LEGAL IMPLICATION OF 2024 CBN RECAPITALISATION POLICY ON LABOUR AND BANK WORKERS

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BACKGROUND

Following the realization of economic tensions and its supposed possible effect on the generality of the population as well as the value of the Nigerian Naira, the Central Bank of Nigeria, on March 28, 2024, reviewed the existing Minimum Capital requirements for Commercial, Merchant, and Non-Interest Banks in Nigeria announced an upward review of the minimum capital requirements of the said banks.[1]

The policy provides that the new Minimum Capital for Commercial banks will be 500 billion, 200 billion, and 50 billion for International, National, and Regional Banks respectively. National Merchant Banks are to increase their capital to 50 billion and both National and Regional Non-Interest Banks are to increase to 20 billion and 10 billion respectively.

In furtherance of the above regulation, the court provides means by which the banks could explore attaining the new minimum capital requirements in the 2024 regulation. These include

1. *Injection of fresh equity capital through private placements, rights issue and/or offer for subscription:*
2. *Mergers and Acquisition; and/or*
3. *Upgrade or downgrade of license authorization*[2]

The time range for the effectual application of the policy is 2 years, starting from April 01, 2024, to March 31, 2026. Existing banks are therefore required to comply with the regulation within this time frame. All pending banking license applications are allowed to maintain the old capitalization requirement and comply with the new regulation before April 2026 while new applications can only be made based on the new regulations from April 1, 2024.

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[1] Financial Policy and Regulation Department, Central Bank of Nigeria, "Review of Minimum Capital Requirements for Commercial, Merchant, and Non-Interest Banks in Nigeria," *Circular FPR/DIR/PUB/CIR/002/009*, March 28, 2024.

[2] supra

Aside from many questions that the regulations beg, there could be questions on whether Banks are restricted only to the medium of capitalization increase as provided in the policy. Especially looking at the fact that there is no mention of the existing shareholder interests and deposits. However, the crux of this paper is on the possible effect of the measure that would or could be taken by the Banks to increase their capital on the interests and rights of their human resources and labour.

There have been concerns as to the effect of the policy on the labour market, especially the bank employees in the struggle for each bank to strengthen themselves. Following the 2005 recapitalization process, more than 5000 staff members of banks that were not able to meet the recapitalization benchmark lost their jobs and engagements with the banks.[3] It also extended to employees of companies and organizations that adjunctly work or render services to these banks – the banks being the hotspot for their business engagements. Many of the affected banks' employees after the 2005 recapitalization were largely from Stanbic IBTC, Union Bank, Oceanic Bank, Intercontinental Bank, and Fin Bank to mention but a few.[4]

Given the precedence that had been set by the 2005 recapitalization, that had created a wave through the spin of some workers that have tried to maximize their options in less than 2 years time frame given by the CBN for compliance. The prediction for the effect of the recapitalization is that about 17 banks may struggle to meet the new recapitalization minimum in 24 months according to Ernst and Young.[5] Also, after the recapitalization process of 2005, the number of banks in Nigeria reduced from about 50 to 20 and according to the predictions of Asset and Resources Management Co. (ARM), the banks are also bound to reduce their workforce, following the new policy.[6] One of the basic uncontested effects of the

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[3] Ogaga Ariemu, "Recapitalization: Jobs Losses Loom as Nigerian Banks Battle to Escape Extinction," *Daily Post,* April 02, 2024. Retrieved on April 06, 2024. https://dailypost.ng/2024/04/02/recapitalization-jobs-losses-loom-as-nigerian-banks-battle-to-escape-extinction/

[4] Ariemu, "Recapitalization: Jobs Losses Loom as Nigerian Banks Battle to Escape Extinction,"

[5] Daily Trust News, "Bank Recapitalisation: 17 Out Of 24 Banks Might Not Meet CBN Capital Requirements – Report," *Daily Trust,* March 16, 2024. Retrieved on April 06, 2024.

[6] Bukola Aro-Lambo, " Recapitalisation: Mergers To Reduce Number Of Nigerian Banks Soon – ARM," *Leadership,* April 04, 2024. Retrieved on April 06, 2024. https://leadership.ng/recapitalisation-mergers-to-reduce-number-of-nigerian-banks-soon-arm/

recapitalization is that there will be a heavy drop in the number of bank employees as predicted by analysts and other institutions.[7] This comes to the core of this paper as it addresses the inevitable labour disputes, discharges, and adoptions in the measures used in strengthening bank capitals.

LEGAL PROTECTIONS FOR WORKERS

One of the most basic approaches to beating recapitalization benchmarks set out by the CBN directives is merger and acquisition. This has been one of the non-negotiable restructuring strategies in every economy.[8] However, in this respect, there are options as to how the workers would be handled in such business alliances.

Notification and Consultation

First, the law prompts the possibility of trumping the interests of employees in mergers and acquisition processes. The *Federal Competition and Consumers Protection Act*[9] provides in Section 16(3) (a-b) that in merger agreements and acquisition, the Trade Union or respective employees or representatives of employees in both the acquiring and undertaking companies be put on notice of the transactions.[10] However, it does not amount to a compulsory transfer of workers to the acquiring companies. This is because, by the position of law, no employer or bank is mandated to retain or employ any person despite the acquisition of a new company. In a simple contract of labour, safe the technicalities in contracts with statutory flavours, the law

[7] Punch NG Report, "Bank recapitalisation will worsen unemployment– Analysts," *Punch Nigeria, April 02, 2024.* Retrieved on April, 06,. 2024. https://punchng.com/bank-recapitalisation-will-worsen-unemployment-analysts/

[8] Festus O. Ogiji and Onyekachi Richard Eze, "Impact of Merger and Acquisition on the Growth of Nigerian Banking Industry*," Research Journal of Finance and Accounting* 6, no. 13 (2015): 147-151.

[9] Federal Competition and Consumers Protection Act 2018

[10]

or the court will not compel an employee on an unwilling employer.[11] It defeats the rationale behind contractual voluntariness.[12]

Transfer of Employee

While the acquiring bank can not be compelled under the law to employ employees of the undertaken banks, the acquiring bank could also explore the Employees Transfer Regulations that exist in Nigeria. **Section 10 of the Labour Act** provides thus:

> (1) The transfer of any contract from one employer to another shall be subject to the consent of the worker and the endorsement of the transfer upon the contract by an authorized labour officer.
>
> (2) Before endorsing the transfer upon the contract, the officer in question-
>
> (a) shall ascertain that the worker has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake; and
>
> (b) if by the transfer the worker will-
>
> (i) change his form of employment from one which is the subject of an exemption order made under section 8 (2) of this Act; or
>
> (ii) be subject to such a change of conditions as in the officer's opinion renders such a course advisable, may require the worker to be medically examined or re-examined, as the case may be.[13]

Succour is also impliedly provided in the *Companies and Allied Matters Act 2020*[14] in its provision for the ratification of a pre-existing contract before the incorporation of another. By the virtue of *Section 71 of the Act*, as well as the position of the court in *Edokpolor v Sem-do*

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[11] Andrew Ejovwo Abuza, Kingsley Omote Mrabure, and Kenneth Owhighose Odhe, "A Reflection on the Socio-Legal Conundrum of Unfair Termination of Employment in Nigeria," *Baltic Journal of Law & Politics* 15, no. 7 (2022): 60-80. See also, Obo v. Comm. of Educ. Bendel State (2001) 2 NWLR (Pt. 698) 625

[12] See Agwu v. Julius Berger Nig. Plc. (2019) 11 NWLR (Pt. 1682) 165 S.C

[13] Cap L1, LFN

[14] Cap C20

Wire Industries Ltd,[15] the contract of the employee could be ratified or adopted as subsisting or continuing based on the previous agreement or new agreements is drawn up subject to the peculiarities of the acquiring bank.

The transfer of employees' agreement could form the basis of a memorandum of understanding or the restructuring processes to protect the interest of the workers. Such agreement as stated above could be an adoption or vary to a certain degree. An example of this is the process of privatization of the Nigerian National Petroleum Corporation to a Limited Liability Company under *Section 53* of the *Petroleum Industry Act 2021.*[16] *Section 57* provides for the transfer of employment to the new corporation. It states that:

> 57-(1) Upon the Incorporation of NNPC Limited under Section 53 of this Act, employees of the NNPC and its subsidiaries shall be deemed to be employees of NNPC Limited **on the term and conditions** not less favourable than that enjoyed prior to the transfer of service and shall be deemed to be service for employment-related entitlements as specified under any applicable law.
>
> (2) NNPC Limited shall continue to fulfil the statutory obligations of NNPC in relation to the pension scheme of employees of NNPC and its subsidiaries prior to the date of incorporation of NNPC Limited.[17]

While this is the provision of a statute, it forms a foundation for the adoption and transfer of employment from two or more companies that seek to merge in the recapitalization period to continue to be a going concern.

On this subject, it is imperative that there are legislative developments that will properly cater for the rights of employees in mergers, acquisitions, and other restructuring strategies, especially in the banking sector. For instance, the *Transfer of Undertakings (Protection of Employment) Regulation 2006* of the United Kingdom, makes provision for the extant protection of the employment of workers in restructuring, especially mergers.[18] The only

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[15] 1(984) 7 S.C

[16] Cap P10, LFN 2004

[17] Supra

[18] John McMullen, "An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006," *Industrial Law Journal* 35, no. 2 (2006): 113-139.

exceptions provided in that law are technical, economic, or organizational rationales that could be argued to be too broad or subjective to determine.

Redundancy Protection

A concept that may ensue in the process of restructuring, especially, merger and acquisition is the occasion of redundancy.[19] When the role of assignment prescribed in the contract of a particular employee ceases to exist, the employment of such person could be disengaged. The court in the *Nigerian Society of Engineers v. Ozah*[20] distinguishes between termination of appointment and redundancy thus:

> The termination of appointment of an employee is therefore in a bracket of its own removed from the incident of an employee leaving service because of redundancy. Termination of appointment implies complete severance of an employer/employee relationship by dispensing with the services of an employee with his post extant, while redundancy implies that the post occupied by an employee is no longer necessary and/or useless to the employer.[21]

In a situation of Business closure where the bank ceases to exist or winds up on the occasion of not meeting the required capital benchmark, there could be redundancy of some or all the banks' employees. More so, there are instances, where acquiring banks decide to reduce the totality of work force when considering the large human resources in the context of both the acquiring and undertaken banks employees. This was seen in the Merger between Access Bank and Diamond Bank that was completed in 2019. It was reported that the Bank had put plans in motion to lay off 75 per cent of its junior staff after the closure of about 340 branches nationwide because of the coronavirus and the inability to manage a large number of inherited

[19] Tinuke M. Fapohunda, "The Human Resource Management Challenges of Post Consolidation Mergers and Acquisitions in Nigeria's Banking Industry," *International Business Management* 6, no. 1 (2012): 68-74.

[20] (2015) 6 NWLR (Pt. 1454) 76

[21] supra

staff.[22] Also, the reduction of salaries of some staff members was rumoured as an option for consideration.[23]

Aside from the above business realities and giving no reasonable choice to a bank, other issues could arise that could warrant redundancy. Technological changes and automation of banking works could mean a reduction in the labour force affecting both acquiring and undertaken banks. However, Restructuring still poses a huge premise for redundancy.

The Nigerian law and even decisions of the court have anticipated these business realities and have laid down rules that would guide organizations, including banks, and the employees on the supposed actions, steps, and due diligence to be done in redundancy cases. Section 20(1) of the Labour Act provides for procedures and processes for handling issues of redundancy. It states that:

> 20. (1) In the event of redundancy-
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> (a) the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy:
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> (b) the principle of "last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability; and
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> (c) the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection (2) of this section.
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> (2) The Minister may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy.

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[22] Ayodeji Adegboyega, "Coronavirus: Access Bank Plans to Cut Staff Salaries to Avoid Job Losses," *Premium Times,* May 01, 2020. Retrieved on April 06, 2024. https://www.premiumtimesng.com/news/top-news/390873-coronavirus-access-bank-plans-to-cut-staff-salaries-to-avoid-job-losses.html?tztc=

[23] Paul Owolabi, "Access Bank to Fire 75 Percent of Junior Workers," *The Internatuional Centre for Investigative Reporting, May 01, 2020.* Retrieved on April 06, 2024. https://www.icirnigeria.org/covid-19access-bank-plc-junior-workers-to-suffer-job-loss/

(3) In this section "redundancy" means an involuntary and permanent loss of employment caused by an excess of manpower.[24]

By the provision of the Act, the first, step to be taken is to inform the workers' representatives in case there is no existing trade Union about the possibilities or eventualities of redundancy. The second is to follow the “last in, first out” principle, which presupposes that the last person employed should be the first person to be considered for lay-off. However, this step or condition is qualified by its dependency and subjectivity to “all factors of relative merit, including skill, ability, and reliability.”

The third step is that the bank should endeavour to negotiate redundancy payment with the employees who are being discharged, except there is a regulation by the Minister of Labour on compulsory disbursement of redundancy payment. The current situation is that there is no regulation by the Minister on compulsory payments, as such, the payment is dependent on the agreements reached at redundancy payment negotiation. In many instances, some Banks already have redundancy policies in their Handbooks. This is recommended that banks, in general, review their Handbooks to address such incidents in the future.

Another question that may arise is the determination of who would be responsible for the payment of redundancy. The Act basically refers to “employer” in Section 20 and the right deduction from the above is to assume that the undertaken bank should be the payer of redundancy payment. However, the **Bank and Other Financial Institutions Act, 2020**, provides in **Section 7(5)** that when a new license is granted to the new Bank after any restructuring arrangement, the assets, and liabilities of all the banks that were in the agreements and negotiation of merger would pass to the new bank. Hence, where an undertaken bank has not discharged its liability for redundancy payments, the new bank would be able to pay such debts. Hence, the new bank can not claim ignorance of the preexisting agreement to make redundancy payments.

The above gives a statutory dynamic to the bindingness of the pre-incorporation agreements. Where the agreements stretch to the rights and other dealings with employees, including the payment of necessary compensations and redundancy payments. **Section 96 (1) (2) of the Companies and Allied Matters Act**, **2020** provides that the company has the discretion to either ratify the agreement or not**. Section 7(5) of BOFIA** seems to put mandatory

[24] supra

disposition on Banks as the use of "shall," ordinarily connotes compulsion. In this instance, the express position of law, without any qualifying construction of the court implies that new banks must ratify and enforce pre-incorporation employment contracts or agreements for payment of redundancy fees. Where general and specific statutes conflict, the position of the law is that specific provisions will take precedence.[25]

To avoid the possibility of statutory conflict, although the position of the law is established, it is advisable to include such employment agreements in the MEMART of the newly licensed banks. This is because where there is MEMART conflict with any pre-incorporation agreement, the MEMART would take superiority and prominence.

NON-COMPETE CLAUSES

The law allows the inclusion of restriction of employment, as in a non-compete agreement in a contract of employment. It presupposes that an employee, in the event of leaving the company, will be restricted from, working for the company's competitor within a time frame. The combined reading of **Section 59 and 68(e) Federal Competition and Consumers Protection Act** posits those restrictions in the contract of employment of an employee for not more than 24 months.

However, questions that could arise from this subject is whether the post-contractual agreements of trade restrictions on non-compete agreements would be enforceable in a case where the employer is the party that provoked the determination employment contract. In a case of refusal to transfer employees in merger and acquisition transactions and where an employee is relieved because of redundancy, it begs the question if the clauses would still have the same strength of bindingness and enforceability.

The position of the Nigerian law is not definite on the enforceability of the non-compete clause at the instance of the employer where the employer has provoked the determination of contract, either by firing, sacking, dismissing or breaching the terms of agreements. However, where these questions arise, one would not fold his/her hand to the complexities of judicial constructions.

[25] Abubakar v. Nasamu (No.1) (2012) 17 NWLR (Pt. 1330) 407 S.C

In some jurisdictions, where the contract is terminated legally and according to the operation of law, followed by the right compensations, the employer would be able to claim the subsistence of the clause. However, it is the opinion of this writer that the clause should not be enforceable based on the arguments below.

First, the Supreme Court in the case of **Koumoulis v Leventis Motors Ltd**,[26] gives a qualification for a non-compete clause enforceability. The court states that:

> Generally, all covenants in restraint of trade are prima facie unenforceable at common law. They are enforceable only if they are reasonable with reference to the interests of all parties concerned and the public.[27]

Based on the reasonability test, one could ask the subjective question whether to a reasonable man or the court's evaluation of reasonability, bearing in mind the peculiarities of merger and acquisition vis a vis the interest of the banks and the employee, a non-compete clause would be enforceable against an employer that sacks or lay-off its employee. This is because the laying-off is not the choosing of the employees. The mischief rule consideration of the clause is that the clause tends to protect the interest of the employer ab initio, but one must then ask if a person can be allowed to benefit from their wrongdoing. If the employee had had a choice, he or she would have loved to remain in employment and as such, it would have meant that the clause seeks to incapacitate an employee involuntarily.

This goes to another leg of the qualification of enforceability of the non-compete clause. Could we say that the supposed mass lay-off that is proposed to follow the imbroglio would not cause mass unemployment and further unemployability if non-compete clauses are put in motion or enforceable? Would that not be against the overriding principles of public interest as seen in the decision of the Supreme Court above?

More so, the jurisprudence of the idea of "Good Leaver and Bad Leaver" could be applied in the determination of the entitlement of a party to benefits accruable to him from a contract.[28] On a balance of provocation of the agreement, the employer/bank is the party that

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[26] (1973) 1 ALL NLR Part 2, 144

[27] Supra

[28] *Cook v. EAGLEPICHER TECHNOLOGIES, LLC*, No. 1: 22-cv-01893-LTS (S.D.N.Y. Jan. 31, 2024). See also *Daum v. Planit Solutions, Inc.*, 619 F. Supp. 2d 652 (D. Minn. 2009).

necessitates the disengagement of the employment contract and as such, an extension of that jurisprudence could paint the employer as a bad leaver of employment that should not be allowed access to the benefits and compensations accruable to him from the agreement.

THE OUTSOURCED LABOUR DYNAMICS

To allow for employment flexibility and reduce the culpability and liabilities of banks to employees, they outsource human resources to bodies known by the Labour Act as "Fee-Charging Employment Agencies."[29] The workers are also often referred to as "Casual or Contract workers," within the context of the agreements they had with the agencies. In many of the agreements, parties to employment are largely the agencies, the employees, and the work site.

However, after many negotiations and dialogues with stakeholders, the Federal Ministry of Labour and Employment, in partnership with other stakeholders in the banking sector, released the *Guidelines of Labour Administration Issues in Contract Staffing/Outsourcing Non-Permanent Workers in Banks, Insurance, and Financial Institutions.* The Guidelines aimed to ensure that contract workers are also entitled to similar rights as permanent workers in Financial Institutions. They will be entitled to yearly salary increments, career development and path, unionism, and saner exit procedures that allow them fair hearings as well as shield them against exploitation.

Subject to the provisions of these guidelines, employment of contract or casual workers will also be protected by law. As a result of achieving protection against discrimination, the rights accruable to permanent workers could be claimed by non-permanent workers. However, this makes the agreements tripartite, in the sense that contractors or agencies also have interests to protect in this case.

RECOMMENDATIONS AND CONCLUSION

It is imperative that Banks, in their bids to ensure meeting the recapitalization benchmarks, comply with the provision of the Federal Competition and Consumers Protection Act,

[29] See **Section 71 of Labour Act.**

particularly Section 16(3) (a-b), by notifying and consulting with trade unions or employee representatives about the transactions. While the law does not mandate automatic transfer of employees, transparency and communication can help mitigate concerns and facilitate smoother transitions. In fact, ensuring due diligence could be a way of lowering the liabilities of "Bad Leaver," as well as giving more favorable grounds in employment claims.

It is the disposition of this writer that more legislations are needed to envisage the rights of employees in cases of mergers and acquisitions and definite guidelines must be published to guidelines. against possible exploitations. It is also important that the banks ensure that there is reasonableness and justifiable grounds in the process of laying off workers. It is also important that the services of labour experts should be employed in the determination of the employment contracts of employees.