Recession and Redundancy in Nigeria

Nigeria, a pre-dominantly monolithic economy which generates majority of her earnings from the sale of crude oil suffered a mammoth decline in its foreign reserves when global oil prices crashed in 2015. The Central Bank failed to devalue the currency which led to the shortage of forex earnings to fund imports which led to investors struggling to get forex for their imports.

In the absence of other investment opportunities for the production sustainability of the economy, the FPI and FDI investors became frustrated over the shortage of foreign exchange to pay for raw materials and machinery and consequently divested from the Nigerian economy. As production dropped, the GDP also began a downward trend.

The negative growth recorded in the first quarter of 2016 led the economy into recession for the first time since a full-year recession in 1987. Thus, the unemployment rate increased and is now at 23.1% as of March 2019, inflation has persisted, meanwhile living standards have plunged.

Against this backdrop, which has largely continued into 2017, companies across various sectors in Nigeria have been faced with the inevitable task of conducting reorganisation and restructuring exercises with consequent overhead reductions and job role eliminations

In this article, we briefly examine key considerations to be mindful of when seeking to implement work place redundancy in Nigeria.

Recession

Recession is defined as a period of general economic decline, defined usually as a contraction in the GDP for six months (two consecutive quarters) or longer. Marked by high unemployment, stagnant wages, and fall in retail sales, a recession generally does not last longer than one year and is much milder than a depression.[1] The term recession is not unpopular globally. It has been referred to over the years as financial meltdown, economic crash et al.

According to the International Monetary Fund, there have been four global recessions since World War II, beginning in 1975, 1982, 1991 and 2009[2].

Nigeria's economy exited a painful recession in March 2018 after a historic collapse in oil prices–exacerbated by falling oil production and inadequate policies–took a major toll on the economy. Rising oil prices, new foreign exchange measures, attractive yields on government securities, and a tighter

[1] www.businessdictionary.com

[2] Global Recession, retrieved on November 14, 2016 from http://www.investopedia.com/terms/g/global-recession.asp

monetary policy have made foreign exchange more readily available and helped contain inflation. Consequently, investors are returning to Nigeria.

Prior to exiting the recession, scarce foreign exchange and high cost of energy led to increasing cost of production which ultimately reduced the country's competitiveness. Consequently, several businesses were forced to shut down. In order to survive, many companies reduced production by close to 50%, declared some employees redundant and slashed the remuneration of the remaining employees. Banks struggled with declining operating profitability and poor liquidity.

Redundancy

Redundancy is a term linked with an employer dispensing with the services of its employees because the services of the employees are no longer required. It is a decision reached by the employer to keep the business going.

Redundancy is distinct in nature. It is not a voluntary or forced retirement. It is not a dismissal from service. It is not a voluntary or forced resignation. It is not a termination of appointment as known in the public service. Instead, it is a form unique only to its procedure whereby an employee is quietly and lawfully relieved of his post.[3]

Section 20(3) of the Labour Act defines redundancy as "an involuntary and permanent loss of employment caused by an excess of manpower".

Redundancy as defined by the Labour Act is restrictive, as there are reasons for redundancy unconnected with "excess of manpower". A company may have the accurate workforce and still declare redundancy.

A company may declare redundancy due to unstable economic policies, corporate restructuring, exorbitant cost of doing business, change in technology, outrageous tax regime, epileptic power supply, high bank interest rates, lack of patronage, insecurity, and recession. Thus not all redundancies are as a result of "excess of manpower".

Redundancy during Economic Recession

When a country is in recession, employees become wary as nobody wants to be laid off by his employer.

However, a common trend in a country confronted by recession is that companies would use different mechanisms to stay afloat by reducing costs

[3] Peugeot Automobile Nigeria Ltd v. Saliu Oje & 3 Others (1997) 11 NWLR (Pt. 530) 625 at Page 635, Paras A-B, vide Muhammad JCA

either by cutting down production, employee benefits, or reducing its labour force.

The choice to reduce its work force is often the last resort of employers. Until business becomes unsustainable as a result of unbearable dwindling income, companies may not lay off its workers. The reason is because the greatest asset of any company is the employee and production cannot happen without a workforce capable of executing the task.

Procedure for Redundancy under Nigerian Law

The surge in redundancy in Nigeria has called to question the mode for retrenching employees. Section 20(1) of the Labour Act stipulate how redundancy can be done. It provides for:

a. Informing the trade union; and

b. Applying the principle of "last in, first out"

a. Informing the Trade Union

Section 20(1)(a) stipulates that "in the event of redundancy - the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy".

The Act merely mandates the employer to inform the trade union but does not state that the employer requires the consent of the trade union to lay off employees. Meanwhile, would it have been just if the Act had stated that the employer needs the consent of the trade union to lay off an employee. I wouldn't think so. As this would give enormous power to the employees to do as they deem fit since they know that the trade union would defend their actions and wouldn't give consent to them being laid off.

However, when an employer declares redundancy, a common practice is for the employer to hold meetings with the workers or their representatives, and agree on modalities for the payment of the redundant workers paid.

Other questions arising from the provision of Section 20(1) of the Labour Act anchors more on the right and remedies of the employees and trade union where the employer refuse to comply with the law. For instance, what happens where the employer refuses to inform the trade union before laying off its employees? Can legal action be commenced against the employer? Assuming that a legal action is commenced, what would likely be the decision of the Court? Are there any remedies available to the employees under the Labour Act for failure of the employer to inform the trade union?

In ***National Union of Hotels and Personal Services Workers v Imo Concorde Hotel Ltd***[4] the employees of the respondent company embarked on a strike which led to the closure of the respondent for few months. The appellant (as claimant at the trial Court) claimed during negotiation to end the strike, there was an agreement with the respondent (as defendant at the trial Court) that no staff of the respondent company would be victimised for the strike. Contrary, to the agreement, the appellant proceeded to lay off 55 members of the appellant union. The appellant commenced a suit challenging the termination of the employment of its members and sought an order for reinstatement of the employees. At the trial, the respondent argued that the termination of the employment of the members of the appellant union was based on the directives of the Imo State Government and it was done to re-organise the respondent in order improvement its services. In its ruling, the Court stated that the contention of the appellant lacked substance[5] The Court then asked what right does the law confer on a trade union?[6] In answering the question, the Court per Edozie JCA considered the provision of Section 20(1) of the Labour Act and held *"…that the only rights conferred on a Trade Union is merely a right to be informed by an employer of a redundancy in his establishment. No sanction is provided for failure by employer to do so. This section does not confer a right to sue in default of the employer notifying the trade union of a redundant"* [7]

The decision of the Court in ***National Union of Hotels and Personal Services Workers*** has made it clear that a trade union only has a right to be informed and nothing more. The right of the trade union to be informed is therefore based on courtesy as representative of the employee but where the courtesy is not observed, the trade union cannot ask the Court to reverse the redundancy.

b. **The principle of "last in, first out"**

The principle of Last In, First Out (**"LIFO"**) may also be referred to as 'last come, first go'. LIFO means that a company should retrench employees in an ascending order. That is the last person employed should be the first person to be retrenched.

It has been argued that LIFO has a tendency to work against younger employees because they are often the ones likely to have served with the company for the shortest time.[8] Thus, it could create workplace discrimination on the basis of years of employment.

[4] (1994) 1NWLR (Pt. 320) 306
[5] Ibid Page 321, Para. H
[6] ibid
[7] Ibid Page 322, Paras. C-D
[8] UK: Last In First Out Redundancy Policy, published October 20, 2008, retrieved November 10, 2016 from http://www.mondaq.com/x/68126/Discrimination+Disability+Sexual+Harassment/Last+In+First+Out+Redundancy+Policy

In order to avoid discrimination, Section 20(2) of the Labour Act stipulates that "*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*". This provision made it explicit that the application of the principle of LIFO must be done meritoriously by considering the skill, ability and reliability of the employees that would be affected. Thus, the principle is not to be applied rigidly.

In applying the LIFO principle, it is for the employer to determine the yardstick for measuring the level of skill, ability and reliability of the employees required to remain in employment. Where the LIFO principle is observed, the Court would enter judgment in favour of the employer.

In ***Agoma v. Guinness (Nig) Ltd***[9] the Supreme Court considered the compliance of the respondent with Section 20(b) of the Labour Act. The respondent informed its employees that there would be retrenchment because of its inability to cope with the wages. The respondent in its retrenchment process considered and rated the performance of its employees. The appellant's rating did not meet expectation; she was retrenched with others, and paid all her benefits. The respondent subsequently advertised the vacant positions, but invited the appellant for a meeting to know if she was interested in working for the respondent. The appellant attended the meeting and showed interest but she was not employed. The appellant challenged the redundancy procedure. Based on evidence of compliance with LIFO, the Court held that the redundancy was done in accordance with Section 20(1) (b) of the Labour Act.

Considering Agoma's case, a question begging to be answered is whether the recent retrenchment carried out by Nigerian banks was done in accordance with the provision of Section 20(1) (b) of the Labour Act? We may not get an immediate answer until the redundant workers challenge the decision of the banks in Court.

However, it is notable that where an employer fails to comply with the principle of LIFO, the Court can invalidate the retrenchment and award damages[10].

Moreso, LIFO principle is not applied, it could lead to the loss of talented and dedicated employees.

[9] (1995) 2 NWLR (PT.380) 672 SC
[10] *Steyr Nig Ltd v. Gadzama* (1995) 7 NWLR (PT. 407) 305.

Redundancy Payment

When an employer declares redundancy, the next step is for the employer to proceed to pay the affected employees. In determining redundancy payment reference can be made to:

a. The Condition of Service;

b. The regulation on Redundancy Payment; and

c. Best Endeavour Approach.

a. Condition of Service

Condition of service (**"CoS"**) may also be referred to as the term of employment. It contains the conditions that an employer and employee agree upon for a job.[11] It often contain employee's work days and hours, dress code, leave, discipline of employees, remuneration, severance pay, and other benefits.

The CoS of some companies provides for how redundancy payment is effected and in such instance, all that the company does is to pay the redundant employee in accordance with the CoS.

In ***Peugeot Automobile Nigeria Ltd v. Saliu Oje & 3 Others***[12] the respondents (claimant at the trial Court) commenced action for themselves and on behalf of over 1,000 co-workers against the appellant (defendant at the trial Court) for relieving them of employment by declaring their post redundant. The evidence before the Court showed that the CoS provide for redundancy payment. Evidence also showed that the respondents were paid in accordance with the CoS. The respondent however claimed that they were not paid gratuity. The trial Court granted the respondents' claims on gratuity. On appeal, the Court held that gratuity payment would apply where employment was determined either by retirement or resignation and not redundancy.[13] The Appellate Court also held that the respondent cannot claim gratuity when it does not form part of the redundancy payment, and since the appellant has paid the respondents for redundancy as contained in the CoS, the respondent have no further claim against the appellant.

The rationale for the claim for gratuity by ***Saliu Oje*** may be that the he and his co-respondents assumed that redundancy was equivalent to retirement or

[11] Terms Of Employment, retrieved on November 11, 2016 from http://www.investopedia.com/terms/t/terms-of-employment.asp#ixzz4PhKUrXRK
[12] supra
[13] Supra at Page 635, Para. A,

resignation. However except provided by the CoS, gratuity does not form part of the entitlement of a redundant employee.

It need be added that a CoS constitutes a contract between the employer and employee. The principle of law governing contracts of employment is akin to that of other contractual obligations thus, where parties have agreed to be bound in their relationship by written agreements, such a contract must be governed by the terms of the contract.[14] Thus, where the CoS provides for redundancy payment, the employee cannot claim beyond the content of the CoS.

b. **Regulation on Redundancy Payment**

Section 20(2) of the Labour Act stipulates that *"The Minister[15] 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"*.

The drafters of the Labour Act recognise that not all companies would have a redundancy payment mechanism in their CoS. Thus, the Minister has been empowered by law to make regulation which would ensure the "compulsory payment of redundancy allowances" to an employee.

This provision in our opinion is simply to ensure that retrenched employees are paid by their employer.

Although the regulation is at the discretion of the Minister, we are not aware of any ministerial regulations on redundancy payments in Nigeria.

It is imperative that the Minister make the regulation especially in times of recession in order to ensure that employers can be guided on the payment of retrenched employees.

c. **Negotiating redundancy payments– "Best Endeavour" Approach**

Section 20 (1)(c) of the Labour Act stipulates that *"in the event of a redundancy – 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"*.

[14] Supra at Page 632-633, Paras H-A.

[15] Section 91 of the Labour Act defines "Minister" as the Federal Minister for Employment, Labour and Productivity

This provision enjoins an employer to use its "best endeavour" to negotiate redundancy payments for their employees. The law did not provide for the parameter for deciding when an employer has used its best endeavour.

The "best endeavour" approach puts the employer in control of negotiation and the employee at the mercy of the employer. It appears that the Labour Act wants the employer to think of the employee during negotiation when it is clear that redundancy is a business decision and the employer would consider its business interest before the interest of its employees.

The trade union in my opinion should be in the position to use its "best endeavours" to negotiate redundancy payment on behalf of the employees and not the employer who is more interested in keeping his business and making profits.

In addition, Section 20(1) (c) of the Labour Act does not state the categories of discharged workers which a regulation made by the Minister would not apply to. Thus, when the Minister makes a regulation for redundancy, it is expected that the regulation would list the categories of discharged workers to which it is not applicable (if any).

Can the Minister stop an employer from retrenching or order reinstatement?

Recently, Dr. Chris Ngige, the Minister for Labour and Productivity ordered banks to suspend the retrenchment of their employees and called on banks to re-instate sacked employees or face the wrath of the federal government.[16] The Minister has been criticised for his statement. The Minister said that he knows his rights and insisted that the directive to the banks is in accordance with Section 20 of the Labour Act.[17] The Minister interpreted Section 20 of the Labour Act as *"…you must engage the labour unions in that industry and if it gets out of hand, the local unions will report to their national union. If they can't resolve this, the parties, unions or the banks will refer it to the Minister of Labour for conciliation"*[18].

Having discussed the provision of Section 20 of the Labour Act with judicial authorities, does the Minister have the power to order an employer not to retrench or order an employer to reinstate retrenched employees?

It is trite law that an employer has the power to hire and fire.[19] In fact, an employer is entitled to terminate his employee's appointment for good or bad or for no reason at all.[20]

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[16] Bank Retrenchment: I Know My Rights as Labour Minister, Ngige Tells Critics, published June 27, 2016, retrieved on November 8, 2016 from http://www.thisdaylive.com/index.php/2016/06/27/bank-retrenchment-i-know-my-rights-as-labour-minister-ngige-tells-critics/

[17] ibid

[18] ibid

[19] Shitta Bey v. Federal Public Service Commission (1981) 1 SC (Reprint) 26

In ***Dr. Ben O. Chukwumah v. Shell Petroleum Development Company Of Nigeria Plc***[21], the Supreme Court held that the termination of employment even if unlawful brings to an end the relationship between master and servant which cannot continue in the absence of mutuality.

Should the Minister decide to take the matter to Court for failure of the banks to reinstate the retrenched employees; the law is that the Court cannot impose an employee on an unwilling employer.[22]

The remedy of reinstatement cannot be ordered by the Court except in those very restricted cases where the administrative law remedies could be invoked to declare the dismissal null and void.[23]

Curtailing Redundancy in Recession

In a dwindling economy like Nigeria, redundancy cannot be stopped, but can be curtailed. In order to curtail redundancy, the causes of redundancy must be tackled.

In tackling redundancy, the government must on its part remove impediment to profitability of businesses in Nigeria. Merely ordering companies not to retrench would not help. The government needs to solve the infrastructural decadence and bureaucracy which has made it cumbersome to do business in Nigeria.[24]

The government also needs to put policies in place which would encourage small and medium enterprises to succeed in Nigeria.

Concluding Remarks

Implementing redundancies is never an easy process (whether for the company or the employee). The key throughout is to engage with employees at an early stage so as to minimise the prospects of employee disputation and low staff morale.

When redundancy is initiated by an employer, it must be ensured that retrenched employees are paid. In order to ensure payment, the employer must be sincere about its intention to pay, the trade union must be actively involved

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[20] ibid
[21] (1993) 4 NWLR (PT. 289) 512
[22] UBN Ltd. v. Ogboh (1995) 2 NWLR (PT. 380) 647 at 664
[23] ibid
[24] The World Bank in its Ease of Doing Business report titled, "Doing Business 2017: Equal Opportunity for All" ranked Nigeria in the169th position out of 190 countries with the ease of doing business. Source: Nigeria ranks 169th position in the World Bank Ease of Doing Business, published October 26, 2016 retrieved on November 11, 2016 from http://www.vanguardngr.com/2016/10/nigeria-ranks-169th-position-world-bank-ease-business/

and the government must put in place mechanism which would not only ensure that employees are paid.

In addition, the Minister can make regulations to guide redundancy payments so that retrenched employees are effectively paid.