IN THE COURT OF APPEAL
HOLDEN AT LAGOS

ON FRIDAY THE 17TH DAY OF APRIL, 2009
BEFORE THEIR LORDSHIPS:-

CLARA BATA OGUNBIYI	**JUSTICE, COURT OF APPEAL**
ADZIRA GANA MSHELIA	**JUSTICE, COURT OF APPEAL**
REGINA OBIAGELI NWODO	**JUSTICE, COURT OF APPEAL**

CA/L/164/04

STEPHEN A. ODEYEMI … …. ….. APPELLANT

AND

NIGERIA TELECOMMUNICATIONS PLC … …. …… RESPONDENT

JUDGMENT
(DELIVERED BY ADZIRA GANA MSHELIA, JCA)

This appeal is against the Ruling of the Federal High Court Lagos presided over by Gumel J. (as he then was) delivered on 12th July, 2002 dismissing the suit filed by the plaintiff now appellant on the ground that the action was statute – barred by virtue of S. 2 (a) of the public officers Protection Act Cap P41 Laws of the Federation of Nigeria 2004.

The Plaintiff now appellant instituted an action at the Federal High Court Lagos seeking among other things a declaration that the purported dismissal by the defendant now respondent was effected without authority and is therefore illegal, invalid and ineffectual. The reliefs sought are contained in paragraph 22 of the Statement of Claim appearing at pages 5 – 7 of the record. Respondent did not file any statement of defence. The learned trial Judge proceeded to hear the matter and appellant testified but

did not call any witness. After the conclusion of trial and final address the matter was adjourned for judgment. In the interim the learned trial judge invited written address from counsel on whether the action is caught up by limitation of time under S.2 (a) of the Public Officers Protection Act. Only counsel to the appellant filed a written address. The learned trial judge found that the suit was time barred and consequently dismissed same. In doing so, learned trial judge in his considered ruling concluded as follows:-

> "It is very clear that this suit was commenced almost three years since the dismissal of the plaintiff from the series (sic) of the Defendant. Based on the foregoing observations and remarks, I have no doubt in my mind that this action was commenced outside the period stipulated by law. It is therefore caught up by the limitation of time provisions under section 2(a). This without doubt, leaves the plaintiff with an action that is statute – barred. It is a barren cause of action that is not capable of being legally enforced. On the consequence of this, the Supreme Court had decided in Egbe v. Adefarasin and Eboigbe v. N N P C that such actions must be dismissed for want of capacity on the part of the courts to adjudicate on same. This suit is therefore, hereby dismissed for, having been statute – barred ."

Dissatisfied with the decision of the learned trial judge, appellant filed notice of appeal on the 16th February, 2004 containing two grounds of appeal. The appellant's counsel on 10th March, 2005 sought and obtained leave of this court to amend its notice of appeal and raise new points not canvassed at the lower court. The amended notice of appeal dated 15th March, 2005, contained three grounds of appeal. In accordance with the Practice and Procedure of this court appellant's counsel Mr. Onamade filed

brief of argument on 5/5/05. A reply brief to respondent's brief was equally filed on 2/9/07. Respondent on the other hand filed respondent's brief on 22/2/2007.

At the hearing of the appeal, appellant's counsel relied and adopted appellants brief as well as the reply brief. Respondent's brief was deemed argued because there was proof of service of the hearing notice on the respondent. Appellant's counsel also abandoned issue I and ground 1 of the amended grounds of appeal and same were struck out.

In the appellant's brief four issues were framed for determination in this appeal. Issue 1 has been struck out as such the relevant issues are (2) (3) and (4) which read as follows:-

(2). Whether the act of dismissal of the applicant by virtue of letter of dismissal dated 27th February, 1997 was in compliance with the Public Officers (Special Provision) Act Decree No. 17 of 1984, and if not, what is the effect.

(3). Whether in the circumstances of the case, the immunity under s. 2(a) Public Officers Protection Act will apply.

(4). What is the appropriate order to make where the court now finds that S. 2(a) Public Officers Protection Act does not apply.

The respondent, on the other hand, contends that these four issues arise for determination in this appeal.

1. Whether it is within the law to have issues in the appellant's brief of argument than the grounds of appeal.

2. Whether the learned trial judge was wrong in dismissing the

suit on the grounds that it was statute barred based on the Provision of S.2(a) of the Public Officers Protection Act.

3. Whether the trial judge was right to raise an issue **suo motu.**
4. Whether the limitation of time was rightly computed by the trial Judge.

When the appeal was reserved for judgment both counsel were invited to further address the court as to whether Federal High Court has jurisdiction to hear and determine issue relating to contract of service and whether respondent is a Federal Government Agency. On 22/01/09 Respondent's counsel though served failed to appear in court. Mr. Onamade contended that section 251(1) (p)(q) and ® confers jurisdiction on Federal High Court to entertain subject matter of this appeal that is termination of contract of service. He referred to **NEPA Vs Edegbenro** (2003) Vol 9 Weekly Report of Nigeria 21 and **Awokunle Vs NEPA** (2008) Vol. 39 WRN 172 at 190 to buttress his submission. Learned counsel urged the court to take judicial notice of the fact that NITEL is an acro-nym for Nigeria Telecommunications Plc and to hold that it is an organ of the Federal Government established by law through whom Federal Government carries out its functions. See **Awokunle Vs NEPA** supra. He still urged the court to allow the appeal.

In determining whether a court has jurisdiction in a matter or not the court will examine or consider the nature of the Plaintiff's claim as disclosed in his writ of summons and statement of claim. See **Mustapha Vs Governor Lagos State** (1987) 2 NWLR (Pt 58) 539; **Tukur Vs Govt Gongola State** (1989) 4 NWLR (Pt 117) 392 and **OHMB Vs Garba** (2002) 14 NWLR (Pt 788) 538.

Courts are creation of statutes and it is the statute that creates a particular court that usually confers jurisdiction on it. Federal High Court is a creation of the constitution. The constitution of the Federal Republic of Nigeria 1999 spells out the jurisdiction of the Federal High Court in section 251(1). The plaintiff/appellant's claim relates to contract of service. Appellant is challenging the validity of the decision of the respondent to terminate his appointment. In other words the cause of action arose out of the Administrative action or decision of the defendant/respondent. The action is for declaration and the principal purpose of it is to nullify the decision of the defendant/respondent terminating the employment of the plaintiff/appellant. The Supreme Court in **NEPA Vs Adegbenro & ors** (2003) 9 WRN 1 held that actions which relate to breach of contract of employment will come within the terms administration and management as defined by section 251(1) (p) (q) (r) and (s) of the 1999 constitution.

For clarity the provisions of Section 251 (1) (p), (q), ® and (s) are reproduced hereunder:-

> "251(1) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
>
> (p) the administration or the management and control of the Federal Government or any

of its agencies;

(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

® any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and

(s) such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly.

Provided that nothing in the provisions of paragraphs (p), (q), and ® of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."

See also **Federal College of Education Vs Ogbonna** (2008) Vol.3 WRN 83 and the unreported Supreme Court decision in the case of **J.A. Adekoya & ors Vs Nigerian Security Printing Minting Company Limited** suit SC 224/2002 delivered on 6th day of February, 2008.

Appellant had pleaded in his statement of claim that Defendant/respondent is a Public Corporation charged with the

statutory responsibility of providing Telecommunications services in Nigeria. Appellant came to be in the employment of the Defendant/respondent as a result of the merger of Nigerian External Telecommunications (NET) and P&T. As a result of the merger his services were transferred to the defendant/respondent. By virtue of section 318 (1)(g) of the 1999 constitution respondent and appellant form part of the Federal Public Service of Nigeria. For clarity section 318(1) (g) provides as follows:-

> Public service of the "Federation" means the service of the Federation in any capacity in respect of the Government of the Federation, and includes service as –
>
> (g) Staff of any company or enterprise in which the Government of the Federation or its agency owns controlling shares or interest.

From the totality of the 22 paragraphs statement of claim one would readily hold that respondent is an agency of the Federal Government. As earlier stated in determining jurisdiction the court must consider both the parties in the litigation as well as the subject-matter of the litigation. I agree with the submission of appellant's counsel that Federal High Court has jurisdiction to hear and determine the case at hand.

I now resolve the appeal on merit. I will adopt the issues formulated by the appellant in the determination of this appeal. I have observed that issues 1, 3 and 4 formulated by the respondent do not arise from the grounds of appeal. It has been settled that a respondent cannot formulate an objection to the grounds or contents of a brief into an issue for determination. He can only raise it as an argument. See **The Registered**

Trustees Trem Vs Okunowo (2003) 7 NRN 85 ratio 4. Issue 1 is therefore incompetent and ought to be struck out. Similarly, issues 3 and 4 do not arise from the grounds of appeal. It is settled that the question to be determined in an appeal must be a question over which there is a dispute at the lower court. Issues 3 and 4 are not disputed or challenged by the appellant. A respondent is not entitled to formulate issue outside the grounds of appeal unless he has cross-appealed or filed respondent's notice in which case he can formulate issues relating to the grounds of appeal he filed which could be outside those filed by the appellant. See **Uyoette Vs Ibiono Ibom L.G.** (2003) 33 WRN 148 ratio 3 at page 162 and **Fed College of Education Vs Ogbonna** (2008) 3 WRN 88. It should be borne in mind that issues for determination are distilled from grounds of appeal. An issue not tied to any ground of appeal is improper and will not be countenanced. See **Shami Vs Akinola** (1993) 5 NWLR (Pt 249) 423 at 444 and **1wuoha Vs Nipost Ltd** (2003) 28 WRN 111 page 115. I hold that respondents issues 1, 3 and 4 are incompetent and are accordingly struck out. Respondent is left with only one competent issue that is issue 2 which relates to appellant's issue 2.

The three issues formulated by appellant will be resolved serially. Issue 2 arose from ground 3 of the amended notice of appeal. Mr. Onamade contended that appellant was dismissed from employment by a letter dated 27th day of February, 1997 (Exhibit F) signed by one D.I. Anurukem a Deputy General Manager for the General Manager. See page 13 of the record. The question to be determined in resolving this issue is whether this letter complies with the provisions of Decree 17 under which the power to dismiss the appellant was exercised. Learned counsel referred to section 1(1) of Decree 17 of 1984 and contended that the power of dismissal must

be exercised in accordance with the provisions of the Decree or Act vesting that power. See PHMB Vs Ejitagha (2000) 13 WRN 1 at 16. For the power vested by Decree 17 of 1984 to be exercised validly, it must be exercised by the "appropriate authority". Learned counsel posed the question as to who is the appropriate authority to dismiss the appellant. Appellant was employed by the respondent, a Federal parastatal wholly owned by the Federal Government. The "appropriate authority" to dismiss the appellant is as provided in Section 4(2) of Decree No 17 1984 that is to say the President or any other person duly authorised by him. See **Nitel Vs Clifford Ikaro** (1994) 1 NWLR (Pt 320) 366 paras A-E and **Okoro Vs Delta Steel Co. Ltd** (1990) 2 NWLR (Pt 130) 87 at 101 paras A-C. Appellant's counsel contended that the dismissal letter was signed by one D.I. Anurukem for the General Manager. Learned counsel submitted that neither D.I. Anurukem nor the General Manager is the appropriate authority as prescribed by Section 4(2) b of Decree 17. Neither of them is the president or the minister of the supervisory ministry of the Respondent. There is no indication that the letter was written on the direction of the appropriate authority. Relying on the cases of **Nitel Vs Ikaro** supra and **Okoro Vs Delta Steel** supra and **Nepa Vs Ososanya** (200)13 WRN 1 at 13 learned counsel further contended that the signatory was not the appropriate authority.

Furthermore, appellant's counsel submitted that even if the General Manager had been delegated to sign the letter he cannot further delegate the duty of signing the letter to D.I Anurukem as the principle is delegatus non protest delegare – where power has been delegated to a person, it is exercisable by him directly and he is not competent to further redelegate. Learned counsel also contended that the letter of termination referred to cannot be linked with the minister. See **Nepa Vs Osasanya** (supra) and

Wilson Vs A.G. Bendel & ors (1985) 1 NWLR (Pt 4) 572. The logical effect is that the officer signing the letter was not authorised to do it and acted on his own. Learned counsel further contended that the dismissal of the appellant by a letter that does not conform with the provisions of Decree No 17 of 1984 is ultra vires incompetent, null and void. It was his contention that the letter of dismissal dated 27th February, 1997 (Exhibit F) not having been signed by the appropriate authority is unauthorized, ultra vires, incompetent, ineffectual and a nullity as such it is incapable of dismissing the appellant. Learned counsel urged the court to hold that the letter of dismissal was not issued by the appropriate authority and is therefore ultra vires, incompetent and a nullity.

Respondent's issue 2 is whether the learned trial Judge was wrong in dismissing the suit on the grounds that it was statute barred based on the provision of Section 2(a) of the Public Officers Protection Act. Learned counsel referred to the provision of Section 2(a) of the Public Officers Protection Act and contended that the law is unequivocal as to when an action against a public officer ought to be commenced in court, hence once a court is satisfied that the defendant is a public officer like in this present suit, it is left with no option but to apply the provisions of Section 2(a) of the Act simply sita . See **Egbe Vs Alhaji** (1990) 1 NSCC (Pt 1) Vol. 21; **Egbe Vs Adefarasin** (1987) NWLR (Pt 47) page 1; **Adeoni Vs Governor Oyo State** (2003) FWLR (Pt 149); **Obieguna Vs Okoye** (1961) SCNL (Pt 144) and **Anusan Vs Obideyi** (2007) NWLR (Pt 710) 674. Respondent's counsel submitted that in the present circumstance it is immaterial to argue whether the act of the public officer was done in the execution of a public duty or not what remains of great importance to this matter is whether the action was commenced within the appropriate time stipulated by the law. Mr. Nwogu

Nnaemeka contended that the underlying interpretation of the Ruling of the Supreme Court in **Egbe Vs Alhaji** (supra) is that no matter how relevant, genuine or important the argument of the appellant may seem to be in this appeal, the fact remains that so long as he did not comply with the provisions of Section 2(a) of the Public Officers Protection Act his case stands to be dismissed. He urged the court to uphold the judgment of the trial Judge at the lower court and dismiss the appeal.

In reply appellant's counsel contended that respondent's issue 2 is a misconception of the position of the law. The position of the law is that the protection and immunity offered by the provision of Section 2(a) Public Officer Protection Act will only apply for as long as the public officer is acting within the confines of his statutory duty. See decision of Supreme Court in **Ibrahim Vs JSC** (1998) 14 NWLR (Pt 584) 1 at 32 paras B-F, where Iguh JSC had this to say:-

> "Once they step outside the bounds of their
> public authority and are acting outside the
> colour of their statutory or constitutional duty,
> they automatically lose the protection of the law.
> In other words, a public officer can be sued outside
> the limitation period of 3 months if at all times
> material to the commission of the act complained
> of, he was acting outside the colour of his office or
> outside his statutory or constitutional duty".

Appellant's counsel submitted that it is the contention of appellant that the act of respondent was outside statutory or constitutional duty and is thus ultra vires. It cannot be protected under Section 2(a) of the Public Officers Protection Act. This appellant's counsel contended remains the position of

the law. I have considered the submission of both counsel. The question to be resolved is whether the learned trial Judge was right to have dismissed the appellant's claim on the ground that it was statute-barred. For the appellant it was contended that the learned trial judge ought to have determined whether the dismissal letter Exhibit 'F' was signed by appropriate authority before invoking the provisions of Section 2(a) of the Public Officers Protection Act. This is because the 3 months limitation period provided under Section 2(a) of Public Officers Protection Act will not be available to public officers who acted outside the colour of their office or outside their statutory or constitutional duty. He placed reliance on the case of **Ibrahim Vs JSC** supra. Respondent's counsel on the other hand relied on the case of **Egbe Vs Alhaji** supra and contended that appellant did not commence the suit within 3 months of the dismissal, so that ends the matter. The issue of whether the letter of dismissal was signed by appropriate authority can only be determined if the action was commenced within 3 months in compliance with Section 2(a) of the Public Officers Protection Act. I have had the privilege of reading the two authorities relied upon by both counsel in support of their submissions. The position stated by the Supreme Court is very clear and unambiguous. A public officer can be sued outside the limitation period of 3 months if at all times material to the act complained of, he was acting outside the colour of his office or outside his statutory or constitutional duty. In my humble view it is appropriate to first determine whether the act complained of, was done by the appropriate authority before invoking the provisions of Section 2(a) of the Public Officers Protection Act. Once it is resolved that the dismissal letter Exhibit 'F' was not signed by the appropriate authority, it means Section 2(a) of the Public Officers Protection Act will not apply. The effect is that the action will not be caught up by the

limitation period of 3 months. I agree with the submission of appellant's counsel on this issue. The learned trial Judge resolved the issue of limitation of time prematuredly. He ought to have first determined whether Exhibit 'F' the dismissal letter was signed by appropriate authority in accordance with the provisions of Decree No. 17 of 1984 under which the power to dismiss the appellant was exercised before coming to the conclusion that the action was statute-barred. I have observed that the learned trial Judge made reference to the case of **Ibrahim Vs JSC** but did not advert his mind to the portion of the decision under consideration.

The question to be resolved is whether the dismissal letter Exhibit 'F' was signed by the appropriate authority as required by the provisions of Section 1(1) of the Decree No. 17 of 1984. The appellant was dismissed from employment by a letter dated 27th February, 1997 (Exhibit F) signed by one D. I. Anurukem who designated himself as the Deputy General Manager for the General Manager of the company. For avoidance of doubt the letter is reproduced hereunder:-

" NIGEIRAN TELECOMMUNICATIONS LTD
INTERNAL MEMO

27th February, 1997

S.A. Odeyemi

ID 116569

Date ………………..

To: …………………….

GMPTMD/D.3/VOL.
XI/M/Reg.0901

General Manager (PTMD)

From: ………………………….

Ref: …………………….

SUBJECT ……DISMISSAL………

I am directed to inform you that in the public interest, your services with NITEL Ltd are no longer required. You are,

therefore, dismissed with effect from 26th February, 1997, under the provisions of Decree No 17 of 1984.
You should hand over all the company properties in your possession to your Head of Department.

Sgd
D.I. Anurukem
Deputy General Manager (P)
For: General Manager (PTMD)"

As earlier stated the dismissal was done in accordance with the previsions of Decree 17 of 1984. Section 1(1) of Decree 17 of 1984 empowers the "appropriate authority" to dismiss or remove public officers summarily. Who then is the "appropriate authority? "Appropriate Authority" is defined in Section 4(1), (2)(i) of the Decree in respect of any office which was held for the purposes of any state, shall be the Military Governor of that state or any person authorised by him, and

(ii) in any other case, shall be the Head of the Federal Military Government or any person authorised by him or the Supreme Military council."

Appellant was employed by the respondent, a company in which Federal Government has controlling shares. Going by the provisions of Section 4(2)(ii) of the Decree the appropriate authority to exercise the power of dismissal is the President or any person duly authorised by him. See cases of **Nitel Vs Clifford Ikaro** supra; **Okoro Delta Steel Co Ltd supra** and **NEPA Vs Ososanya** supra all relied upon by appellant's counsel. In the instant case neither the General Manager nor the Ag. General Manager is the President or the Minister of the supervisory ministry of the respondent. I agree with the submission of appellant's counsel that there is no indication on the dismissal letter exhibit 'F' that it was written on the direction of the appropriate authority. There is also no clear evidence that Mr. D.I.

Anurukem when signing the letter of termination acted under the authority and directive of the appropriate authority. Even if the General Manager had been delegated to sign the letter, he cannot further delegate the duty of signing the letter to D.I. Anurukem based on the principle of delegation non protest delegare – where power has been delegated to a person, it is exercisable by him directly and he is not competent to further redelegate. See **Okoro Vs Delta Steel Co. Ltd** supra wherein Salami JCA supporting the lead judgment at page 105(D) said "Assuming for purposes of argument that the power was delegated to the General Manager, it is exercisable by him directly and personally, he is not competent to re-delegate it. It is a fundamental principle of law ………..". Furthermore in **Nitel Vs Ikaro** supra it was held that where in the termination of an employee's service based on Decree No. 17, there was no mention of whose direction the termination was made, it is improper and there is no direction to do so. In **Anya Vs Iyayi** (1993) 7 NWLR (Pt 305) 290 at 312 – 313 Karibi–Whyte JSC observed as follows:-

> "It is therefore necessary for a valid exercise of the powers under the Public Officers (special provisions) Decree No. 17, 1984 ……….. the power must be exercised by the appropriate authority or any person authorised or any person authorised by him ………:."

Having regard to the reasons stated hereinabove I am of the humble view that the letter of dismissal (exhibit 'F') was not signed or issued in accordance or in compliance with Decree No. 17 under which it was issued and the power there under was not validly exercised. The logical effect is that the officer who signed the letter was not authorised to do it. In **F.C.D.A. Vs Sule** (1994) 3 NWLR (Pt 332) 257 at 273 paras B the court

held that any termination of appointment under Decree No 17 of 1984 not done by the appropriate authority is ineffectual. Similarly in the case of **Okoro Vs Delta Steel Co**. Ltd supra the court held that the act of issuing a letter of dismissal not signed by the appropriate authority is ultra vires and a nullity.

I hold that the letter of dismissal dated 27th February, 1997 (Exhibit 'F') not having been signed by the appropriate authority is unauthorized, ultra vires, incompetent, ineffectual and a nullity. The officer acted outside the scope of his duties or outside his statutory or constitutional duty. The dismissal is therefore a nullity and is ineffectual.

Having regard to the circumstances of this case I am of the humble view that Section 2(a) of the Public Officers Protection Act will not apply. For clarity Section 2(a) provides:-

> "Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any act or law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, law, duty or authority, the following previsions shall have effect –
>
> (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, or in case of a continuance of damage or injury, within three months next after the ceasing thereof:"

It is settled that Section 2(a) Public Officers Protection Act will only apply so long as a public officer is exercising his duties as prescribed by law.

Once they step outside the bounds of duty or are acting outside the colour of official duty or outside constitutional or statutory duty, the protection is automatically lost. See **Ibrahim Vs JSC** supra page 1 at 32 paras B-F. In effect a public officer can be sued even after the limitation period of three months. In **Ibrahim Vs JSC** supra the Supreme Court per Iguh JSC at page 32 paras B-F observed as follows:-

> "Once they step outside the bounds of their public authority and are acting outside the colour of their statutory or constitutional duty, they automatically lose the protection of the law. In other words, a public officer can be sued outside the limitation period of 3 months if at all times material to be commission of the act complained of, he was acting outside the colour of his office or, outside his statutory or constitutional duty."

Following the decision of the Supreme Court in **Ibrahim Vs JSC** supra the action though commenced after 3 years of the act complained of is not caught up by the limitation period. Since the dismissal letter Exhibit 'F' was not signed by the appropriate authority, the effect is that there was no dismissal. It was therefore wrong for the trial Judge to have dismissed the action on the ground that it was statute barred. I will therefore resolve issue 2 in favour of the appellant.

Appellant's counsel had urged us to invoke the provisions of Section 15 of the Court of Appeal Act and enter judgment for the appellant as remitting the case for retrial will cause more hardship to the appellant. Respondent did not contest the case at the lower court and all the necessary

evidence including documentary are all before this court. I have carefully gone through the record of appeal. I agree with appellant's counsel that all the evidence required to decide the issue in controversy between the parties is before this court. The Plaintiff/appellant filed his writ of summons and statement of claim and same was served on the defendant/respondent. Defendant/respondent did not file any statement of defence. On 25/6/2001 trial commenced in absence of defendant/respondent because the court noted that hearing notice was served on them but there was no appearance in court and no explanation offered as to why they were absent. Plaintiff/appellant testified and closed his case on the same date. The matter was adjourned for defence to 25/9/2001. The defendant/respondent did not appear and case was adjourned for address. On 20/11/2001 plaintiff/appellant's counsel adopted his written address and case was adjourned to 21/01/2002 for judgment. On 22/4/2002 both counsel were invited to address the court as to whether the action was statute-barred. Only Plaintiff/appellant's counsel appeared in court and case was adjourned to 28/05/2002 for adoption of written address. On 4/7/2002 the trial court delivered its ruling and dismissed the case on the ground that it was statute barred. It is an uncontested case. It is to be noted that respondent only reacted by filing respondent's brief when appellant lodged his appeal to this court against the decision of the trial court. Having regard to the circumstances of this case, I think it will not be out of place to invoke the powers granted to this court under Section 15 of the Court of Appeal Act and Order 4 of the Rules of Court 2007 and determine the matter in controversy between the parties to avoid further hardship to the appellant. The resolution of this case would not involve assessing credibility of witnesses. The most relevant aspect of the case involves documentary evidence. Having regard to the facts and

circumstances of this case I hold that this is a proper case to invoke the provisions of Section 15 of the Court of Appeal Act and complete the case on merit. In **J.E. Ehimare & Anor Vs Okaka Emhonyon** (1985) 1 NWLR (Pt 2) 177 following **Metalimpex Vs A.G. Leventis (Nigeria) Ltd** (1976) 2 SC 91 at 102 the court held that an appellate court is equally capable like a trial court (unless the findings rest on the credibility of witnesses) of drawing correct legal conclusion or inference or deduction from admitted or disputed facts. Furthermore, in **Alhaji Akibu Vs Opaleye & Anr** (1974) 1 All NLR (Pt 2) 344 at 356 the apex court had the following to say about the duty of the appellate court in this regard to wit:-

> "Although this court rehears a case on appeal it does this only on the record and, where it is quite clear that evidence has been led in the Lower court which establishes a fact, it will make the necessary findings which the lower court failed to make."

See also **Ramonu Atolagbe Vs Korede Shorun** (1985) 1 NWLR (Pt 2) 360 at 364; **Akpang Vs Otong** (1996) 10 NWLR (Pt 476) 108 at 124; **Oshaboja Vs Amuda** (1992) 6 NWLR (Pt250) 690; **Tinubu Vs Khalil & Debbo Trans Ltd** (2000) NWLR (Pt 677) 183; **Fashanu Vs Adekoya** (1974) 6 SC 83; **Nneji Vs Chukwu** (1988) 10 NWLR (Pt 81) 184; **Shell B.P. Petroleum Company of Nigeria Ltd Vs His Highness Pere-Cole & ors** (1978) 3 SC 183 at 194 and **Adeyemo Vs Arokopo** (1988) 2 NWLR (Pt 79) 703.

Having earlier in this judgment resolved that the dismissal letter Exhibit 'F' is a nullity and ineffectual the question now is what is the appropriate order to make in the circumstances? Before answering this question, I find it necessary to first examine the pleadings and evidence on

record in order to determine whether plaintiff has made out a case to be entitled to judgment.

The reliefs sought by the plaintiff/appellant against the defendant at the lower court as per paragraph 22 of his statement of claim are as follows:-

"WHEREOF the Plaintiff claims as follows:-

1. A declaration that the plaintiff is a public servant whose employment is statutorily protected.
2. A declaration that the purported dismissal of the Plaintiff by the Defendant was effected without authority and is therefore illegal, invalid and ineffectual.
3. An order reinstating the plaintiff and directing the Defendant to pay the Plaintiff all his entitlement which have remained unpaid form June, 1996 to date of reinstatement including any increments that might have accrued within that time.
4. ₦1 Million damages against the Defendant for the unlawful detention of the plaintiff, the inhuman and degrading treatment he has been subjected to by the Defendant and his unlawful dismissal.

<u>ALTERNATIVELY</u>

The Plaintiff claiming:

1. A declaration that the plaintiff is a public servant by virtue of Decree 17 of 1984 and that the Plaintiff is entitled to continue in his employment until the statutory retirement age of 60 years or when he has spent 15 years in service.

2. A declaration that the dismissal of the Plaintiff by the Defendant is wrongful and amounts to a violation of the Plaintiff's right not to be wrongfully dismissed.
3. The sum of ₦3,462,398.60 as special damages against the Defendant the same being an amount the Plaintiff would have earned as salary and allowances for the remaining 13 years if his employment has continued up to the statutory retirement age. The said sum is calculated as follows:-

Rent Allowance	p.a.	₦62,500.00
Leave Allowance	p.a.	₦12,306.00
Furniture Allowance	p.a.	₦30,000.00
End of Year Allowance	p.a.	₦10,255.60
Transport Allowance	p.a.	₦12,600.00
Meal Subsidy	p.a.	₦ 7,920.00
Basic Salary	p.a.	₦130,755.96
and allowances		₦266,338,96 as at 27/2/07

multiply by the 13 years left for the plaintiff in service
4. An order for the payment of the plaintiff's salary and allowance from July, 1976 uptill February, 1997 when he was wrongfully dismissed.
5. An order that the special damages being salary & allowances of the plaintiff (as at 27/2/97) for the 13 years left for him in service, take into account

increments and other benefits that may have accrued to officers of the plaintiff's cadre and should be calculated as at the current salary and allowances on the date of judgment.

6. ₦1 million as general damages against the Defendant for the unlawful and illegal dismissal."

Plaintiff testified as PW1 in support of his 22 paragraphs statement of claim. He did not call any other witness. Plaintiff gave evidence that he was employed by the Federal Government into the Department of Posts and Telecommunication in 1975. In support of this he tendered Exhibit 'A' (letter of employment). He said that upon the merger of the said P&T with Nigeria External Telecommunications (NET) his services were redeployed to the newly established NITEL. The plaintiff said he rose to become an Exchange Area Manager and that throughout his years of service he was variously showered with praise and commendation. He tendered Exhibit 'C' (Certificate of merit) and Exhibit 'D' (letter of commendation) both attesting to his meritorious and diligent service. The Plaintiff further gave evidence that in April, 1996 he was transferred from the Ikeja exchange to the Isolo exchange. He tendered Exhibit 'F' in support of this. In July, 1996 there was a fire outbreak at the Ikeja exchange and a panel was set up by the Government to investigate the cause of the fire. The plaintiff in his evidence said the panel invited him as a former manager of the Exchange to submit a memorandum. This he did. However, the plaintiff said that in August, 1996 he was invited by the Task Force on Telecommunications to answer questions on the fire incident. The plaintiff said he was thereafter clamped into detention at Directorate of Military intelligence (DM1) Apapa. The plaintiff further stated that when the findings of the panel came out, he was

completely exonerated as the panel ruled out sabotage and declared that the fire was due to negligence. He said after the report was released he was released and asked to resume duty at his duty post. It was while he was awaiting an official letter to that effect that he was issued letter of dismissal purportedly issued under Decree 17 of 1984. The said letter of dismissal (Exhibit 'F') was signed by one D.I. Anurukem on behalf of the General Manager. Plaintiff urged the court to reinstate him in his place of employment. He also pray for the full payment of any accrued entitlements, his due promotions and compensation for unlawful detention. Exhibits 'F' and 'G' were tendered at that stage. Defendant neither testified nor cross-examined the plaintiff. As earlier stated this case was not contested by the defendant at the lower court.

In civil cases the position of the law is that he who asserts has the burden to prove the assertion. Where the evidence adduced is unchallenged or uncontroverted the standard of proof is based on minimal proof. Furthermore, it is trite that where a piece of evidence remains unchallenged, uncontroverted supported by the pleading and by its very nature incredible the trial judge has no option but to accept it. See **Nwabuolu Vs Ottih** (1961) 2 SCNLR 32; **MA & Sons Vs FHA** (1991) 8 NWLR (Pt 209) 205 and **Odulaja Vs Haddad** (1973) 11 SC 357.

By his evidence plaintiff has established that he is a public officer. Section 318(g) of the constitution of the Federal Republic of Nigeria 1999 classifies Plaintiff as a public officer and he is thus entitled to all the protection and privileges available to Public Officers. See the unreported Supreme Court decision in the case of **J.A. Adekoya & Ors Vs Nigerian Security Printing Minting Company Limited** suit SC/224/2002 delivered on 6th day of February, 2008. Exhibit 'A' and 'B' the letters of employment clearly

supports the contention of appellant's counsel that plaintiff/appellant is a public officer. I hold that plaintiff's employment has statutory flavour. An employment is said to have statutory flavour where the contract of service is governed by provisions of statutes or where the conditions of service are contained in regulations derived from statutory provisions. See **Imoluame Vs WAEC** (1992) 9 NWLR (Pt 265) page 303 and **Olaniyan Vs University** of Lagos (1985) 2 NWLR (Pt 9) 599 at 605.

Where the court declares a dismissal letter null and void and ineffectual the appropriate order to make in such circumstances is reinstatement of the public officer particularly if the contract has statutory flavour. See **Olatunbosun Vs Niser** (1988) 3 NWLR (Pt 80) 25; **Shitta-Bey Vs F.C.S.C.** (1981) 1 SC and **Udo Vs CRS News Co.** (2001) 22 WRN 53. It is trite that the court will not impose an employee on an unwilling employer. There are however, exceptions. In the instance case the plaintiff's employment is certainly one above that of a mere master/servant relationship. The nature of plaintiff's employment is one which this court ought to order a reinstatement. I find plaintiff's main claim particularly reliefs 1 – 3 has merit and same succeeds.

As for relief 4 the claim for damages for unlawful detention, I am of the humble view that appellant did not adduce sufficient evidence to support the claim. Plaintiff gave evidence that when the findings of the panel that investigated the fire incident was released he was completely exonerated and as a result he was released from detention. I expect appellant would tender the report to support his claim for unlawful detention. In absence of the report I hold that relief 4 fails.

Appellant asked for alternative reliefs. Having granted the main reliefs, it is not open to this court to grant the alternative reliefs again. In

Merchant Bank Vs Adalma (1990) 5 NWLR (Pt 153) 747 the court observed that where a claim is in the alternative the court should first consider whether the principal or main claim ought to have succeeded. It is only after the court may have found that it could not, for any reason, grant the principal claim that it would only need to consider the alternative claim.

From the totality of what I have said so far in this judgment I am of the humble view that this appeal has merit and it is resolved in favour of the appellant. Appeal allowed. The Ruling of the lower court delivered on 4/7/2002 is hereby set aside. In its place I hereby enter judgment in favour of the Plaintiff/appellant and grant reliefs 1 – 3 claimed in paragraph 22 of the statement of claim. I hereby make an order directing the respondent to reinstate the appellant as a member of its staff and should be paid all his arrears of salaries and entitlement which have remained unpaid from June 1996 to date of reinstatement including any increments that might have accrued within that time. The appellant is also awarded costs assessed at ₦50,000.00 (Fifty thousand).

ADZIRA GANA MSHELIA
JUSTICE, COURT OF APPEAL

APPEARANCE

O. Onamade for appellant

Respondent (absent) (not represented)