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SOLICITORS, ADVOCATES & ARBITRATORS

YOUR MONEY OR YOUR BENEFITS

"I need money!"; Paul lamented, rummaging through his briefcase, hoping to find any semblance of cash. *"I just paid my daughter's school fees, sent money to my aging parents and paid rent. I have even spent my salary in advance"*. Paul took a deep breath, heavily burdened with worry and barely able to focus on the document open on his computer. He managed to



continue working but paused suddenly; he just remembered that his employer offers staff loans to employees. Finally, a light at the end of the tunnel! Paul thought to himself: *"I am a senior staff, I have dedicated my life to this job with a sterling record, the company is doing well financially, and I have job security. All I need to do is to take the loan and repay it from my salaries. I mean, what could possibly go wrong?"* Elated by this discovery, Paul dashed to his employer's accounts department, signed the necessary documents and within few hours, he received a credit alert, and all was well with him again, or so he thought. But was it? Little did he

know that his problems were just about to begin; as a few months later, Paul's employment was terminated. As a last resort, Paul believed that the company would at least apply its long-standing custom of waiving loans obtained by employees in the course of employment. *'It never rains but it pours'*, they say. His employer denied such custom and demanded for the repayment of the entire outstanding loan. At this point, Paul had no choice but to turn to the courts, hoping for some sort of remedy for his rapidly escalating problems.

Interestingly, the National Industrial Court of Nigeria (NIC/Court) was opportune to consider a similar scenario which recently played out in the recent case of *Mrs. Adebola Ogunsanwo V. Polaris Bank Limited (Suit No: NICN/LA/I64/2014)*, where the NIC considered the myriad of issues relating to staff loans.

FACTS

Mrs. Adebola Ogunsanwo (the claimant) was employed by Prudent Merchant Bank Plc in May 1998 which subsequently became Prudent Bank Plc in 1999. Following a merger in 2006, the Bank became Skye Bank Plc, now Polaris Bank ("the defendant"). Sequel to the merger, the claimant was given a letter transferring her employment to the defendant. According to claimant, her employment was continuous, and she was not given a new letter of employment by the defendant. In the course of her employment with the defendant, she obtained a mortgage facility from her employer in the sum of ₦11,500,000 which was agreed to run for a term of 10 years. She also took a personal loan in the sum of ₦2,200,000 with a tenure of two years. However, on 7th July 2013, the claimant's employment was suddenly terminated by the defendant. As at the time the claimant was disengaged, she had partially repaid the mortgage facility and the personal loan, leaving an outstanding balance of ₦4,200,000.00 and ₦1,995,096.08 respectively. Even though the tenure of the mortgage facility and the personal loan had not expired, the defendant calculated the defendant's severance package and six months' salary in lieu of notice and applied same towards the repayment of the loan without the claimant's consent. It was also the claimant's grouse that her severance pay ought to have been calculated from 1998 when she was first employed as opposed to 2006; her employment being continuous. Furthermore, she claimed that it was the customary practice of the defendant to write off outstanding

mortgage and personal loans for well-performing staff, which was not done in her case. Aggrieved, the claimant instituted an action against the defendant at the National Industrial Court (*the “Court”*), claiming amongst other reliefs:

1. *A declaration that the arbitrary deduction of the balance of the claimant's mortgage facility and personal loan by the defendant from her terminal benefits, irrespective of the unexpired loan term and the payment plan agreed by the parties was wrongful.*
2. *A declaration that the claimant's employment with the defendant commenced in 1998 and was at all material times continuous.*
3. *A declaration that by virtue of the customary practice of the defendant, the claimant was entitled to a waiver of the balance of her outstanding mortgage and personal loan in view of her exemplary performance while employed by the defendant.*
4. *An order mandating the defendant to release the 107,520 Skye Bank shares representing the monetary balance of the claimant's bonus over the years, held on her behalf by the defendant's Bank Staff Share Trust Fund.*

FINDING/DECISION

Upon a careful examination of the case of both parties, the Court in granting part of the reliefs sought by the claimant, determined the following issues:

- a. **Use of employee's terminal benefits to offset staff loans:** Staff loans generally inure to employees by virtue of their employment, as such, they are governed by the terms and conditions of the employment contract. In the instant case, the defendant's staff handbook provides that repayment of personal loans and other types of advances becomes due upon retirement. The Court also noted that the defendant's staff handbook further provides that: *“Retiring staff shall be availed their gratuity benefits, less of their financial obligations to the Bank”*; and that the foregoing provision excludes mortgage loans. Accordingly, the Court held that whilst the defendant was right to offset the claimant's personal loan from her terminal benefits, the offsetting of the mortgage loan from the claimant's terminal benefits was contrary to her employment contract and therefore wrongful.
- b. **Proof of continuous employment:** The Court held that the decision in *CBN v. Igwilo*¹, is to the effect that the acceptance of transfer of an employee by an employer implies that the employer will take into consideration the years of service of the employee before his transfer to the employer. To this end, an employee who alleges a continuous employment through different companies/employers has the burden of presenting to the Court solid evidence in proof of such claim. Furthermore, if the continuous employment was alleged to be as a result of a merger/acquisition, the employee must furnish proof of such merger/acquisition. Having reviewed the claimant's evidence, the Court found that the claimant placed nothing before the Court indicating how Prudent Merchant Bank Plc became Prudent Bank Plc; or proving the fact that she was transferred from Prudent Bank Plc to the defendant. Additionally, there was no evidence before the Court (other than the claimant's pleadings) confirming the alleged purchase of Prudent Bank Plc by the defendant.
- c. **Proof of an employer's customary practice:** The rule is that evidence of customary practice must come from a person other than the person asserting its existence. As such, it is unsafe for the Court to rely on the sole testimony of the person claiming the evidence of a custom. In other words, any person alleging that the act of an employer has been repeated so many times and long enough for same to be considered a customary practice, such that though unwritten, is enforceable, must call an independent witness who is versed in the alleged custom to testify in court. Thus, the Court held that the testimony of the claimant alone was not sufficient to prove the defendant's alleged customary practice of waiving the balance of outstanding loans for employees with exemplary performance.
- d. **Jurisdiction of the Court over employee stock option:** Under section 254C(1)(k) of the 1999 Constitution, the National

¹ [2007] 14 NWLR (Pt. 1054) 393

Industrial Court has exclusive jurisdiction over the ‘payment or nonpayment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee’. The Court further held that employee benefits include non-salary compensation that can vary from one establishment to another; often indirect and non-cash payments within a compensation package and provided in addition to salary to create a competitive package for the potential employee. In light of the foregoing, the Court held that it has the jurisdiction to consider the claimant’s claim for the release of her 107,520 Skye Bank shares, being the monetary balance of her bonus over the years held on her behalf by the defendant. The Court also granted the claimant’s claim in this respect, the claimant having proven same.

COMMENTS

Notwithstanding the common law position that ‘parties are bound by the terms of their contracts’, the Court may in appropriate circumstances, and in the interest of justice, disregard the rigidity of written contracts and grant equitable remedies to which, in the Court’s view, a party is entitled. The facts in *Asana v First Bank of Nigeria Suit No. NICN/LA/184/2016* are instructive. In *Asana’s* case, Mrs. Asana was constructively dismissed (compelled to resign) by the Bank, following which the Bank demanded for the repayment of her outstanding loan, including what the Bank coined as “unearned allowances” paid to Mrs. Asana before she was forced to resign. Though the Court upheld that Bank’s demand for the repayment of the loan, the Court held that given the constructive dismissal of the employee, it would be unfair for the Bank to make a claim for the repayment of such unearned allowances. The Supreme Court has also held in *B. O. Lewis V. United Bank For Africa Plc (2016) LPELR-40661(SC)* that “contracts of employment and personal loans are two distinct contracts having distinct subject-matters and their duration not co-existent, nor can it be said that one is dependent on the other, or that the right to terminate the contract of employment by either party could operate as a condition precedent to the repayment of the personal loan or balance thereof.” Be that as it may, the attitude of the Court in all circumstances is to carefully consider the unique facts of each case before making an informed decision.

An equally interesting part of the judgment was the position of the Court on the enforceability of customary practices of an employer. A similar issue was presented for consideration by the Court in *The Registered Trustees of Union Bank & Anor V Union Bank of Nigeria Plc & 2 Ors - Suit No: NICN/LA/555/2012*. Here, the claimant called two witnesses who were former employees of Union Bank, and who tendered evidence in proof of the Bank’s practice of paying 13th month salary spanning over a period of 23 years. The Court held that considering that the Bank had paid 13th month pay to the members of the claimant for 23 years, a custom, tradition and practice had been established, therefore raising the legitimate expectation of the claimants that the 13th month pay would continue, and creating an enforceable legal obligation on the part of the defendant.



In all, a clear and adequate representation of the intentions of the parties in the employment contract cannot be over-emphasized, especially with regards to staff loans and the superiority of the employment contract where conflicts arise.



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