2ND ANNUAL CHIEF GABRIEL OLIYIDE SODIPO
MEMORIAL LECTURE

HELD ON

WEDNESDAY, DECEMBER 12, 2001

AT

THE NEWMAN CENTRE, NCR BUILDING, 6, BROAD STREET, LAGOS

TITLE:

THE RESOLUTION OF MASTER AND SERVANT DISPUTES IN PRIV ATISATION, MERGERS AND ACQUISITIONS AND MANAGEMENT BUY-OUTS.

BY

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The reason I feel particularly delighted to have been invited to give this lecture in memory of the Late CHIEF GABRIEL OLIYIDE SODIPO, is not only because, as it is a great honour done to me but especially because it had given the only opportunity I have had since the Chief s death to publicity pay tribute to him. 1998, my wife for over thirty six years also passed. It was a very sad year for me. I remember Chief as a person who had great sagacity. He was sharp in thought and perception and was, as well astute, discerning and judicious in whatever he did. He was a wise man. I remember how vividly he conducted activities at a workshop on Intellectual Property organised by his firm at the Nigerian Institute of Advanced Legal Studies a couple of

years before his death. The claim to scholarship which the firm of CHIEF G. O. SODIPO & CO., can justifiably make today owes a lot to the vision and leadership of the late Chief. The topic for today's lecture in remembrance of his death chosen by the firm, indicates abundantly that the firm continues to have one of its legs firmly in legal practice and the other equally firmly in academia.

The Topic for the 2nd Annual Chief Gabriel O. Sodipo Memorial Lecture is - "The Resolution of Master Servant Disputes in Privatisation, Mergers and Acquisitions and Management Buy-Outs". On the surface, the topic appears not only formidable and intimidating but also certainly a tongue-twister. I believe, however, that the substance or essence of it can be captured by a consideration of what happens to employees of a given company which has been subjected to privatisation or a merger. Nothing much would be lost by an examination of the legal situation of an employee whose company employer has either been privatized or has lost its identity by merger in another company.

The term merger is not a legal term of act but a concept which may cover a variety of situations. A distinction exists between transfer of an undertaking which may result in a change of identity and transfer of control of an entity by way of the acquisitions of the shares of that entity but under which the entity remains the same.

A transaction may involve the acquisition of an undertaking in which case, a new employer may merger in the place of the old or it may merely involve a change in the ownership of the shares of the enterprise. In the former case, the employer remains the same and its relationship with its employees remains the same. The employees contracts of employment are not thereby directly affected. Where, however. a merger involves the destruction or cessation of an enterprise taken over or merged in another enterprise the contracts of employment of the employees of the enterprise taken over may be affected. Of course the distinction we have tried to draw may often prove hollow. It may sound attractive in theory only. There can be such transformation of a

company as would adversely affect its employees without the company necessarily changing its identity. Thus, for example, all or a majority of the sharers of a company may be bought by other shareholders who may them appoint new managers and formulate new policies inimical to the interest of the employees although the company remains the same in that it has not changed its identity. As Viscount Simon said in the leading case of Nokes vs. Doncaster Amalgamated Colleries Ltd.,

> "Moreover, the change involved in a wage earner serving the new company in place of the old is, in normal cases, no greater than the change he would experience when the company which he is serving throughout change its directors, its shareholders, its managers, its scope of operations, and its name, all of which it may do without losing its identity."

Of course it is necessary to illustrate that although change of control of a company brought about by the acquisition of its shares, including even controlling shares, may not necessarily affect directly the employment relationship that sooner or later policy changes may be adverse to the interests or continued employment of the employees of the undertaking. On the other hand, there could be change in policy adverse to the interests of employees without any change in ownership of the shares of an enterprise to company. Thus any change which does not affect employees contract of employment cannot put the employees at any disadvantage. The rights and obligations of the parties remain the same as provided under the contracts and any relevant statute.

However contractual and statutory rights would, on the other hand, be affected by a change of employer. This is because such a change would result in the ending of the employment with the original employer and where a continuation of employment with the new employer is mutually agreed it would be on a new contract. The leading authority is Nokes vs. Doncaster Amalgamated Colleries Ltd. Under a statutory power given under a company's statute the court made an order transferring to the transferee company all the property, rights, power, liabilities and duties of the transferor company.

The House of the Lords, overruling two lower court, held, nonetheless, that the contracts of employment of the employee of the transferor company were not transferred to the transferee company. The House upheld the common law position that, unless there is a clear and express provision of statute to the effect, contracts of employment, being in their nature personal, cannot be transferred without the consent of the employees. The following statement of Lord Atkin is often quoted:

> "My Lords, I confess it appears to me astonishing that apart from overriding questioning of public welfare power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf."

It is to be noted that the House did not deny that statute can provide otherwise. The point in this case was that statute had not made any such provision. "it will be readily conceded", said Viscount Simon, the Lord Chancellor, "that the result contended for by the respondents in thus case would be at variance with a fundamental principle of our common law - the principle name, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his service cannot be transferred from one employer to another without his assent. The whole question, however, is whether S.154 of the Companies Act, 1929, provides a statutory exception to that principle".

Now we may examine our statutes on privatisation and mergers with a view to finding out (I) whether they effect a change of employer or not and (ii) where there is such a change whether the statutory provision amounts to an exception to the common law rule in Nokes vs. Doncaster Amalgamated Colleries Ltd..

The extant statute on privatisation is the Public Enterprises (Privatisation and Commercialization) Act, 1999 No. 28. This repealed the Bureau of Public Enterprise Act, 1993 No. 78 which itself had repealed the Privatisation and Commercialization Act, Cap 369 Laws of the Federation of Nigeria, 1990

Section 1 (1) of the Public Enterprises (Privatisation and Commercialization) Act provides that the enterprises listed in part 1 of the first schedule to the Act shall be partially privatised in accordance with the provision of the Act and similarity Section 1 (2) provides that those listed in part 2 of the same schedule shall be fully privatised in accordance with the provision of the Act. The mode for privatisation is by the sale of Federal Government shares in the listed enterprises. Section 2 provides that an offer for the sale of the shares of the listed enterprises may be by public issue or private placement or even on the basis of a willing seller and buyer or through any other means. An offer for sale by public issue may be made at the capital market but only to Nigerians. Partial privatisation ensures that the Federal Government shares in an enterprise to be partially privatised do not exceed 40% and that shares sold to individuals amount to 20% of the shares of such an enterprise whilst a maximum of 40% of the shares may be sold to a strategic investor defined as a reputable core investor or group of investors having the requisite technical expertise, the managerial experience and the financial capacity to effectively contribute to the management of the enterprise privatised. Under full privatisation, the Federal Government would sell all of its shares in the listed enterprises. Given these provisions neither partial or full privatisation can give rise to a change of employer in any of the listed enterprises. Furthermore, the provisions of Section 5, for whatever reason they may have been made, could have the effect that no radical policy changes take place in the enterprises after privatisation. The 20% of the shares to be sold to individuals under partial privatisation must be sold on the basis of equality of states and not less than 1 % of those shares must be reserved for the employees of the privati- sed enterprise. It is not apparent that employees of privatised enterprises would necessarily be put at a

disadvantage by the act of privatisation.

Commercialisation is even more innocuous as per commercialization alone. There is no definition of commercialization but Section 8 provides that a commercialised enterprise shall operate as a purely commercial enterprise and may, subject to the general regulatory power of the government of the Federation (a) fix the rates, prices and charges for goods and services it provides, (b) capitalise its assets, (c) borrow money and issue debenture stocks and (d) sue and be sued in its corporate name. Hence it is difficult to understand why a distinction is made between partial and full commercialization. Section 6(1) provides that the enterprises listed in part One of the second schedule shall be partially commercialised in accordance with the provisions of the Act and Section 6(2) similarly provides that the enterprises specified in part 2 of the same schedule shall be fully commercialised in accordance with the provision of the Act.

Although Section 1, as we have seen, provides that privatisation shall be in accordance with the provisions of the Act and Section 6 that commercialisation be in accordance with the provisions of the Act, such provisions are not readily apparent. Perhaps these are oblique references to the functions and powers of both the Council and the Bureau of Public Enterprises established by the Act. The functions of the National Council on Privatisation, headed by the Vice President as Chairman, includes, to determine the political, economic and social objectives of privatisation and commercialisation, approve policies on privatisation and commercialisation, approve guidelines and criteria for valuation of public enterprises for privatisation and choice of strategic investors, approved public enterprises to be privatised or commercialised and review, from time to time, the socio economic effects of the programme of privatisation and commercialisation and decide on appropriate remedies. Among the functions of the Bureau with respect to privatisation are to - prepare public enterprises approved by the Council for privatisation, advise the Council on further public enterprises that may be privatised, ensure the success of the privatisation exercise taking into account the need

for balance and meaningful participation by Nigerians and foreigners in accordance with the relevant laws of Nigeria and with respect to commercialisation, prepare public enterprises approved by the council for commercialisation, ensure the updating of the accounts of all commercialised enterprises to ensure financial discipline, ensure that public enterprises are managed in accordance with sound commercial principles and prudent financial practices etc.

It is clear that neither privatisation nor commercialisation as presently provided for, brings about a change of employer. Where either phenomenon hopefully brings about better management of an enterprise and consequent loss of employment it would be because those who have lost their jobs should have not been there in the first place.

MERGERS

Mergers present a different picture. A merger may be carried out under a statutory provision. The statutory provisions on mergers, take-overs and acquisitions are now contained in the Investment and Securities Act, 1999 No. 45. This Act has repealed part XVII of the Companies and Allied Matters Act, Cap. 59, LFN 1990. By section 100 of the Act where two or more Companies propose to merge and a merger scheme is approved by the Securities and Exchange Commission, an application may be made to the court by anyone or more of the companies and the court has power to sanction the scheme by order. The order sanctioning the scheme may provide for all or any of certain listed matters including (I) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company, (ii) the continuation by or against the transferee 'company of any legal proceedings pending by or against any transferor company or (iii) the dissolution, without winding up, of any transferor company. Where an order provides for the transfer of property or liabilities, such property or liabilities are automatically transferred to and become the property or liabilities of the transferee company. And unlike the definition of liabilities considered in NOKES' case which merely said liabilities included duties, subsection (7)(b) defines

liabilities to include rights, powers and duties of every description notwithstanding that such rights, powers and duties are of a personal character which could not generally be assigned or Performed vicariously. This provision marks a clear departure from the decision in NOKES case and is perhaps in response to several suggestions made for automatic transfer of employments upon mergers and changes in ownership of enterprises. The effect of this is, of course, the employee has the rights and obligations under the new employer as he had against the old employer and vice-versa. In practice, this may not be of great benefit to an employee where the new employer decides to exercise his contractual or other right to remove an employee in pursuance of re-organisation for more efficiency.

An employer has a common law right to terminate any employment by notice and without assigning a reason. The point is that there is no job security. The only statutory scheme on redundancy is grossly inadequate. The Labour Act provides for the redundancy of only employees who are workers within the definition of that term under the Act. Broadly, there are employees who do not perform functions which can be described as executive, administrative, technical or professional. All that is required is that an employer inform a trade union or the workers representatives of an impending redundancy and that the principle of "last in first out" be applied in discharging those workers affected, al though the employer may also have regard to merit in such discharge. The employer is then only required to use his best endeavour in paying redundance payments. Some senior employees are covered by collective agreements on redundancy and employers are usu31ly well disposed to implementing these. But many such employees are not so protected in cases of redundancy. Similarly with pensions. Aside of the statutory scheme employers are not obliged to provide for pensions and even where such schemes exist an employer is not obliged to continue an employee in employment until he cams his pension. This is why section 100 (4) is of great significance in merger cases. The subsection provides that an order for dissolution of any transferor company must not be made by a court unless the whole of

the undertaking and the property, assets and liabilities of the transferor company are being transferred into the transferee company and "the court is satisfied that adequate provision by way of compensation or otherwise have been made with respect to the employees of the company to be dissolved". The courts have a duty there to ensure that employees who may lose their jobs or some special benefit are adequately provided for.

Lastly it is necessary to point out that all disputes which are trade disputes are defined in the Trade Dispute Act must be settled in accordance with the provisions of the Act. A trade dispute is any dispute between employers and employees concerning terms and conditions of employment or the right to remain in employment. Such disputes are to be settled by conciliation or arbitration or finally by a decision of the National Industrial Court. What appears to be the only uncertain issue is as to whether a dispute between an employer and an employee is a trade dispute. In Akinlade vs. Non-Academic Staff union of Educational & Associated Institutions, the Oyo State High Court held, rightly in my opinion, that an action for wrongful termination of the employment of the Plaintiff could not be tried in the High Court as it was a trade dispute. It is regretted that the court of appeal failed to avail itself of the opportunity presented to it on the appeal in that case to give an authoritative interpretation.

Ladies and gentlemen my brief conclusion is that Nigerian workers have nothing to fear in the implementation of the privatisation programme in so far as their employments are concerned. The provisions on merger are adequate and a proper application should allay any fears of Nigerian employees. I wish to thank you all for listening.

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