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The Effect of Frustration on an Employee's Earned Salary: *National Revenue Mobilisation Allocation and Fiscal Commission v. Johnson in Perspective*

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Abstract

This paper adopts analytical methodology in interrogating the effect of frustration of contract on an employee's earned salary under Nigeria's labour jurisprudence analysing the Supreme Court of Nigeria (SCN) decision in National Revenue Mobilisation Allocation and Fiscal Commission & Ors. v. Ajibola Johnson & Ors. The paper examines the rationale, effect and extent of applicability of frustration of contract on a vested right under an employment contract. It also discusses the nature of the employer's duty to provide work as well as the legal effect of failure to do so especially when an employee reports to work and is willing to and able to work. The paper examines the impact of this decision on employment relationship in Nigeria especially the manner in which courts should reconcile split interests. The paper observed that the SCN in the judgment, has laid down a rule to guide courts in balancing accrued rights of individuals and directives of government to engender a mutually beneficial outcome.

Keywords: Employee**,** Contract of employment, Frustration of contract, Right to work, Remuneration

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1. Introduction

Once an employment relationship is created, it creates some rights and obligations between the parties (i.e. employer and employee).[1] Pursuant to this relationship, the employee is expected to use his/her skill and knowledge to faithfully render services to the employer (either on full-time or part-time basis depending on the nature of the contract between them), while the employer is expected to provide work and remunerate the employee in exchange for the services rendered.[2] During the subsistence of the employment contract, the parties are expected to duly perform towards each other the rights and obligation accruing therefrom.[3] Where either party fails and or neglects to perform towards the other, this will amount to breach of contract of employment.[4] This breach, entitles the aggrieved party to seek appropriate remedy.[5] So long as an employee reports to work, willing and able to work, the employer is duty bound to provide work and where none is provided, the employer is duty bound to ensure that that employee (s) are duly remunerated.[6] This is not to say that the employer's obligation to provide work can always be dispensed with by payment of wages and salary by the employer in all instances.[7]

However, where after the creation of the employment contract (with the concomitant rights and obligation), a supervening event, beyond the contemplation of the parties occurs rendering performance by the parties not only extremely burdensome but impracticable, the contract is said to have been frustrated.[8] Frustration as a

[1] Agomo, C.K. *Nigerian Employment and Labour Relations Law and Practice* (Lagos: Concept Publications Ltd., 2011) 117.
[2] Oji, E.A. and Amucheazi, O.D. *Employment and Labour Law in Nigeria* (Lagos: Mbeyi & Associates (Nig.) Ltd. 2015) 110.
[3] *Heaton's Transport Ltd. v. Transport & General Workers Union* (1972) 3 All E.R. 101.
[4] *Leyland Nig. Ltd. v. Dizenoff* [1990] 2 NWLR (Pt. 134) 610.
[5] *Kusfa v. United Bawo Construction Co.* [1994] 4 NWLR (Pt. 336) 1.
[6] *Chemical and Non-Metalic Products Senior Staff Association v. Benue Cement Co. Plc.* [2006] 5 NLLR (Pt. 14) 1
[7] *Clayton v. Oliver* (1930) A.C. 209.
[8] *Obayuwana v. The Governor of Bendel State* (1982) SJSC 167.

supervening event, by operation of law, brings a validly created contract to an abrupt end devoid of the act or omission of either party.[1]

The issue that arises from the above is, where there are accrued obligation or vested rights such as where prior to the occurrence of the frustrating event, an employee has earned salary (by reason of reporting at work regularly and willing to work but none was provided), will the frustration of the contract of employment affect this right? Does the failure to provide work for an employee who reports daily at work and willing to work makes the employer obligated to remunerate such an employee? These knotty issues have been adjudicated upon by the Supreme Court in *National Revenue Mobilisation Allocation and Fiscal Commission & Ors. (N.R.M.A.C.) v. Ajibola Johnson & Ors.*[2] This Article which reviews this decision, focuses on proffering answers to the aforementioned issues. The article examines the impact of this decision on Nigeria's labour jurisprudence particularly with reference to the effect of frustration of contract on earned salary of an employee as well as whether reporting to work without working despite being willing creates an obligation to pay salary by the employer.

The article is divided into five parts. Part one is the general introduction. Part two examines the operationalisation of the doctrine of frustration of contract and its extent of applicability to contract of employment. Part three interrogates the employer's duty to provide work and remunerate an employee under *corpus juris nigeriana*. Part four contains brief facts of the case under review and matters arising therefrom. Part five contains the conclusion and recommendations.

2. Operationalisation of the Doctrine of Frustration of Contract

The law permits individuals (animate and inanimate), with contractual capacity to enter into legally enforceable contracts. Once a contract is created, concomitant rights and obligations accrue and the parties are expected to perform towards themselves the accrued obligation (s) arising from their contract. However, it is not impossible that after the conclusion of a contract, without the fault of either of the parties, due to a supervening event, the performance of obligation arising from the contract becomes impracticable.[3] When this happens, the contract is said to have been frustrated.[4] According to Otuturu[5] frustration of a contract arises when an event occurs through no fault of either party to the agreement, which fundamentally alter it and which was not in contemplation of the parties such that they could not make provision for it. In such a situation, both parties to the contract would be discharged.[6]

From the foregoing, the following points should be noted. For an event to frustrate a contract it must occur independent of the will of the parties and it must be within their contemplation.[7] The implication of this is that where either of the party by omission or commission, set in motion a frustrating even, same will be held to be incapable of frustrating the contract.[8] Where the purported frustrating incident/event is within the contemplation of the parties; wherein they ought to have made adequate provision but failed or ignored to do so, its occurrence will not frustrate the contract.[9] The frustrating even must occur posterior and not anterior the formation of the contract otherwise, it will not be recognised as frustrating the contract.[10] Where the event merely renders performance difficult or more strenuous than the parties had envisaged and not impracticable, the event will not be held to have frustrated the contract.[11]

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[1] *United Bank for Africa Plc. v. BTL Industries Ltd.* [2006] 19 NWLR (Pt. 1013) 61.
[2] *National Revenue Mobilisation Allocation and Fiscal Commission & Ors. (N.R.M.A.C.) v. Ajibola Johnson & Ors* [2019] 2 NWLR (Pt. 1656) 247.
[3] *Adeshina, T. and Okonkwo, O. "Frustration of Contract in Nigeria' [Online] Available: https://jee.africa/frustration-of-contract-in-nigeria/ (January, 20 2023).*
[4] *Davis Contractors Ltd. v. Fareham U.D.C.* (1956) A.C. 696. The English Court of Appeal held that "frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract."
[5] Otuturu, G.G. *Principles and Practice of the Law of Contract in Nigeria* (Lagos: Princeton 7 Associates Publishing Co. Ltd., 2021) 298.
[6] *Saka v. Iguh* [2010] 4 NWLR (Pt. 1184) 405.
[7] Alobo, E. E., *Modern Nigerian Law of Contract,* (Calabar, University of Calabar Press, 2012) 557.
[8] *National Bank for Commerce and Industry v. Standard (Nig.) Engineering Co. Ltd.* [2002] 8 NWLR (Pt. 768) 104 at 131.
[9] *Cricklewood Property 7 Investment Ltd. v. Leighton Investment Trust Ltd.* (1945) 1 All ER 252.
[10] *Mazin Engineering Ltd. v. Tower Aluminium* [1993] 5 NWLR (Pt. 295) 537.
[11] *United Cinema & Film Distributing Co. v. The Shell British Petroleum Development Co. of Nigeria Ltd.* (1973) 3 U.I.L.R. 439.

This doctrine (i.e. frustration of contract) was enunciated by Blackburn J in *Taylor v. Caldwell.*[1] Prior to this decision, the rule of absolute contract prevailed.[2] By the principle of absoluteness of contract, a party to a contract was strictly bound by his/her contract and in the absence of express limitation of liability, he/she must take the consequences of being unable to discharge his/her accrued obligation in changed circumstances. The justification for this rather harsh rule was that a contracting party could always make provisions for unforeseen contingencies in his/her contract, and if he fails or ignores to do so, the fellow must be taken to have assumed the risk involved in such a situation.[3]

This principle (i.e. absoluteness of contract) is exemplified by the decision in *Paradine v. Jane*[4] where the defendants defence that his failure to pay his rent was due to the fact that the period in issue, he had been evicted from the property by an alien enemy who had occupied the house, was rejected by the court on the basis that having created obligation by entering into the lease agreement, he was bound to pay rent despite his dispossession by an enemy alien. Recognising the harshness of this doctrine, the court began creating exceptions. Thus, in *Brewster v. Ketchell*[5] it was held that supervening illegality would excuse parties from further performance of their contractual obligations. The modern doctrine of frustration was espoused in *Taylor v. Caldwell*[6] where the court held that the principle seems to us that, in contracts in which the performance depends on continued existence of a given person or thing, a condition is implied that the impossibility of performance rising from the perishing of a person or thing shall excuse the performance.[7] This position was subsequently applied to charter parties where the adventure was frustrated by perils of the seas as was held in *Jackson v. Union Marine Insurance Co. Ltd*[8] In *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd*[9] Lord Viscount Maugham described the doctrine of frustration as "a special case of the discharge of contracts by an impossibility of performance arising after the contract was made." Events such as subsequent legal changes or statutory impossibility, outbreak of war or hostility, destruction of the subject matter of the contract, government acquisition of the subject matter, death, imprisonment or incapacitating illness have been held to qualify as frustrating events.[10] Once a contract is proven to have been frustrated, the effect is that parties are discharged from further performance as the frustrating event has rendered the performance impracticable.[11] In fact, in *Brown v. Haco Ltd*[12] where the claimant was caught up in the Biafran section upon the occurrence of the civil war, by the time he returned to Nigeria at the end of the war and sought to continue in the defendant's employ, the court held that his employment contract had been frustrated by the war. In *Hare v. Murphy Brothers Ltd.*[13] the court held that the protracted imprisonment of the claimant frustrated his employment but in *London Transport Executive v. Clarke*[14] the court held that the imprisonment of the defendant did not frustrate the employment contract between the parties as the imprisonment was caused by one of them.

3. X-raying the Employer's Duty to Provide Work and Pay Remuneration

It has been stated that the formation of employer-employee relationship leads to the crystallisation of rights and obligations between the parties. One of the duties of the employer to an employee is to provide work and pay remuneration for work done or services rendered. The employer's duty to provide work is anchored on the fact that the enterprise exists at the behest of the employer and hiring people to work presupposes that there is work to be done. Section 17 of the Labour Act[15] recognises the employer's duty to provide work for the employee. Emiola[16]has opined that at common law, there is generally no compulsion on the part of the employer to provide work so long as the wages are paid.[17] This position is traceable and discoverable from the dictum of Asquith J in

[1] *Taylor v. Caldwell* (1863) 3 B & S. 826.
[2] Sagay, I.E., *Nigerian Law of Contract,* (Ibadan, Spectrum Law Publishing, 2000) 565.
[3] *Ibid.* at 565.
[4] *Paradine v. Jane* (1647) Aleyn 26.
[5] *Brewster v. Ketchell* (1691) 1 Salk. 198.
[6] (1863) 3 B & S. 826.
[7] Ibid. at 839.
[8] *Jackson v. Union Marine Insurance Co. Ltd* (1874) LR 10 CP 125 at 148.
[9] *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd* (1942) AC 154 at 168.
[10] *Nwaolisah v. Nwabufoh* [2011] 14 NWLR (Pt. 1268) 600.
[11] *Salami v. Bentworth Finance (Nig.) Ltd.* [1968] 2 ALR 304.
[12] *Brown v. Haco Ltd* (1970) 2 All NLR 47.
[13] *Hare v. Murphy Brothers Ltd* (1974) 3 All E.R. 940.
[14] *London Transport Executive v. Clarke* (1981) 1 CR. 355.
[15] Labour Act Cap. L1 Laws of the Federation of Nigeria, 2004.
[16] Emiola, A., *Nigerian Labour Law* 4th Ed., (Ogbomoso: Emiola Publishers Ltd., 2008) 95.
[17] See Section 16(1) of the Labour Act Cap. L1 Laws of the Federation 2004.

Collier v. Sunday Referee Publishing Co. Ltd[1] where he held thus "a contract of employment does not necessarily, or perhaps normally, oblige the master to provide work for the servant to perform. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out."[2] It is apposite to note that this decision was delivered at a time and age that labour was regarded as a mere commodity that is sold or offered by the "servants" to their "masters." This belief explicates the description of the employment relationship in a rather derogatory manner as master-servant employment relationship. The description of an employment relationship as master-servant aside sounding derogatory, is capable of inspiring or encouraging the master to actually treat the servant in an unfair manner which is the unfortunate reality in this employment type. It is snack of slavery or servitude which should not be encouraged. Pursuant to this position, it has become accepted that in a master-servant employment, either of the parties can terminate the employment by payment of salary in lieu of notice.[3] This common law position gives the impression that earning of wages/salary is the only reason for working but this is not correct. Aside earning wages/salary, people work for several other reasons including but not limited to the natural instinct to contribute to the well-being of the society. Giving the prevailing economic situation of Nigeria, it is difficult, if not impracticable, to have an employer who will remunerate an employee who has not worked.

This Asquith J's position in *Collier Case*[4] has been abandoned by the English Court of Appeal in *Langston v. Amalgamated*[5] by Lord Denning MR[6] when he stated thus "that was 33 year ago, things have altered since then. We have repeatedly said in this court that a man has a right to work, which the court will protect. To my mind therefore, it is arguable that in these days a man has, by reason of an implication in the contract, a right to work. That is, he has a right to have the opportunity of doing his work when it is there to be done." This has paved way for several exceptions to the rule that an employer, as long as he remunerates the employee, has no duty to provide work.

Thus, where the employee earns based on commission, the employer is duty bound to provide work so that the employee can earn as much as he/she can work as was held in *Turner v. Goldsmith.*[7] It is crystal clear that while the employer is not duty bound to provide work so long as the employee is duly remunerated, there are conditions under which provision of work is mandatory.

4. Explicating *N.R.M.A.C. v. Ajibola Johnson & Ors.*

The brief facts of this case are as follows. The Respondents were invited for interview having applied for employment in the 1st Appellant. After the interview and other preliminary matters, they were offered employment and issued letters of employment to that effect. They complied with the terms of the employment requiring them to submit certificate of fitness issued by a government hospital upon acceptance of the employment which duplicate they all signed and returned to the 1st Appellant. Upon assumption of duty at the 1st Appellant, the Respondents were addressed by the Director of Personnel of the 1st Appellant. The Respondents continued to report at work at the 1st Appellant Headquarters ready and willing to work until they were orally informed to stay away from work. This stay away order was said to be a directive from the new government that ordered the halting of all appointments made in the 1st Appellant in the month of May which the new government took over the rein of power in Nigeria. Consequent upon the directive, the 1st Appellant wrote the Respondents withdrawing the employment it had offered them.

Being aggrieved by this action, the Respondents commenced an action at the Federal High Court, Abuja Division. They claimed that until their employment is effectively terminated based on the terms and conditions of employment contained in their letters of employment, they remain employees of the 1st Appellant. As a result, they are entitled to their salaries and other emoluments and a declaration that the Appellants deliberately denying them the opportunity to serve their fatherland for which they had been lawfully engaged is unlawful and

[1] *Collier v. Sunday Referee Publishing Co. Ltd* (1940) 2 K.B. 647.
[2] Uvieghara, E.E. *Labour Law in Nigeria* (Ibadan: Malthouse Press Ltd., 2001)34.
[3] *Chukwuma v. Shell Petroleum* (1993) LPELR-864 SC at 28.
[4] (1940) 2 K.B. 647.
[5] *Langston v. Amalgamated* (1974) 1 All ER 980 at 927.S
[6] In *Nagle v. Fielden* (1966) 2 Q.B. 633 Lord Denning MR in upholding the right to work, has stated that "the common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whims and caprices of those having the governance of it. If they make a rule which enables them reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The court will not give effect to it." It must be noted that what was being dealt here was not the duty of the employer to provide work *per se* but the right of a worker to engage in his trade and not be unreasonably restrained by trade union.
[7] *Turner v. Goldsmith.* (1891) 1 KB 544.

unconstitutional. The trial court partly granted their prayers. Both parties were dissatisfied with the judgment and appealed same to the Court of Appeal. In a unanimous decision, the main appeal was dismissed for lacking merit while the cross appeal was upheld in part wherein the court held that the Respondents were entitled to be paid salaries and other emoluments from the date they assumed duty till when the trial court delivered judgment and that the Appellants do not enjoy the protection of the Public Officers' Protection Act. The Appellant whose appeal was dismissed, further appealed to the Supreme Court against the decision of the Court of Appeal which affirmed the decision of the trial court. The Parties filed and exchanged their brief.

The Appellant argued that the decision of the trial court which was affirmed by the Court of Appeal that the Respondents are entitled to salaries and other emoluments from the date of employment till when judgment was delivered is contrary to the findings of the trial court (affirmed by the Court of Appeal that from the date the directive from the government was issued, the employment of the Respondents was frustrated hence, they are not entitled to salaries and emolument as at the time the trial court delivered its judgment). The Appellant argued that having found and held that the government directive to it to suspend all employments undertaken as from the time that of the Respondents was done amounted to frustration of contract, ordering it to payment remuneration, emolument, etc. to the Respondents from when they were purportedly employed till when the trial court judgment was delivered was without foundation.

The Respondents argued that the trial court and the court below were concurrent on the findings that they were entitled to salaries, emolument and entitlement from the time they were employed until when the judgment of the trial court was delivered as there was a valid contract of employment between the parties.[1] After reviewing the argument of the parties and the findings of the courts below from the records of appeal, the Supreme Court came to the conclusion that from the tenor of the letter of offer of employment and withdrawal of employment based on the directive of the government, there was in existence, a valid contract of employment between the parties.[2] Thus, since there was a valid contract between the parties which was subsequently frustrated, the court held that the trial court and the court of Appeal were correct to have ordered the payment of salaries, emoluments and entitlements to them from the date the contract was created till when the judgment of the trial court was delivered.[3]

The Court held that although the contract was frustrated, the failure of the Appellant to timeously inform the Respondents of the frustration but allowed them to report to work, was fatal to the defence of frustration as their accrued rights cannot be extinguished by the frustrating event in the circumstances of the case.

This decision is profound as to the applicability of frustration to contract of employment. It should be noted that the peculiarity of this case must be countenanced. The Supreme Court by this decision, has laid down the rule that in employment cases, accrued rights especially salaries, emolument and entitlements will not be extinguished by the occurrence of a frustrating event which of course, set in after the accrual of these rights. also, where a frustrating event has taken place but not to the knowledge of the employees, who continue to belabour under the ignorance of its occurrence particularly when same is of the nature that it is within the exclusive knowledge of the employer; the failure to timeously inform the employees will not prejudice their entitlement to salaries and other employment benefits that would have accrued during that period. Computation of the period of time employees whose employment has been frustrated are entitled to accrued benefits will start from the date the employment contract was created or the last entitlement was received to the time the employer informed them of the frustrating event which was known to him and not when it actually occurred. Thus, an employer is duty bound to timeously notify the employee (s) of the occurrence of a frustrating event especially such that is not apparent. Otherwise, where the employees continue to report at work, willing and ready to work thereby entitling them to remuneration and other benefits, the employer cannot clandestinely lay hold on the frustrating event to extinguish the accrued benefits. It will seem that accrued employment benefits are proprietary hence, will not be extinguished by the occurrence of frustration. If the court held otherwise, the implication it would have is far reaching. At present, there is an unprecedented high level of unemployment in Nigeria with several employees especially those employed by the government, owed accumulated salaries and other benefits. It will not only be unfair and unjust for a frustrating event to extinguished such accumulated salaries and benefits which if had been paid, would not even be a subject of contention. The Court was not unmindful of this ugly trend and the negative consequences it could have on the polity.

[1] *National Revenue Mobilisation Allocation and Fiscal Commission & Ors. (N.R.M.A.C.) v. Ajibola Johnson & Ors* [2019] 2 NWLR (Pt. 1656) 247 at259, paras. F-H.
[2] *Ibid.* at 264, Para. H.
[3] *Ibid.* at 267, Paras. A-D.

From practical experiences, it has been observed that some employer in Nigeria, particularly within the banking subsector, are in the ugly habit of posting workers to redundant branches/department who would report for work for a considerable time. After this, such workers are informed that their employment has been frustrated by the unavailability of work which was known to the employer *ab initio*. It is worthy to note that employers who resort to this stealthy gimmicks to get rid of their worker, are being wise by half. For as long as such workers report to work, willing and ready to work, by the tenor of this decision, they are entitled to remuneration and all accrued benefits for the period they reported to work. The decision is a subtle reaffirmation of the employer's unshifting duty to remunerate the employee for work done. Indeed, the court has approved the aphorism that a worker is worthy of his wages.[1] The decision is a welcomed development and a fortification of security of employment entitlement.

5. Conclusion and Recommendations

From the exposition above, it is crystal clear that parties with contractual capacity are allowed to enter into legally enforceable contract of employment. The occurrence of an event that destroys or radically alter the contract which occurrence was not contemplated by the parties nor brought about by them, will result in the frustration of the contract thereby excusing the parties from further performance as such performance is rendered impracticable. However, in employment contract, while frustration brings such contracts to an end, if the frustrating event is within the exclusive knowledge of the employer who fails to communicate its occurrence to the employee (s) and allows them to report at work. Same will not extinguished accrued rights and privileges such as salaries, entitlements and emolument for the period which the employee (s) reported at work. While frustration determines an employment contract or any contract for that matter, the Supreme Court of Nigeria has severed salaries, emolument and entitlements from the contract hence, they subsists the frustrating event. Hence, every employer must be proactive in communicating the occurrence of a frustrating event to its employee and take necessary steps to dissuade them from reporting at work or offering their services in anticipation of remuneration.

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[1] 1 Timothy 5:18b, Holy Bible King James Version.

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