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OALP Client Update

CBN Governor's Powers – The Ambit

Danson Izedomwen & Ors v. Union Bank Plc & Ors - Suit No. FHC/B/290/2009

The Powers of the Governor of the Central Bank of Nigeria to Intervene in a Failing Bank

Introduction

"In my view, by virtue of the combined effect of the provisions of Section 33 and 35 of BOFIA, the CBN Governor is empowered to order a special examination into the books and affairs of a bank, and to intervene in the operation of a bank by removing and replacing the directors of a bank found to be in a grave situation by the Central Bank." This was the judgment of the Honourable Justice Idris of the Federal High Court, Lagos (unreported) in Suit No. FHC/B/290/2009, Danson Izedomwen & Ors v. Union Bank Plc & Ors (the "Suit") delivered on October 25, 2010.

This note discusses the reasoning that underpinned the decision of the Court in the case, which in the main, was based on application of the rules of statutory interpretation.

The Dispute Leading to the Suit

Further to the powers conferred on the Governor of the Central Bank of Nigeria ("Governor") and the Central Bank of Nigeria ("CBN") by the Banking and Other Financial Institutions Act Cap B3 LFN 2004 ("BOFIA"), particularly Sections 33, 35, and 36 thereof, the Governor, after the conduct of a special examination into the affairs of Union Bank of Nigeria Plc ("Bank") and a finding that the Bank was in a grave situation, removed the executive directors of the Bank, and appointed replacements.

The Suit

Aggrieved by the actions of the Governor in *inter alia* removing and replacing the executive directors of the Bank, some shareholders of the Bank instituted an action by way of an Originating Summons, against the Bank.

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The Applicants argued that upon a proper construction of the powers conferred upon the Governor by BOFIA, the Governor had acted *ultra vires*, as the law only conferred power on the Governor to: (a) remove only one director at any given time, (b) either remove, or appoint a director, but not both, (c) the Governor lacked powers to allocate specific functions to the directors he appoints, and (d) the actions of the Governor were in breach of the memorandum and articles of association of the Bank.

Upholding Olaniwun Ajayi LP's submission on behalf of the Bank, the Court, affirmed the Governor's powers, reiterating the paramount rule of statutory construction that a *"statute is to be construed according to its manifest and expressed intention. The words are to be understood by looking at the subject matter they are speaking of and the object of the legislature as words could produce a different intention in reference to a different set of circumstances whereby (sic) another would have been produced."*

The Court held that the governor is empowered to exercise any one or more of the powers specified in section 35 of BOFIA and the use of the word '*any*' in the Section means that the Governor is not restricted to exercising only one of the powers specified in section 35(2) [which allows for removal of directors, appointment of directors, capital injection etc], *"but could indeed exercise some or all of the powers specified in subsection 2 of Section 35 of BOFIA."*

The Court also noted that the legislature had used the word "or" after the provisions of Section 35 (2) (d) (i), and Section 35 (2) (d) (ii). The Court agreed that while 'or' was generally construed disjunctively, there were instances where it was necessary to read 'and' in place of 'or', and *vice versa* in order to carry out the intention of the legislature, and avoid absurd or impractical results. The Court relied on the decision in ***Ndoma Egba v. Chukwuogor (2004) All FWLR [Pt.217] 735***. The court thus held that it will not accord with the harmonious interpretation of the section if the word 'or' in section 35(2)(d)(i), is given a disjunctive reading.

The Court noted that by Section 35(2)(d) of BOFIA, the powers of the Governor are exercisable 'notwithstanding anything in any written law', or any limitation contained in the memorandum, and articles of association of the Bank. The Court, relying on the decision of the Supreme Court in ***NDIC v. Okem Enterprises Ltd (2004) 4SC [Pt.11] 77***, held that where *the word 'notwithstanding' is used in a section of a statute as in subsection (2) (d) of Section 35, it is used to exclude an impinging or impending effect of any other provision of the statute or subordinate legislation so that the said section may fulfill itself."*

Use of 'Or' after the provisions of Section 35 (2) (d) (i) of BOFIA:

Whether disjunctive or conjunctive

The Provisions of BOFIA *vis a vis* the Memorandum and Articles of the Bank

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further held that it cannot be correct that the legislature only intended to empower the Governor to remove one and not several directors by the use of the singular word ‘director’ in Section 35 (2) (d) (i). “*Section 14(b) of the interpretation Act which states that ‘words in the singular include the plural, and words in the plural include the singular’ clearly displaces that position.*” His Lordship also referred to ***Apena v. NUPP (2003) 8NWLR [Pt.822] 426***, and stated that in the context of which it is used in Section 35 (2) (d) (i), the word “any” clearly indicates that there is no limit to the number of directors that the Governor is empowered to remove.

Finally, the Court recognized that the general rule is that he who has the power to hire has the power to fire, “...*even where the power to appoint is silent on power to remove.*” *The Court referred to the decision in Okomu Oil Palm Co. Ltd v. Iserhienrhien (2001) FWLR [Pt.45] 670 and* Section 11(1) of the Interpretation Act which provides that where an enactment confers a power to appoint a person either to an office or to exercise any functions, whether for a specified period or not, the power includes the power to remove or suspend him.

Conclusion

Clearly, the Powers of the Governor of the CBN as conferred by the BOFIA and the CBN Act in relation to a failing Bank, particularly the power to change its management, has now received judicial *imprimatur*, and has been put beyond pettifogging. It is now left to be seen if other cases where these powers of the CBN Governor are being challenged will be decided along the same lines, and what the attitude of the Appellate Courts will be.

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