

DIVISION OF POWERS BETWEEN THE BOARD OF DIRECTORS AND THE GENERAL MEETING IN A COMPANY, EFFICIENCY, CHALLENGES AND THE WAY FORWARD

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Abstract

In an ideal Company Law regulation, practices, functions, duties of Directors and the General meeting are clearly defined. Both the Memorandum and Articles of Association clearly spelt out these responsibilities. The Companies and Allied Matters Act, 1990 acts as a regulatory instrument in ensuring that these responsibilities are carried out within the instrumentality and confines of the law. Put differently, the purport of all these legal instruments is to avoid role conflict and at the same time ensures that the operations and activities of a Company is smooth and would not grind to a halt. However, is lifting the veil, it becomes obvious that the Company operates through natural persons as opposed to its artificial corporate personality status, which was established for the sake of convenience. In this paper, the role of these various organs and machinery of company administration was examined with the aim of ensuring that the efficiency in management is maintained. It also looked at the challenges that are embedded in the activities of these organs of company's administration which in some instances cannot be said to represent the directing will of the Company. Finally, the paper made some useful suggestions on the way forward so as to achieve a better and more efficient operational efficiency of a Company.

Introduction

Directors are key officers of the Company that constitute one organ or Corporate administration Directors are trustees of the company as well as agents. They are trustees of the Company's funds, properties and assets and must give proper account and exercise powers in good facility and in the best interest of the Company and shareholders. This paper aims at tackling the "Divisional of Powers" between the Board of Directors and the General Meeting in a Company, Efficiency, Challenges and the way forward.

The Doctrine of Alter Ego

One of the consequences of the artificial nature of a company is that it depends on its organs or alter ego to carry out its objective (s). This concept is to the effect that as an artificial person, a company functions through natural persons who act as its organs. The act of any organ of the company is the act of the company. The court will treat any act of Directors, or official acting within his power as the act of the company¹. The officer, the agent or the Directors is then treated as the Alter Ego of the Company.

In *Lennard's Carrying Company v. Asiatic Petroleum Co. Viscount Haldane*², L.C stated that:

A corporation is an abstraction, it has no mind of its own. Its active and directing will must be consequently sought in the person who may be an agent, who is the very ego and centre of the personality of the company.

Also *Lord Denning in Bolton (Engineering) Company Ltd v. Graham & Sons Ltd*³. The learned trial judge stated that:

¹ Section 65 Companies and Allied Matters Act 1990

² (1915) A.C. 705

³ (1957) 1q.b. 159

A company may be likened to the human body. It has a brain and a nerve centre, which controls what it does. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the directing will of the company. Others are directors and managers, who represent the directing mind and wills of the company and controls what is done, and are treated in law as such.

Management and Running of a Company

A company is usually managed and ran by two principal organs:

1. Board of Directors
2. Shareholders in the General Meeting⁴.

The question is what then is the relationship between the Board and the General meeting? Up to the close of the 19th century in England, the Board of Directors are usually treated as mere agents of the company, the general meeting was regarded as the company and the former is subject to the overall control of the latter. In the case of *Isle of Wight Railway Company v. Tahourdin*⁵ it was held that members in general meeting could pass a resolution empowering them to interface with the ways the directors manage the company. This view however is out of date.

The Modern Trend

The modern trend is that once directors are appointed it behooves the board to exercise effective control and the general meeting's intervention may only arises as a result of the director's failure. The purport of modern rule is that as a general rule or proposition a general meeting cannot give directives to a board of directors on how to run the company business. Neither can they override decision arrived at by the directors in the conduct of the company's business unless such matters are specifically reserved either by the articles as originally framed or by alteration.

The Court of Appeal in *Automatic Self-cleansing filter Syndicate Co.v Cuninghame*⁶, made it clear that division of powers between the board and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that where powers had been vested in the board the general meeting could not interfere with their exercise.

Also in *John Shaw & Sons (Salford Ltd v. Shaw*⁷ power to commence action was given to directors who validly commenced an action in the company's name. the general meeting passed a resolution purporting to withdraw the action from the court. Held their resolution was a nullity.

Also in *Scott v. Scott*⁸. It was held on the same grounds, that resolution of a general meeting, which might be interpreted either as directors to pay an interim dividend or as instructions to make loans, were nullities.

The directors are therefore trustees and agents of the company but not the servants of the shareholders, hence they are not bound to carry out all the instructions of a general meeting).

⁴ Modern Nigerian Company Law by M.O. Sofowora, Published by Alpha Press (1992) Surulere Lagos, Nigeria

⁵ (1884) LR 25 Ch. D. 320

⁶ (1906) 2 Ch.34, C.A.

⁷ (1935) 2 K.B. U. 153 L.T. 245

⁸ (1943) 1 All E.R. 582 W.N. 16

They are empowered to (except as may otherwise be provided in the company's articles, manage the company and exercise all those powers of the company that are not specifically reserved for the shareholders in general meeting by the decree or the articles. The directors are the "mind and will" of the company.

Section 83 of CAMA⁹ specifically divides the powers of a company between these two organs. In their relationship with each other, the two organs are expected to act independently in such a way to operate as checks and balances to each other.

Section 63(1) CAMA provides that

A company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from the members in general meeting or the Board of Directors.

Section 63(2) CAMA Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Decree or the articles required to be exercised by the members in general meeting.

Section 63(4) CAMA Unless the articles, shall otherwise provide, the Board of directors, when acting within the powers conferred upon them by this Decree or the articles, shall be bound to obey the directions or instructions of the members in general meeting, provided that the directors acted in good faith and with due diligence.

Section 63(5) CAMA "Notwithstanding the provisions of subsection(3) of this section, the members in general meeting may-

- a. Act in any matter if the members of the board of directors are disqualified or are unable to act because of a deadlock on the board or otherwise.
- b. Institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or negligent to do so;
- c. Ratify or confirm any action taken by the board of directors; or
- d. Make recommendations to the board of directors regarding action to be taken by the board.

Section 63(6) CAMA No alteration of the articles shall invalidate any prior act of the board of directions which would have been valid if that alteration had not been made. The directors are therefore trustees and agents of the company but not the servants of the shareholders, hence they are not bound to carry out all the instructions of a general meeting. They are empowered to except as pay be otherwise provided in the company's articles, manage the business of the company and exercise all these powers of the company that are not specifically reserved for the shareholders in general meeting by the decree or the articles. The directors are the 'mind and "will of the company"¹⁰.

Duties of Directors

The provisions of Sections 278, 280 and 282¹¹ of CAMA regulates the duties of directors. The duties may be broadly categories as:

- a. Duty of skill and care, the breach of which can lead to a negligence action
- b. Fiduciary duties- the principal ones of which are to act in good faith, ad to allot shares in the capital of the company for a proper purpose and
- c. Statutory duties, breach of which are CAMA prescribes certain penalties.

⁹ See S. 63 (1-6) of CAMA.

¹⁰ Teach Yourself Company Law, Third Edition by John Thomas, Published by Hodder & Stoughton now an imprint of Hachette

¹¹ See Sections -278, 280, 282 of CAMA.

In specific terms, the duties of directors may be summarized as to:

- i. Ensure that the affairs of the company are conducted diligently, legally and honestly (to act bona fide).
- ii. Exercise powers for the company's benefit.
- iii. Ensure that the assets of the company are safeguarded and not diminished, misspent or misappropriated.
- iv. Ensure that management (of the company) is efficient and trustworthy.
- v. Ensure that the shareholders and the commission (on behalf of government and the public) are kept informed.
- vi. Ensure that the company acts within its own powers as laid down in the memorandum and not to act *ultra vires*.
- vii. Ensure that the board itself acts in accordance with powers delegated to directors by the company's articles.
- viii. Avoid a conflict of their interest with that of the company for instance making secret profit, awarding contract that will favour themselves or their interests.
- ix. Not to use any confidential information about the company for personal benefit.

To enable the board effectively perform these duties, individual directors are required to:

- i. Participate actively and regularly in board meeting
- ii. Exercise due diligence, skill and care so as not to cause the company loss by his failure to do so.
- iii. Not to fetter his own discretion or restrict his rights to exercise his duties and powers freely and fully.
- iv. Avoid a conflict of his personal interest with that of the company. Thus, it is wrong for directors to propose or approve a review of their remuneration at a time when the fortunes of the company appears to be dividing¹²
- v. Act for proper purpose. This implies that a director will not act to preserve his own position or control by compromising the interest of members.

Directors owe their duties to:

- a. The company itself (Principally);
- b. Shareholders (director must not act in a manner that it is unfairly prejudicial to the interest of its members general or of some part of its members.
- c. Employee (i.e directors must have regard to the interests of the company's employees in general).
- d. Public (for instance, to avoid false statement in a prospectus issued by the company);
- e. Creditors (where the interest of the creditors are not contrary to those of the company).

Also, in winding-up situation arising from insolvency. It is essentially the creditors' interest that is at stake and no longer the company¹³.

Members of the Company

The members of a company have many important powers over the company's affairs even though management of the company is assigned to directors.

A person becomes a member in one of the following ways,

- a. By subscribing to the company's memorandum. As soon as the company is registered, the subscriber's name is entered on the register.
- b. Transmission. By succeeding to shares on the death or bankruptcy of a member.

¹² Maw N.N. Graham: *The Legal Aspects of the Role of the Company Director*, Rowe Maw, London, 1991.

¹³ Buchan P.B. *Boards of Directors: Adversaries or Advisers*, California, Management: Review, Winter/1981 Vol. XXIVNO.2, Ca, USA.

- c. Allotment. By applying to the company for an allotment of shares. When shares are allotted to him, the company will enter his name on the register.
- d. Transfer. By taking a transfer from a member, the transferee becomes to member when
- e. the shares are registered in his name.

Register

Every company shall keep a register of its members and enter in it the register-

- a. The names and addresses of the members;
- b. The date on which each person was registered as a member;
- c. The date of which any person ceased to be a member¹⁴.

Method of ceasing to be a member

A person may cease to be a member of a company in any of the following ways:-

- a. **Transfer:** The transferor ceases to be a member when the transferee's name is entered in the register of members.
- b. **Forfeitures:** The law gives the Director power to forfeit shares for which calls due have not been paid, when forfeited the shareholders ceases to be a member.
- c. **Surrender:** This is a short-out to forfeiture in order to avoid the formalities.
- d. Transmission to personal representatives on death of a member\
- e. Transmission to trustee in bankruptcy of a member.
- f. Safe by a company under a lien.
- g. Disclaimer by trustee in bankruptcy of a member
- h. **Liquidation:** On liquidation the company is dissolved and members will have their capital returned to them as far as possible.
- i. Redemption of redeemable preference shares.
- j. Repudiation by an infant
- k. Rescission for misrepresentation is the prospectus.
- l. Under "take over bid".

It is not in doubt that the general meeting has ultimate control over the board, the company's activities and management.

Section 65(5) and (C) of CAMA¹⁵

Provides that where the board fails to act, the general meeting has the right to do so. Also the general meeting of shareholders is vested with the ultimate power of the company. They can demand an account of the stewardship of the directors, they could also remove the directors in accordance with the provisions of Section 262 of CAMA.

Section 262(1) provides that: A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him.

Also by the exercise of their powers to alter the articles under Section 48(1)¹⁶ of CAMA provides subject to the provisions at this Decree and to the conditions or other provisions contained in its memorandum, a company may by special resolution alter or add to its articles. Shareholders can therefore reduce the power of the directors.

¹⁴ Business Law by K.R. Abbot & N. Pendebury, Sixth Ed.- Engage Learning Emea, 2000

¹⁵ See S. 65(5-C) and S. 262 of CAMA.

¹⁶ S. 48(1) of CAMA.

Also the members may petition the Corporate Affairs Commission to have the affairs of the company investigated. Nevertheless, it should be realized that directors owe fiduciary duties to the company. In contrast to shareholders proprietary rights which members may exercise in their own self interest even to the detriment of the company. In this respect, the powers of overriding control of general meeting needs to be controlled.