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Rethinking the Effect of Liquidation on Contract of Employment under *Corpus Juris Nigeriana*: Interrogating the Supreme Court Decision in *Gbedu v Itie*

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Abstract

Through doctrinal method, this article appraises the Supreme Court of Nigeria (SCN) decision in *Gbedu v Itie* where the Court held that an order of compulsory winding-up operates as “dismissal” of the employees of the concerned company. The article argues that while liquidation extinguishes the company (i.e. the employer), its effect on the employee(s) contract of employment is termination, not dismissal. Dismissal presupposes the commission of gross misconduct by the employee, and carries infamy which may not be supported by the death of the company via liquidation. The article argues that causing an employee who may not be responsible for the liquidation of a company to be tagged “dismissed from employment” is unjustifiably harsh. The article interrogates matters arising from the decision, particularly the legal status

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of a collective agreement under Nigerian labour jurisprudence and the slavish adherence to the common law position on the issue vis-à-vis the need for industrial harmony and security of employment. The article finds that by the totality of the facts of the case, especially payment of entitlement and benefits post liquidation, the effect of the order of winding-up, contrary to what was decided by the Court, amounts to termination of employment and not dismissal. The article recommends that lower courts should distinguish this decision and not indulge in word-worship as the terminology used by the SCN is unintended within its usage context.

Keywords: dismissal; liquidation; National Industrial Court of Nigeria; termination of employment; Supreme Court of Nigeria; winding-up order

1 INTRODUCTION

In Nigeria, the law permits persons with requisite legal capacity to incorporate business associations to carry on various legitimate businesses.¹ Promoters of business associations work to ensure that they flourish over an indefinite time. However, after incorporation, a company could run into trouble and fail.² Members of a public company can petition for its compulsory winding-up if the company is unable to meet its financial obligations.³ Once a petition for winding-up (voluntary or mandatory) is made, it serves as notice to the general public and the various organs of the company that the company is about to be declared legally dead.⁴ Upon the court making an order winding-up the company, the company is considered dead. This necessitates the appointment of a liquidator to gather all the assets of the company and convert them into cash to satisfy its financial obligations to its creditors in order of priority.⁵ The liquidator is like an undertaker who is legally responsible for giving the dead company a decent burial by making necessary burial arrangements and paying all “burial” expenses from the assets of the dead company to its creditors.

The issue is, bearing in mind that each employee has an independent contract of employment with the employer, what happens to that contract of employment upon the winding-up of a corporate employer (company)? Put differently, what is the effect of winding-up of a company on the individual contract of employment between the wound-up company and its employee(s)? Does the winding-up order operate as dismissal or termination of the employee (s) employment? The SCN in *Gbedu & Ors. v Itie & Ors.*⁶ held that a winding-up order from the date it is made has the effect of dismissal of the employees of the wound-up company as it leads to the legal death of the employer (company).

This article argues that this decision is *per incuriam* even as it concedes that by operation of judicial precedence⁷ and *stare decisis*⁸ this is the law in Nigeria. Nevertheless, it urges lower

1 See generally Part A, B, and C of the Companies and Allied Matters Act (CAMA) 2004.

2 *Santana v Ajede* [2000] WRN 35.

3 See S 457-485 of CAMA 2004.

4 *Ezenwa v J.C. Ltd.* [1994] 7 NWLR (Pt. 356) 292.

5 *Provisional Liquidator, Tapp Industries Ltd. v Tapp Industries Ltd.* [1994] 5 NWLR (pt 393) 9; *N.D.I.C. v Financial Merchant Bank Ltd.* [1997] 2 NWLR (Pt. 490) 735.

6 [2020] 3 NWLR (pt. 1710) 104.

7 Judicial precedent is a doctrine which requires that inferior courts, on the hierarchy of courts, abide by the decisions of the higher or superior courts. For instance, the Supreme Court is the highest court in Nigeria, all other courts, must abide by its laid down pronouncements in deciding cases before them and can only depart, therefrom under established permissible circumstances. Failure to so do would amount to judicial insubordination which is a serious judicial misconduct and sternly condemned.

8 *Stare decisis* is a Latin maxim meaning “stick or abide by what has been decided”; it comes into effect where there is in operation, judicial precedence where there is an established hierarchy of courts.

courts to distinguish this decision and not indulge in slavish word-worship as the use of the word (i.e. dismissal instead of termination) is likely unintended when its use in other contexts is countenanced. The article further argues that the use of “dismissal” as opposed to “termination” concerning the effect of winding-up on the contract of employment of the employees of the wound-up company is not only inappropriate but is a label that is inimical to an employee’s present and future employment prospects, particularly in a labour terrain that is predominantly precarious and convoluted by an unprecedented high level of unemployment as well as underemployment. The impropriety of this decision and the justification for the foregoing assertion becomes apparent when the legal connotation of dismissal, as well as its effect on an employee’s future employment prospects, is countenanced.⁹ Usually, for an employee to be dismissed, a case of “gross misconduct” must be established against the employee. The act of dismissal carries infamy, which affects the reputation as well as employment prospects of the concerned employee(s).¹⁰ When considered that in labour and employment jurisprudence, the word “dismissal” is incapable of more than one legal connotation, its usage in the judgment under review cannot be explained to mean something else (i.e. “termination”) but only what it has been established to mean. This article also interrogates matters arising from the judgment, such as the status of the collective agreement under Nigeria’s labour jurisprudence and its effect on industrial harmony. The article argues that the persistent adherence to the common law position on the status of collective agreement by Nigerian courts is an albatross to industrial harmony. Thus, this slavish adherence does not accord due regard to the resources invested in the process of collective bargaining, which culminates in a collective agreement. The article therefore argues that the need for a paradigm shift to ensure that the law meets the yearnings of the populace is inevitable, especially as many nations of common law background have since loosened themselves from the shackles of moribund common law (which has become uncommon law) prescriptions as far as the enforceability of collective agreement is concerned.¹¹

This article is divided into five parts: part one contains the introduction. Part two contains an analysis of the decision under review. Part three appraises the propriety of the decision; it distinguishes between dismissal and termination of employment. Part four examines matters arising from the judgment with an emphasis on the legal status of a collective agreement under Nigeria’s labour jurisprudence. Part five contains the conclusion and recommendations.

2 ANALYSING THE DECISION IN *GBEDU & ORS. v ITIE & ORS.*

The brief facts of the case are as follows. The third Respondent filed a winding-up petition against the second Respondent at the Federal High Court (FHC). On 18 March 2005, the Court made an order compulsorily winding-up the second Respondent. Contingent on this order, the Court appointed the first Respondent as the liquidator of the second Respondent. The Liquidator was appointed to gather the second Respondent’s assets and convert them to cash with a view to discharging the second Respondent’s financial obligations towards its creditors. On 6 April 2006, the Appellants were disengaged from the service of the wound-up company and the liquidator paid them their entitlements. They were dissatisfied with the payment, as they contend that it should have been calculated using the National Joint Industrial Council Agreements (NJICA) of 2002 and 2004, and not the 2000 Agreement, which the liquidator used. They petitioned the liquidator and the third Respondent for reconsideration, but the petition was unsuccessful. As a result, the Appellants filed a suit at the FHC, Ilorin Judicial Division. They claimed several

9 Opera, Uruchi, and Igbaekemen, “The Legal Effect of Collective Bargaining as a Tool for Democratization of Industrial Harmony” 2014 *European Journal of Humanities and Social Sciences* 168.

10 *Irem v Obubra District Council* (1960) 5 FSC 24, at 27.

11 Okene, “Internationalization of Nigerian Labour Law: Recent Developments in Freedom of Association” 2016 *Port-Harcourt Journal of Business Law* 10.

sums based on the 2002 and 2004 Agreements, as opposed to the sum paid to them, which was based on the 2000 Agreement.¹² Their claims were dismissed by the trial court, and the Court of Appeal. Their appeal to the Supreme Court was also dismissed on the ground that the evidence did not support their action.¹³ The Supreme Court also held that from the date the liquidator was appointed, they stood dismissed from the employ of the wound-up company.

2.1 Parties' Arguments

The appellants formulated four issues for the determination of the Court. It is apposite to state that only issues one and four are within the scope of this article, therefore, discussions herein are limited to them. The issues are: whether the Court of Appeal was correct in law in affirming the trial court's decision that upon the making of a winding-up order and the appointment of a liquidator, the appointment of the appellants and the attendant rights become extinguished, and whether the Court of Appeal was right in its view that there was no nexus between the NJIC 2002 and 2004 Agreements, and the respective appointments of the appellants.¹⁴

The appellants argued that the decision of the trial court which was affirmed by the Court of Appeal that, upon the making of a winding-up order and subsequent appointment of a liquidator, the appointment of all the employees of the company comes to an end is not only perverse but had occasioned a grave miscarriage of justice since there was nothing in the Companies and Allied Matters Act (CAMA) to that effect. They contended that if the Legislature had intended the effect brought about by the decision of the two courts below, it would have expressly provided it. They, therefore, urged the Court to reverse the decision. The first to third Respondents urged the Court to affirm the concurrent decision of the courts below, which is that upon the making of a winding-up order and appointment of a liquidator, the servants or employees of the wound-up company are dismissed. Reliance was placed on foreign persuasive authorities, such as Halsbury's Laws of England, Vol. 7, and other scholarly texts.¹⁵ They contended that the trial FHC which was affirmed by the decision of the Court of Appeal is the correct position based on common law applicable in Nigeria. The fourth Respondent argued that the making of the winding-up order meant the automatic dismissal of the appellants from the date same was made placing reliance on *Chapman's Case*,¹⁶ *Fowler v Commercial Timber Co. Ltd.*,¹⁷ and Halsbury's Laws of England, Vol. 7. He argued that the decision of the Court of Appeal is correct in law and equity, and same should not be overturned by the Supreme Court. It is worthy to note that the English Court in *Fowler's Case*¹⁸ per Greer J held that "there is no doubt that an order for the compulsory winding-up of a company puts an end to the employment of the Managing Director." The same conclusion was reached in *Chapman's Case*.¹⁹ Orojo has asserted that "on the making of the winding-up order, the servants of the company are *ipso facto* dismissed."²⁰

On issue two, the appellants argued that they pleaded the agreements, thus the two courts below were wrong to have concluded that there was no linkage between the two agreements and

12 *Gbedu & Ors. v Itie & Ors* [2020] 3 NWLR (pt 1710) 104 at 108.

13 *Ibid.* 109.

14 *Ibid.* 111.

15 *Ibid.* 125, paras A-B, E-F. The Court referred to several scholarly textbooks such as the Loose and Griffiths *Loose on Liquidator* 5 ed 97: "employees are automatically dismissed in the case of creditor's voluntary winding-up and of compulsory winding-up." See also Palmer, *Palmer's Company Precedents* (Pt. 2) 17 ed (1951) 102–103.

16 (1866) LR1EQ 346.

17 (1930) All ER 224.

18 *Ibid.*

19 (1866) LR1EQ 346.

20 Orojo, *Company Law and Practice in Nigeria*, Vol. 1 (1984) 540.

the appellants' contracts of employment. They contended that the allowances or entitlements of the appellants were as regulated by the collective agreements in the 2002 and 2004 NJIC Agreements and not that of the 2000 Agreement which was used. They urged the court to resolve the issue in their favour.

The respondent contended that the Court of Appeal was right when it affirmed the trial court's decision that there was no nexus between the 2002 and 2004 NJIC Agreements and the individual contracts of employment of the appellants. They further argued that the appellants had failed to show that these agreements had passed the litmus test which would have made it binding between the parties entitling them to have their allowances or entitlement calculated according to the agreement as was held in *Ben Chukwuma v Shell Petroleum Company Ltd.*²¹ In this case, it was stated that unless and until a collective agreement has been incorporated into the contract of employment of the individual workers, either express or impliedly, at common law (which is the applicable position in Nigeria) it remains a mere gentleman's agreement only binding in honour.²² The failure of the appellants to tender their contract of employment, wherein the 2002 and 2004 NJIC collective agreement had been incorporated as forming part of, was held to be fatal relying on *Njoku v Dikibo*.²³ The respondent urged the Court to resolve the issue against the appellants.

2.2 Court Resolution of the Issues

On issue one, after reviewing the arguments of the parties, the Court (i.e SCN) observed that in truth, on the question of the effects of a winding-up order on the contract of employment for the employees of the wound-up company, there is a dearth of domestic authorities.²⁴ In such a situation, the trial court is legally permitted to seek guidance from foreign persuasive authorities. The court found that local authorities such as *Provisional Liquidator, Trapp Industries Ltd. v Tapp Industries Ltd.*,²⁵ and *National Insurance Deposit Commission v Financial Merchant Bank Ltd.*,²⁶ and certain provisions of the CAMA support the respondent content that the winding-up order, once made by the court, serves as an automatic dismissal of the employees of the wound-up company.²⁷ Thus, the court jettisoned the appellant's contention that the decision of the Court of Appeal, which affirmed the judgment of the trial court, was perverse and a grave miscarriage of justice, as the appellants did not demonstrate how the judgment was either perverse or a miscarriage of justice which would warrant the Supreme Court to upturn same.²⁸ The Court per Rhode-Vivours JSC, therefore concluded that:

Once an order of compulsory winding up of a company is made, the Board of Directors ceases to function. They no longer have powers. All their powers are taken over by the liquidator. The Managing Director and all employees of the company are dismissed, and the dismissal takes effect from the date the winding-up order was made by the court. I should have observed earlier, but I do that now... The Court of Appeal was right in affirming the trial court's holding that upon the making of a winding-up order, and the appointment of a liquidator, the

21 [1993] 4 NWLR (pt 289) 512.

22 *Olarenwaju v Afribank* [2001] 13 NWLR (pt 731) 691.

23 [1998] 1 NWLR (Pt. 538) 496.

24 *Gbedu v Itie & Ors.* [2020] 3 NWLR (pt1710) 104 at 125, paras B-C.

25 (1995) LPELR 2928 SC P. 47.

26 [1997] 2 NWLR (Pt. 490) 735.

27 *Gbedu v Itie & Ors.* [2020] 3 NWLR (pt1710) 104 at 125.

28 *Military Governor of Lagos State v Adeyiga* (2012) 2 SC (pt 1) 68; *Bassey v State* [2012] 12 NWLR (pt 1314) 209.

appointments of the appellants and the attendant rights become extinguished.²⁹

Based on the foregoing, the Supreme Court has held that when a court grants a winding-up order, from the date the order was made and a liquidator was appointed to take over the management of the company, the office and authority of the Managing Directors (and all other offices) as well as the employees of the company are automatically dismissed. This position is controversial, and is addressed in the section dealing with the dichotomy between termination and dismissal in labour and employment law.

On issue two, the court held that the appellants failed to establish that the 2002 and 2004 NJIC Agreements have any nexus with the individual contracts of employment. Although the parties had negotiated the terms of the collective agreements, the terms of the collective agreement had not been incorporated into the appellants' contracts with the wound-up company save the 2000 agreement under which their entitlements were calculated and awarded. The testimony of the PW2 confirmed that the two collective agreements had not been incorporated. Since parties are bound by the contract that they freely enter into, and the appellants had not shown that the 2002 and 2004 NJIC Agreements were binding between the parties, they could not argue that their entitlements should be calculated based on a non-binding agreement.

The position of the court on issue two is a reaffirmation of the common law position on the enforceability of collective agreement in Nigeria. Although the position of the law has changed in Britain and other common law jurisdictions, the position has remained in Nigeria despite the imminent need for a paradigm shift. This issue and others are discussed in the subsequent part of this article dealing with matters arising.

3 DISMISSAL AND TERMINATION OF EMPLOYMENT DISTINGUISHED

When an employment contract is made, there is an underlining expectation that the relationship will continue for the duration of the contract. This is especially true for permanent employees where the employment is intended to continue indefinitely till retirement. However, in the course of the employment relationship, the contract of employment could be determined abruptly, due to the act or omission of either party. Whatever means through which the contract of employment is determined, it carries legal connotation/implication. This section of the article examines the dichotomy between termination and dismissal in employment relations. At this juncture, it is apposite to note that termination and dismissal are both means to end an employment contract, contrary to the initial expectation of the parties that the contract would be permanent or for a fixed term. The essence of this dichotomy is to assess the propriety of the trial court and Court of Appeal ruling, as affirmed by the Supreme Court that upon the making of a winding-up order, the employees of the concerned wound-up company are automatically dismissed. Considering the legal consequences and negative connotation of the term dismissal, the question remains what the effects are of the winding-up of a company on the employment contract of employees, particularly when there is no proven gross misconduct? This section of the article proffers answers to this question while paving the way for an elaborate discussion of the matters arising from this ruling and its impact on Nigeria's labour jurisprudence.

Determination is a general term used to describe the end of a contract of employment.³⁰ Thus, a contract of employment may be determined by termination or dismissal.³¹ What then is the significant difference between termination and dismissal? The difference is in the circumstance

29 *Gbedu v Itie & Ors.* [2020] 3 NWLR (pt1710) 104 at 126, paras E-F, 127, paras A-B.

30 Oji and Amucheazi, *Employment and Labour Law in Nigeria* (2004) 335.

31 This categorisation is not exhaustive as there are other modes through which a contract of employment could be determined, such as novation, which is the replacement of the existing contract with another by fundamental alteration of its terms and conditions.

and effect the two have on the employment contract post-determination. Oji and Amucheazi³² have rightly cautioned that “dismissal and termination from service are not interchangeable, one should therefore take care to avoid indiscriminate use of the words.” Circumstances that would be considered as terminating a contract of employment are usually, but not always, regarded as mutually agreed upon by the parties, occurring without the fault of either of them, or due to the act or omission of either of them, but without any fundamental consequence beyond bringing the employment contract to an end. The foregoing does not detract from the fact that there have been instances where an employee’s conduct/omission is deserving or warranting dismissal from employment but the employer would magnanimously commute same to termination. Once an employer engages in this extension of magnanimity, the resultant effect is termination as the offensive conduct is lessened and the effect it originally and ordinarily had, rebated. This is synonymous to the extravagant display of mercy or upholding of an *allocutus* plea in a criminal sentence which reduces the punishment prescribed for an offence an accused is charged and found guilty of. When an employment is terminated, the rights and entitlements of the employee are generally not affected by the determination of the contract through termination. Although, the employer may become liable to pay the employee damages for wrongfully determining the contract.³³ Determination via termination can be exercised by both the employer and employee, but dismissal is the exclusive preserve of the employer against a recalcitrant and irritant employee.³⁴

Dismissal, on the other hand, occurs when the act or omission leading to the determination of the contract by the employer is of a fundamental nature that strikes at the root of the contract and has grave consequences beyond merely determining the contract. It extinguishes the benefits that would ordinarily accrue to an employee upon the determination of an employment contract.³⁵ It also extinguishes the right of the employee to entitlements post-employment (with the exception of pension benefits as provided for under the Pension Reformed Act, 2014) determination benefits and carries the omen of ignominy and infamy.³⁶ It touches on the character and moral rectitude of the concerned employee and places a red flag of “prospective employers beware” of the character, competence or suitability deficiency of this employee.³⁷ In dichotomizing termination from dismissal, Chainu³⁸ posits that “Nigerian judges use dismissal to apply to termination at the instance of the employer as a result of an employee’s misconduct. A dismissed employee loses all terminal benefits, unlike a terminated employee who remains entitled to his benefits.”

In *J.A. Irem v Obubra District Council*³⁹ the Supreme Court held that “dismissal as opposed to termination of employment, carries infamy and deprives one from benefit which termination, does not.”⁴⁰ In *Mr. A.S. Jombo v Petroleum Equalisation Fund Management Board & 2 Ors.*,⁴¹ The Supreme Court reiterated its earlier distinction between termination and dismissal in the *Irem Case*, and went a few steps further to state that it is settled law in Nigerian labour jurisprudence that a distinction is made between termination and dismissal. While dismissal is punitive and depending on the contract of employment, it very often entails a loss of terminal

32 Oji and Amucheazi *Employment* 343.

33 *Olatunbosun v NISER* [1988] 3 NWLR (pt 80) 25.

34 Worugji, *Introduction to Individual Employment Law in Nigeria* (1999) 156.

35 *Oyenuga v University of Ife* (1965) NMLR 9.

36 *Texaco (Nig.) Plc. v Kehinde* [2001] 6 NWLR (pt 798) 224.

37 *Irem v Obubra District Council* (1960) 5 FSC 24 at 27.

38 Chianu, *Employment Law* (2004) 289

39 (1960) 5 FSC 24 at 27.

40 See *Abomeli v Nigerian Railway Corporation* [1995] 1 NWLR (pt 372) 51.

41 [2005] 14 NWLR (Pt. 945) 443.

benefits. It also carries unflattering opprobrium toward the employee. Termination on the other hand is not necessarily so and enables the employee to receive terminal benefits under the contract of employment.⁴²

Before further adumbration, it is apposite to note the point that where the employment contract, gives both parties the right to determine the contract by giving a specified notice e.g. three months which is to terminate at a specified time or make payment in lieu of notice, this is not to be done arbitrarily. Take for instance, where a lecturer's employment contract provides that either party is at liberty to terminate the contract by giving three months' notice effective at the end of a semester or session. Where either the employer or employee opt to pay salary in lieu of notice. The salary must be paid at a time that the three months' notice period would be met either at the end of a semester or session as it is *in lieu* of notice. What this means is that as at the time the payment is made, there must be clear three calendar months period to the end of either a semester or a session for the payment to operate as *in lieu* of notice and not a period that is less than three months no matter how slight. Thus, where the payment is made at a time when the notice period would have been impossible to meet, the employment would not have been determined rightly. Thus, although the employment (especially master-servant where reinstatement is ordinarily unavailable) is determined, the determination was effectuated in breach of contract entitling the employer to sue and seek damages for breach of contract. The intendment of the option of payment in lieu of notice is not to give the parties an opportunity to abridge the notice period or arbitrarily suffocate the notice period but to physically leave the employer's employ or be disengaged without the obligation and burden of waiting till the notice period expires. Payment *in lieu* of notice is not a mechanical sham in the hands of either the employer to arbitrarily get rid of an employee and throw him/her back into the labour market or for an employee to expose the business of an employer to inconvenience or hardship due to unplanned reduction in the workforce.

The gist of the articulation above is that the effect of termination of a contract of employment differs from that of dismissal. While both bring the employer–employee relationship to an end, one extinguishes the accrued rights and benefits (save pension under the 2014 Pension Reform Act) to which the employee ordinarily is entitled, and imposes an offensive odour that smears the reputation or suitability of the employee which may be a cause of concern to prospective employers. Conduct that justifies the dismissal of an employee is fundamental or grave in that it radically affects the very foundation of the employment contract. This is in contrast to termination, which may or may not have this effect. The conduct that attracts dismissal must be so fundamental that it undermines or destroys the fabric of the employment relationship, making its continuation impracticable and not mutually beneficial. This is because the confidence, trust, and respect that ought to mutually exist between the parties to the contract have been irreparably destroyed.⁴³ In *New Nigerian Bank Plc. v G.C. Osunde*,⁴⁴ the Court of Appeal characterised such conduct as follows: “a conduct of grave and weighty character, as to undermine the relationship of confidence and trust, which should exist between employer and his employee.” The conduct contemplated here are not just common or simple acts or omissions that occur due to human frailty, but gross misconduct, which in most cases are wilful despicable acts or omissions with injurious outcomes to the employer's business.

An employee's conduct against his employer's interest should entitle an employer to summarily

42 Oji and Amucheazi *Employment* 344.

43 Oji and Amucheazi *Employment* 344.

44 [1998] 9 NWLR (pt. 566) 511.

dismiss the employee.⁴⁵ In *Maja v Stocco*,⁴⁶ Ademola JSC (of blessed memory) cataloged various acts that would justify summary dismissal of an employee including: “willful disobedience to lawful and reasonable order, misconduct of the master’s business, neglect, incompetence, and any other conduct or omission, fundamentally prejudicial to the employer’s business.”⁴⁷ An employee’s insubordination⁴⁸ to constituted authority would merit outright dismissal from employment. This is because insubordination is not only inimical to the employer’s business, but its effects, if not immediately curtailed, would outlive the employee who commenced it as others may be negatively influenced.⁴⁹ Where an employee’s negligent act financially prejudices the employer, it is a ground for dismissal.⁵⁰ Where an employee engages in financial impropriety, such as fraud or self-enrichment at the expense of their employer, it warrants summary dismissal forthwith.⁵¹ In fact, after the dismissal, the employer may, if they so desire, hand the employee over to the authorities for prosecution, since this is a crime.

Some acts of misconduct justifying dismissal, such as criminal acts, are so fundamental that the employer may not have to wait for a court to determine the culpability or otherwise of the employee before dismissing the employee provided that due process is followed.⁵² In some instances, employers have magnanimously converted dismissal to termination, and action for wrongful termination has always failed with the court deriding the “pardoned” employee for foolhardiness.⁵³

The reasons for termination of employment are usually “friendly”, or less damning, and are mutually agreeable. Thus, while one party may wish the relationship continues, the other may be unwilling and therefore, brings the relationship to an end, while the other party who wishes for its continuity, feels nostalgic. The reason for terminating the relationship may be an act or omission that occurred due to the fault of none of the parties; for instance, the operation of law,⁵⁴ such as the occurrence of unforeseeable (frustrating) events like an outbreak of war or natural disaster.⁵⁵ The summary is that terminating circumstances do not carry the same negative weight or impact as that of dismissal just as their outcomes. Parties may even agree in advance on how their contract could be terminated as in the case of termination by notice.⁵⁶ No stigma or opprobrium is attached to the act of termination, it does not *ab intio* raise suspicion or curiosity about the employee’s character. This is in contrast to dismissal, which is a *prima facie* case of character bankruptcy or incompetency/unsuitability on the part of the concerned

45 See *Sule v Nigeria Cotton Board* [1985] 2 NWLR (pt 5) 17; *National Union of Banks, Insurance and Financial Institutions Employees v NICON* (1987) NCLR 211; *Udegbunam v Federal Capital Development Authority* [2003] 10 NWLR (Pt. 829) 487.

46 [1968] NMLR 372 at 379.

47 *Abukugbo v African Timber and Plywood Ltd.* [1966] NMLR 312.

48 *University of Calabar v Essien* [1996] 10 NWLR (pt 477) 225 at 262.

49 *Sule v Nigerian Cotton Board* [1985] 2 NWLR (pt 5) 17.

50 *Usen v Bank of West Africa Ltd.* [1961] 1 All NLR 244; *Ningi v First Bank of Nigeria* [1996] 3 NWLR (pt 435) 220.

51 *Mahah v Standard Bank of (Nig.) Ltd.* (1976) ECSR 199.

52 Agomo, *Nigerian Employment and Labour Relations Law and Practice* (2011) 176. The decision in *Olarenwaju v Afribank (Nig.) Ltd* [2001] 13 NWLR (Pt. 731) 319 followed in *Godwin Iweha v Ebice Company Ltd.* [2001] 13 NWLR (Pt. 731) 691 supports the postulation that so long as due process is followed, an employer can dismiss an employee where the misconduct touches on criminality before the court makes a pronouncement on the culpability of the employee.

53 *Udegbunam v Federal Capital Development Authority and Osakwe v Federal College of Education, Asaba* [2010] 23 NWLR (Pt. 1011) 158.

54 *Oji and Amucheazi Employment* 341.

55 Emiola, *Nigerian Labour Law* 4 ed (2008) 130–132.

56 *Food, Beverage and Tobacco S. S. A. v Premier Breweries Ltd.* (1989–1990) NICLR 56.

employee.

The analysis above was undertaken to ascertain the propriety of the choice of “dismissal” by the Supreme Court as opposed to “termination,” as the effect of a winding-up order and the subsequent appointment of a liquidator on the contract of employment of the employees of the wound-up company and the dichotomy between them, has been established.⁵⁷ In the case under review, the employees were not responsible for the winding-up of the company as there were no allegations of misconduct against any of them that led to the winding-up. If there had been, the employees’ employment would have even been determined via dismissal before or during the winding-up process. While it is conceded that the winding-up of a company can sometimes be traced to the ignoble activities of the employees, especially those at the managerial level, this assumption is nevertheless disputable and would not justify the determination of employment contracts as dismissal, because the essential elements of dismissal are absent. It is vehemently contended that the use of dismissal (which is not susceptible to the innocuous grammatical meaning of discharge in this instant case by the Supreme Court) was inappropriate, particularly when the aftermath of dismissal is countenanced. After the dismissal, the entitlements of the employees were paid. If the Court had held that the employees were dismissed, their entitlements would have been extinguished from the date the winding-up order was made.

The rate of unemployment in Nigeria is alarming with no real effort to address the issue by the government. Every effort must be made to ensure that the record and character of an employee are kept clean which is a *sine qua non* for future employment opportunities. It should be noted that most employers do not have the patience to find out the truth of a matter, and merely hearing that a job seeker was dismissed is enough reason not to consider the person for employment. Why should a person be made to carry a label that has nothing to do with them, and suffer from the consequences? At the expense of repetition but for emphasis, we submit that termination, as opposed to dismissal, is the appropriate outcome a winding-up order has on the contract of employment. Describing the determination of an employment contract as dismissal or termination is not conclusive proof of what has taken place and what has been stated in the letter, if the letter does not accord with the intention of the parties.⁵⁸ A letter of determination could be captioned “dismissal from employment” but the subsequent action of the employer towards the “dismissed employee” could point to what has been done *strictu sensus* is not dismissal, but termination, and *vice versa*.⁵⁹ For instance, where a determination letter is captioned “dismissal from employment” but the “dismissed” employee is paid all entitlements and allowances thereafter; the same cannot be regarded as dismissal because the outcome is not compliant with that of dismissal but rather of termination. In the instant case, the employees were paid their entitlements or benefits, yet their disengagement due to the winding-up of the company was described as dismissal. For all intent and purposes, the payment of these benefits negates the fact of dismissal.

While the doctrine of judicial precedent requires that courts beneath the Supreme Court are bound by its decision, it is trite law that distinguishing is one of the ways a lower court can renege from being bound by precedent.⁶⁰ It has been established beyond contestation that the use of “dismissal” as opposed to “termination” by the Supreme Court of Nigeria (the SCN) is not only inappropriate but decided *per incuriam*. Based on this, and the need to ensure that unjustifiable hardship is not foisted on an employee whose company is wound up, lower courts should distinguish this decision especially as they are enabled by the fact that a decision was reached *per incuriam*. It would be appalling and a great disservice for lower courts to blindly follow

57 Chianu *Employment Law* 291.

58 *Ibid.*

59 *Wilson v Attorney General of Bendel State* [1985] 1 NWLR (pt. 4) 572.

60 *Adigun v Attorney General of Oyo State (No. 2)* [1987] 2 N.W.L.R. (197) 208.

this decision. It can be safely and rightly argued that the use of “dismissal” was unintended, based on its meaning and usage in other contexts. Interestingly, the court had rightly found that Nigerian authorities are united in their interpretation and effect of sections 408(d), 422(9), 423, and 424 of CAMA 2004, to the effect that, a compulsory winding-up order not only dismisses the directors and dissolves the management of the company; it also *ipso facto* “terminates” the employment of all the employees.⁶¹ Regrettably and curiously, despite correctly stating the law, the SC in a somewhat somersaulting manner, came to the erroneous and regretful conclusion that “on the making of the winding-up order, the servants of a company are, *ipso facto*, dismissed.” Nothing is farther from the truth than this conclusion and the same should not be sustained by the lower courts, because to do so would be imprudent and unjustified.

It is apposite to note that the provisions of CAMA 2004 [i.e. sections 408(d); 420(1), (2), (8); 422(9); 423; 424; 425(1), (6); 518(2); 566(1)] which the court interpreted as having the effect of dismissal of the employees of a wound-up company upon the appointment of a liquidator by the court have been retained in CAMA 2020, with no modification. This is so when the provisions of section 571(d) (where a company is unable to pay its debt necessitating it being wound-up) section 585(9) (dealing cessation of the powers of the directors upon the appointment of the liquidator) sections 583(1); 586; 588 dealing with powers of a liquidator, and section 589 which requires the liquidator to give information to the official Receiver. None of these sections of CAMA 2020, like its 2004 predecessor, expressly makes provision on the effect a winding-up order has on the wound-up company’s employees. It makes copious provisions on the outcome of a winding-up order on the directors, pursuant to the appointment of a liquidator, as can be seen in section 587(9), but is absolutely silent on its effect on the contract of employment of the wound-up company employee(s). One would have expected that within sections 579, 580, 581 or 579 of CAMA 2020, provisions would have been made on the effect of a winding-up order on the employment of the wound-up company’s employees, just like the directors. This is so when the fact that CAMA 2020 was enacted after the delivery of the judgment under review. It would therefore seem that if the court is to interpret the aforementioned provisions of CAMA 2020 which are *pari materia* with the erstwhile 2004 CAMA, the same conclusion reached in the case under review is imminent; except the court takes a different position as it is being rightly canvassed herein. Noteworthy is the fact that the SCN placed reliance on the persuasive decision of *Fowler v Commercial Timber Co. Ltd.*⁶² where the English court per Greer J held that “there is no doubt that an order for the compulsory winding-up of a company puts an end to the employment of the Managing Director.” What the court held, in this case, was that an order of compulsory winding-up puts an end to the employment of the Managing Director of the wound-up company. The court never stated that the “end” which an order of compulsory winding-up foist on the Managing Director was dismissal or termination. We argue that the “end” as stated by the court, and based on the preponderance of argument, must be construed as termination and not dismissal as reasoned by the SCN in the case under review. It has already been noted that, based on the legal connotation of dismissal, the use of it by the SCN in this instant case was unintended within the context of usage, therefore, the judgment is *per incuriam*. Based on the foregoing, lower courts can rightly distinguish this decision and safely depart from same without violating the doctrine of *stare decisis* and this is hereby advocated.

4 MATTERS ARISING FROM THE DECISION IN *GBEDU v ITIE*

The decision under review is a novel one. This is the first time that the SC has made a final pronouncement on the effect of a winding-up order on the contract of employment. The Court, also reiterated the status of a collective agreement under Nigerian labour law. This section of

61 *Gbedu v Itie & Ors.* [2020] 3 NWLR (pt1710) 104 at 131, para D.

62 (1930) All ER 224.

the article examines the matters arising from this decision. It is apposite to note that, following the SCN's decision in *Skye Bank Plc. v Victor Anaemem Iwu*,⁶³ upon the enactment of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, the Court of Appeal became the final court on labour matters emanating from the National Industrial Court of Nigeria (NICN), either as of right or with leave. Thus, a civil appeal from the NICN can no longer be lodged with the SCN.

The SCN in reaching its decision in the *Gbedu Case*⁶⁴ raised a germane issue from the second issue formulated for its determination. At the expense of repetition, it is important to note that the second issue for determination was whether the Court of Appeal was right in its view that there was no nexus between the NJIC Agreement of 2002 and 2004, and the respective appointments of the appellants. In other words, were the 2002 and 2004 collective agreements binding between the wound-up company and the appellants to permit them to demand that their entitlements ought to have been calculated as prescribed thereunder and not under the 2000 Agreement? The Court, after reviewing the pleadings and evidence tendered by the parties at the trial court and acted upon by the Court of Appeal, concluded that the appellants had not demonstrated a nexus nor proved that the agreements had been incorporated into their terms and conditions of employment. Hence, the agreements are not binding. The Court specifically held:

Collective agreements are only binding if it is incorporated into the contract of employees ... none of the appellants tendered their contracts of employment as an exhibit in court to show that NJIC 2002 and NJIC 2004 are part of their contract. PW2 finally revealed the truth when he said on oath that the 2002 NJIC and 2004 NJIC are not incorporated in my terms of employment because it is not yet implemented. There was no nexus between the NJIC 2002 and NJIC 2004 agreements (exhibits B and B1), and the respective appointments of the appellants.

By this, the Supreme Court reiterated and reinforced the anachronistic common law⁶⁵ position on the enforceability of a collective agreement which has been upheld in several cases.⁶⁶ Section 2 of the Trade Disputes Act, 1976⁶⁷ provides that where there is a collective agreement in the settlement of trade disputes, the parties shall deposit three copies thereof, with the Minister of Labour, Employment and Productivity, who may make an order of the terms which may specify that the agreement, or part thereof, shall be binding on the employers and employees.⁶⁸ This provision has been criticised as undemocratic and capable of undermining the bargaining processes.⁶⁹ Eyongndi⁷⁰ has argued that the rationale is that where the government is a party to the collective agreement, the Minister of Labour, being an agent of the government, has the power to determine the enforceability or the extent to which a collective agreement is surreptitiously reviewed by one of the parties, where the government is a party to the agreement. It is apt to note that, the rationale for the authoritarian tone of the Act is not farfetched. The Act, which came into force in 1967, was made by the Federal Military Government (FMG) immediately after the civil war which witnessed the policy of interventionism in employment matters by the government. This was in contrast to the government's non-interventionism policy which

63 [2017] 7 SC (Part 1) 1.

64 [2020] 3 NWLR (pt 1710) 104.

65 *Ford Motor Company Ltd. v Amalgamated Union of Engineering & Foundry Workers* [1969] 1 WLR 339.

66 *Texaco (Nig.) Ltd. v Kehinde* [2001] 6 NWLR (pt 708) 224; *New Nigerian Bank Plc. v Osoh* [2001] 13 NWLR (Pt. 729) 232.

67 Trade Disputes Act, 1976 Cap. T8 Law of the Federation of Nigeria (LFN) 2004.

68 Chianu *Employment Law* 73.

69 Idubor, *Employment and Trade Dispute Law in Nigeria* (1999) 185.

70 Eyongndi "The Powers, Functions and Role of the Minister of Labour and Productivity in the Settlement of Trade Disputes in Nigeria: An Analysis" 2016 *Journal of Law and Constitutional Practice* 75–90.

had held sway before the war.⁷¹ However, the losses of the war, and the need to engender economic recovery from the devastating effect of the war, made it practically impossible for the government to stand aloof and allow employers and their employees to manage their affairs as they used to before the war as opined by Eyongndi.⁷² Emiola⁷³ has noted that:

The Nigerian labour law has not yet made collective agreements enforceable in the same way as provided in the now repealed British Industrial Relations Act.⁷⁴ The nearest it has gone in attaching legal enforceability to a collective agreement is the provision of section 2(3) of the Trade Dispute Act 1976 which stipulates expressly that the terms of a collective agreement confirmed in an order of the Minister of Labour shall be binding on the employers and workers to whom they relate.

As Emiola points out, Britain has moved beyond the shackles of agreement, as collective agreements are enforceable once reached between the parties without any formalities. Section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 specifies the conditions under which a collective agreement is presumed to be conclusively enforceable. In general, a collective agreement is presumed not to be conclusively enforceable by the parties unless and until it is in writing and contains a provision that the parties intend it to be legally enforceable.⁷⁵ Hence, section 179(2) provides that a collective agreement that does fulfil the aforementioned conditions shall be conclusively presumed to have been intended as a legally enforceable contract by the parties. If a collective agreement complies with the above-stated conditions and the parties agree that one or more parts of the agreement should be enforceable, then those parts are conclusively presumed to be an enforceable contract between the parties. The other parts shall be conclusively presumed not to be binding and enforceable between the parties. Section 180 places a duty on an employer who has recognised a trade union to make full disclosure of information within its knowledge during collective bargaining; as a result an employer who conceals or intentionally gives misleading information does so at their peril. By section 23 of the Labour Relations Act (LRA),⁷⁶ all collective agreements, in South Africa, enjoy the legal status of the contractual agreement between the parties, and it is, therefore, binding on them and their privies. There is no need for subsequent incorporation or ratification for them to become enforceable.⁷⁷ In Ghana as well, collective agreements are binding once reached by the combined effect of sections 97(1) and 105(1) of the Labour Act of Ghana.⁷⁸ Thus, the Act enjoins parties to engage in the collective agreement in good faith, making full disclosure of all facts, even those that may not be favourable. This is to ensure honest bargaining since the outcome is binding. The Constitutional Court of the Republic of South Africa, in *Nehawu v the University of Cape Town*⁷⁹ reiterated that the right to collectively bargain and the duty to abide by a collective agreement is constitutional and must be upheld by all. This stance is progressive and insulates the bargaining process from being used as a time-wasting platform, bearing in mind the fact that the outcome of the process is merely a gentleman's agreement which is quite often than not, never honoured by the employer.

The stance of the Court in the instant case is antithetical to international best labour practices

71 Oji and Amucheazi *Employment* 5.

72 Eyongndi, "The Right to Strike under Nigerian Labour Law: The Need to Delineate the Meaning of Right" 2017 *Akungba Law Journal* 87–107.

73 Emiola *Nigerian Labour Law* 495–96.

74 British Industrial Relations Act, 1971.

75 Section 179(1) (a) (b) of the Trade Union and Labour Relations (Consolidation) Act 1992.

76 Labour Relations Act No. 66 of 1995.

77 *Sandu v Minister of Defence* (2003) 9 BCL 1055.

78 Labour Act No. 651 of 2003.

79 (2003) (2) BVL 154.

and does not portray Nigeria as a progressive labour jurisdiction. Both the National Industrial Court Act (NICA) and the 1999 CFRN (Third Alteration) Act, 2010⁸⁰ empower the NICN to apply ILO conventions and regulations on international best practices to which Nigeria is a signatory. The ILO Recommendation Concerning Collective Agreements (Recommendation 91) stipulates that “collective agreements should bind the signatories and those on whose behalf the agreement is concluded; stipulations in contracts of employment which are contrary to provisions in a collective agreement are regarded as void and automatically replaced by the stipulations of the collective agreement.” This recommendation is to the effect that, once voluntarily reached, as is usually the case, collective agreements would become binding and therefore, automatically enforceable without any ratification. It is hoped that the Courts in Nigeria, especially the National Industrial Court of Nigeria, will reconsider their position and follow the ILO Recommendation, to give weight to collective bargaining. The 1999 CFRN (Third Alteration) Act 2010, expanded the jurisdiction of the NICN to include matters dealing with the interpretation and enforcement of collective agreements.⁸¹ If nothing is done to address the persistent industrial unrest, especially in essential sectors of the country, due to the non-implementation of collective agreements, the nations’ economic fortunes will continue to decline.

5 CONCLUSION AND RECOMMENDATIONS

While it is a general belief that a contract of employment like any other contract, is created by mutual agreement of the employer and the employee, the reality is that the employer often imposes terms and conditions of employment on the employee thereby questioning the argument of mutuality of minds. The contract of employment could either be for a fixed term or intended to be permanent. However, the occurrence of certain events, either due to the act or omission of either party or supervening circumstances, could lead to the premature ending of the contract. In the case under review, the Supreme Court of Nigeria dealt with the effect of a winding-up order on the contract of employment and concluded that it automatically dismisses the employee of the wound-up company. The choice of “dismissal” as the means through which the employment contract came to an end, is not only inappropriate but controversial. To place such an inappropriate label on an employee whose employment came to an end through winding-up (which may not be due to their fault) is unfair and unjustifiable. “Termination”, as opposed to “dismissal” is the appropriate terminology to be used to describe the effect of a winding-up order on the contract of employment.

Moreover, the Court also reiterated the common law position that collective agreements, unless and until incorporated into the contract of employment, are unenforceable. They are mere gentleman’s agreements binding in honour only. This attitude of making an agreement without actually agreeing to it has become the main reason for incessant industrial unrest in Nigeria, particularly the educational sector, as the Academic Staff Union of Universities (ASUU) and the Federal Government have continued to renegotiate the 2009 Collective Agreement between them, with ASUU going on strike repeatedly to compel implementation. There is no doubt that it is now absolutely imperative to follow global best practices to change this situation as Eyongndi⁸² have posited that the subsisting position in Nigeria, is not only obsolete but otiose and resistant to dire needed industrial harmony.

Based on the above findings, it is recommended that when the Supreme Court or the Court of

80 See ss 7 of the NIC Act, 2006 and 254C (2) of the 1999 CFRN (Third Alteration) Act, 2010, respectively.

81 Ogbe “The Finality of Court of Appeal Decisions in Labour and Related Matters: Is it Only Restricted to NICN Judgments?” 2020 *Section on Legal Practice Law Journal* 65–75.

82 Eyongndi, “Enforceability of Collective Agreement in Nigeria: The Imperative for a Legal Paradigm Shift” 2022 *Lesotho Law Journal* 1–25.

Appeal has the opportunity to rule on the enforceability of collective agreements in Nigeria, they should abandon the position that such agreements are unenforceable unless and until they are incorporated into the terms and conditions of employment. This position is outdated and should be replaced with the position that is taken in other common law jurisdictions. This will not only promote industrial harmony but honest and sincere bargaining, since the outcome can be relied upon and enforced. If this is done, it would bring the law in Nigeria, as far as the enforceability of collective agreements is concerned, in line with modern labour realities and international minimum best labour practices.

Also, given the negative effect of dismissal and its legal connotation, it is inappropriate to describe ending an employment relation contingent on a winding-up order made by a court, since the reason for the winding-up may not be due to the employee's misconduct. When the opportunity presents itself again the Supreme Court should substitute "termination" of a contract of employment for "dismissal" as the effect of a winding-up order on the contract of employment. Termination does not carry any negative connotation which if mentioned at first instance, could raise suspicion about an employee who may be seeking other employment post-implementation of a winding-up order. Alternatively, lower courts should distinguish this decision to ensure that the opprobrium it pours on the image of an employee affected by the winding-up of a company with its related outcome on their prospect of securing other employment, is not sustained. This should be done because the decision was reached *per incuriam* and the use of dismissal, as opposed to termination, could be said to be unintended when its meaning is considered.

Furthermore, to ensure that there is clarity on the effect of winding-up on the contract of employment of the wound-up company's employee, given that the CAMA 2020 like its 2004 predecessor does not contain any express provision on it, the CAMA 2020 should be reviewed with this provision in mind. This becomes imperative when it is considered that winding-up is an event that is bound to occur from time to time and leaving the court to legislate its effect on the contract of employment of a company's employees is responsible for the existing inelegant use of terminology, which should be avoided.