the FHC is vested, to the exclusion of other Courts, with jurisdiction to entertain the matter.

In this case, the Court of Appeal was called to determine whether the appropriate Court to institute an action bordering on the relationship between a Non-Executive Director and the Company is the NIC. In agreeing with the contention of the Respondent, the Court of Appeal, relying on Section 254C of the Constitution, held that the NIC was the appropriate court to institute the action and noted as follows:

*I am very clear in my view that the said court, the National Industrial Court, is eminently qualified to invoke the relevant sections of CAMA, appropriately so, especially when the issue is based on an employment that is statutorily flavored, as in the instant case...*

**(Paragraph 2, page 14 of the judgment)**

It is apparent from the above that the Court of Appeal was of the view that the NIC was the appropriate court to institute the action, based on the existence of a purported contract of employment between the Appellant and the Respondent (despite the Respondent being a Non-Executive Director). The Court of Appeal considered the letter appointing the

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- 5 Regulation 3(8)
  - 6 Regulation 6
  - 7 Regulation 7(1)
  - 8 Regulation 7(2)



Respondent as a contract of employment, which formed the basis of the Court's conclusion that the Respondent was in an “employment” relationship with the Appellant. Specifically, paragraph 3, page 18 of the Judgment reads as follows:

*As stated earlier, the Appellant employed the Respondent as a Non-Executive Director in the Appellant company, the said contract of employment was in line with the policy of the Appellant-company...*

This position of the Court of Appeal, however, raises concerns, specifically because based on the nature of services provided and relationship with the company, a Non-Executive Director is widely known and accepted as not being an employee of the company, but rather, an independent advisor or director who is involved in policy-making and monitoring the performance of executive directors and the management team.<sup>3</sup>

Therefore, it becomes pertinent to consider whether the appropriate court to institute an action relating to the appointment, remuneration, removal and compensation of a Non-Executive Director as provided under the Companies and Allied Matters Act, is the NIC. In examining the jurisdiction of the NIC, as it relates to matters that concern a Non-Executive Director, it is necessary to clarify the status of a Non-Executive Director.

#### **4. The status of a Non-Executive Director viz-a-viz the Jurisdiction of the NIC**

In Nigeria, there is no strict definition of employment, and generally contractual relationships involving the provision of goods/ services is defined from two lenses: “contract of service” and “contract for service”. Contract of service are regarded as giving rise to an employer-employee relationship, while a contract for service, does not.

Consequently, it is crucial to clarify whether the contract between a NED and the company is a contract of service (as to warrant an employer-

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3 Dan Byrne, 'The difference between a director and a non-executive director' (Corporate Governance Institute) <<https://www.thecorporategovernanceinstitute.com/insights/guides/director-and-a-non-executive-director/#:~:text=In%20smaller%20companies%2C%20the%20directors,not%20employees%20of%20the%20company.>> accessed February 25, 2025



employee relationship) or contract for service. This distinction is vital in ascertaining an NED's legal position and the appropriate forum for disputes relating to an NED; whether the FHC or the NIC.

In ***Shena Security Co. Ltd v. Afropak (Nig.) Ltd & 2 Others*** [2008] 18 NWLR (Pt. 1118) 77 SC; [2008] 4 – 5 SC (Pt. II) 117 the Court laid down the following factors that should guide courts in determining whether a contract is one of service, or for service:

- a. *If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.*
- b. *Where the employer supplies the tools and other capital equipment, there is a strong likelihood that the contract is that of employment or of service. But where the person engaged has to invest and provide capital for the work to progress that indicates that it is a contract for service.*
- c. *In a contract of service/employment, it is inconsistent for an employer to delegate his duties under the contract. Thus, where a contract allows a person to delegate his duties there under, it becomes a contract for services.*
- d. *Where the hours of work are not fixed, it is not a contract of employment/of service. See **Milway (Southern) Ltd v. Willshire** [1978] 1 RLR 322.*
- e. *It is not fatal to the existence of a contract of employment/of service that the work is not carried out on the employer's premises. However, a contract which allows the work to be carried on outside the employer's premises is more likely to be a contract for service.*
- f. *Where office accommodation and a secretary are provided by the employer, it is a contract of service/of employment.*



Another distinction is seen in the degree of control, also known as the 'control test', which examines the level of control the company exercises over the individual.

A proper consideration of the above factors leads to the conclusion that a NED cannot be categorised as an employee of the company, as the contract with the company is a contract for service.

In the case of *Huilanje Mineral Resources Ltd. v. Mr. Abdul Fatai Yahaya*<sup>4</sup>, the National Industrial Court considered its jurisdiction in relation to “contract for service” cases. The Court in its pronouncement stated as follows:

“...the relationship between the Claimant and the Defendants is a business relationship meant for the claimant to procure and supply lead ore to the defendants and in return for procurement he was to be paid commission; and I so find and hold. Since the relationship is not one of an employment relationship, it is not a contract of service, and so this Court has no jurisdiction over the instant case; and I so hold.

From the foregoing, it can be deduced that a contract of service denotes an employment relationship in which the individual is subject to the employer's control. On the other hand, a contract for service refers to a business or commercial relationship where the individuals provide services as independent contractors.

Building on the Court's pronouncement above and the factors set out in *Shena Security v. Afropak (supra)*, NEDs fall under the category of “contract for service”, as they are not involved in the daily management of the affairs of the company, do not have fixed hours of work, they are not confined to working from the office location or a designated work station, and only receive directors' fees/ sitting allowances, and not wages or salaries.

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4 (2014) (Unreported Suit No. NICN/LA/12/2013)



This position is further buttressed by the definition of an NED and ED in the NCCG 2018. The Code defines an Executive Director as a director who supports the Managing Director/Chief Executive Officer in the operations and management of the Company.<sup>5</sup> On the other hand, NCCG 2018 is clear on the fact that NEDs who provide oversight and independent judgment in the operations of the company,<sup>6</sup> should not be involved in the daily operations of the company.<sup>7</sup>

Furthermore, it is imperative to note that “labour” which falls within the ambit of the jurisdiction of the NIC, as espoused in Section 254C of the 1999 Constitution has been defined by the courts in a plethora of cases, to mean working for wages, which falls under the category of “contract of service”, and not “contract for service”.<sup>8</sup>

Consequently, an NED cannot under any circumstance invoke the jurisdiction of the National Industrial Court as there is no recognisable contract of employment between himself and the company. Thus, any claim for wrongful removal or termination of his contract for service, should be instituted at the Federal High Court, which is clothed with exclusive jurisdiction under Section 251 (e) of the CFRN, 1999 to entertain matters arising from the operation of the Companies and Allied Matters Act, or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act.

Flowing from the above, it is lucid that the Court erred when it held that the Respondent's appointment letter to the Board of Odua Investment represented an employment contract, which empowered the NIC to have jurisdiction to entertain the suit to the exclusion of the Federal High Court.

## 5. Position in other jurisdictions

It appears that the consensus in other jurisdictions is that a NED is not an employee of the company. In the English case of *McMillan v Guest (1942) AC p.561 (UKHL J0427-4)*, the House of Lords established that a non-executive director who does not dedicate their full time to the company is generally not considered an "employee" for the purposes of employment

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5 Principle 5 of the NCCG

6 Principle 6 of the NCCG

7 Principle 6.3 of the NCCG

8 Coca-cola(Nig) Ltd V. Akinsanya (2017) 17 NWLR (pt. 1593) 132



law, meaning they are not entitled to employee benefits like statutory protection against dismissal. Similarly, in the South African case of *Rift Valley Water Services Board & 3 Others vs Geoffrey Asanyo & 2 Others* (Civil Appeal No. 60 of 2015), the Court of Appeal clarified that a director who is not engaged full-time by the company and does not have an employment contract is considered an officeholder, not an employee, and is therefore not entitled to employee benefits or protection under the Employment Act. A similar decision was also made by the Australian court in *Mark Feldschuh v Strong Room Technology Pty Ltd FWC 216*.

## 6. Removal of Directors

The procedure for the removal of a director is governed by Section 288 of the Companies and Allied Matters Act (CAMA). According to this section, a director may be removed by an ordinary resolution of the company. This means that shareholders can remove a director through a simple majority vote at a general meeting, subject to compliance with the prescribed procedural requirements.

Special notice is required for any resolution to remove a director or to appoint a replacement at the same meeting. Upon receiving such notice, the company must immediately inform the director concerned, who has the right to be heard at the meeting where the resolution will be considered. Additionally, if the director submits written representations of a reasonable length and requests that they be circulated to the members, the company must:

- a. Include a statement in the meeting notice acknowledging the director's representations.
- b. Send a copy of the representations to all members before the meeting.

If the representations are received too late or if the company fails to circulate them, the director may require that they be read aloud at the meeting. This ensures that the director has an opportunity to present their defense before a decision is made.



Furthermore, Section 288(6) of CAMA expressly clarifies that the provisions of Section 288 do not exclude or restrict any other legal authority that may exist for the removal of a director beyond the procedures outlined in this section. This means that while Section 288 prescribes a statutory framework for directors' removal, it does not override alternative mechanisms that may be available under the company's governing documents or other applicable laws. Therefore, in addition to the shareholders' procedure for the removal of directors under Section 288 of CAMA, directors may be removed in line with alternative removal procedures set out in the company's governing documents.

This position finds further support in Section 46 of CAMA, which reinforces the principle that where a company's memorandum or articles of association confer authority on any person to appoint or remove a director or any other officer, such power remains valid and enforceable. Crucially, this authority applies regardless of whether the person exercising it is a shareholder or officer of the company. Therefore, while Section 288 provides a general statutory procedure for director removal, a company's internal governance structure, as outlined in its constitutional documents, may also establish additional avenues for effecting such removal.

The importance of strict adherence to statutory and procedural requirements when removing a director has been emphasized by the Supreme Court in *First Bank of Nigeria v. Longe* (2015) 5 NWLR (Pt. 1452) 341. In that case, the Court held that a director's removal must strictly comply with the provisions of Section 288 of CAMA and any applicable provisions in the company's articles of association. The Court made it clear that any deviation from these prescribed procedures would render the removal unlawful and ineffective, reinforcing the necessity for companies to meticulously follow due process when effecting changes in their leadership.

Applying this principle to the present case, the Court of Appeal was right in upholding that the removal of Mrs. Oguntola failed to meet the statutory requirements set out in Section 288 of CAMA, because no resolution was passed to effect her removal, which is a fundamental prerequisite for



removal under the law. Additionally, counsel did not submit any evidence that the company's memorandum and articles of association contained provisions granting authority for her removal through alternative means. Given the precedent set in *FBN v. Longe*, this failure to adhere to the prescribed legal framework renders Mrs Oguntola's removal invalid and without legal effect.

## 7. Right of Appeal

Unfortunately for the Appellants, Section 243 (4) of the 1999 Constitution makes the Court of Appeal the final court in respect of appeals arising from any civil jurisdiction of the National Industrial Court. This was also the position of the Supreme Court in *Skye Bank Plc v. Iwu* (2017) 16 NWLR (Pt. 1590) 24, where it was held that;

In other words, section 243(4) of the Constitution unequivocally makes the Court of Appeal the final court in respect of any civil appeal from the decision of the National Industrial Court.

By the provision of Section 243 (4) of the Constitution, the Appellant has no further recourse/right of appeal, and will be required to pay the judgment sum of NGN112,608,496 (One Hundred and Twelve Million, Six Hundred and Eight Thousand, Four Hundred and Ninety-Six Naira), being special and general damages for unlawful termination and wrongful removal.



## 8. Recourse for Companies

Considering the Court of Appeal's decision in this case, we recommend that companies review their contracts with Non-Executive Directors to ensure that it expressly conveys the status of such directors as NEDs. We further recommend clarity on the following points in the appointment letter:

- i. Specify that the director is appointed and engaged as a Non-Executive Director.
- ii. Expressly state the roles and responsibilities of the Non-Executive Directors, which should exclude the day-to-day management of the affairs of the Company.
- iii. Be explicit on the fact that the contract is one for service and not of service, as such, it cannot create an employment relationship between parties.
- iv. State that the appointment, tenure and removal of directors is regulated by the provisions of the Companies and Allied Matters Act, the Company's articles of association.



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