

## FORMATION OF COMPANIES: A COMPARATIVE ANALYSIS\*

### Abstract

Companies play a major role in every economy because they provide the much-desired goods and services to consumers, create employment opportunities, boost the economy, and bring innovation and growth. Companies carry on businesses which play a fundamental role in the economic success of every nation as companies create an enabling environment that cause development and economic welfare to thrive. The work was aimed at examining the provision of the Company and Allied Matters Act 2020 with a view to highlighting some of the novel provisions regarding the formation of companies and comparing same with other jurisdictions; South Africa, Ghana, the United Kingdom and India. This was achieved by examining the company laws of the said jurisdictions, establishing the similarities, differences and what Nigeria can imbibe from the jurisdictions compared. It was found that the major types of companies for carrying on business in the entire jurisdiction discussed are; companies limited by shares, limited by guarantee and unlimited companies which maybe a private company or a public company. In addition to the above, the Republic of South Africa and Ghana provided for external companies which are similar to foreign companies under the Indian company law. This is where a company registered in another country can carry on business in the said countries provided that such company has met the requirement of the law of the country where they are domiciled. It is recommended that a sole subscriber to the Memorandum of Association under the Company and Allied Matters Act should be made to elect a successor at the point of incorporation as this is in line with the principle of perpetual succession.

**Keywords:** Formation of Companies, Comparison, Companies and Allied Matters Act 2020, Nigeria, Ghana, South Africa

### 1. Introduction

A company is a society or association comprising a considerable number of persons, bound by a common interest and for such purposes has united themselves in accomplishment of some business or industrial undertaking.<sup>1</sup> It has also been defined as an entity with a separate legal personality from its members formed for the purposes of business undertakings.<sup>2</sup> It is a channel through which businesses are carried out in furtherance of societal goals.<sup>3</sup> It is therefore safe to say that a company is an entity incorporated under the relevant laws specifically for profit or non-profit purposes having a distinct legal personality separate from that of the individuals that formed it. Companies play a major role in every economy because they provide the much-desired goods and services to consumers, create employment opportunities, boost the economy, and bring innovation and growth.<sup>4</sup>

Companies carry on businesses which play a fundamental role in the economic success of every nation as companies create an enabling environment that cause development and economic welfare to thrive.<sup>5</sup> Businesses play an all-important role in influencing the level of development in every nation. They create the much needed employment; contribute in the reduction of poverty level at all stages, play a key role in the creation of wealth and as such contribute to the Gross Domestic Product of a nation.<sup>6</sup> Therefore, the process of formation of companies is of great importance in every economy and as such, it is important that their formation and activities are well regulated and their interest properly protected under the law.

---

\*By Chizaram Joy OBANU, LLB Hons (Nig.), BL (Nig. Law Sch), LLM (RSU), Stainless Fountain Chambers, No. 146 Aba Road, Port Harcourt Rivers State. Phone No.:08036737806. Email: zaraobanu@gmail.com.

<sup>1</sup>Black's Law Dictionary < <https://thelawdictionary.org> > accessed on March 9,2020

<sup>2</sup>The Free Online Dictionary < <https://thefreeonlinedictionary.com> > accessed on March 9, 2020

<sup>3</sup>C.E Halliday and N.K Krakrase 'Formation of Companies under Company Law Jurisprudence: Lesson from other Jurisdictions' (2008) (10) (1) *The Journal of Jurisprudence and Contemporary Issues* 182

<sup>4</sup>*Ibid*

<sup>5</sup>The Role of Companies in Economic Development <<https://m.economicstimes.com>> assessed on April 30, 2020

<sup>6</sup>F.B Satope and B Akande 'Effect of Business on Economic Development in Nigeria' (2014) (5) (4) *E3 Journal of Business Management and Economics* <<http://www.e3journals.org>>

A company can be said to be a separate legal entity from the persons that formed it. That is to say, it exists independently of the subscribers to the Memorandum and Articles of Association. It is capable of suing and being sued; endowed with the power to hold property in its corporate name. Another distinctive incident of incorporation is that a company has perpetual succession. This implies that the company does not come to an end at the demise of any of the members but can only cease to exist by the operation of the law that brought it into existence. Again, the liability of the members of the company is limited to the amount of any unpaid shares held by such a member for a limited liability company or to the amount the members have undertaken to contribute to the assets of the company in the event of winding up. That is to say that the properties of the members of the company cannot be disposed of in order to satisfy any debt incurred by the company.<sup>7</sup>

## 2. Process of Formation of Companies under the various Jurisdictions

### Nigeria

In Nigeria, companies are regulated by the Companies and Allied Matters Act,<sup>8</sup> the Investment and Securities Act,<sup>9</sup> Nigerian Code of Corporate Governance<sup>10</sup> and the Federal Competition and Consumer Protection Act.<sup>11</sup> The CAMA established the Corporate Affairs Commission<sup>12</sup> whose functions include; administration of the Act, regulation and supervision of the formation, incorporation, registration, management and winding up of companies,<sup>13</sup> establishment and maintenance of an office registry in all the states of the federation<sup>14</sup> amongst others. For the purpose of this research, the focus will be on the CAMA. Under the Nigerian law, any two or more persons may incorporate a company as long as they have met the requirements of the law,<sup>15</sup> however one person can form a company if he has met the requirement of the law.<sup>16</sup> The Act further provides that every company, association or organization carrying on business for the purposes of making profit must be registered under the CAMA or any other relevant laws in Nigeria.<sup>17</sup> However, co-operative societies, partnerships of legal practitioners and accountants are exempted from the application of this section.<sup>18</sup> The Act disqualified some categories of persons from joining in the formation of companies; persons under the age of eighteen lack the capacity to form a company<sup>19</sup> unless there are two other persons who have subscribed to the memorandum,<sup>20</sup> similarly persons who are of unsound mind lack the capacity to form a company. This incapacitation also applies to persons who are undercharged bankrupts;<sup>21</sup> a corporate body in liquidation<sup>22</sup> and in the same vein, a person who has been convicted of fraud by a high court in relation to formation and management of a company is disqualified from forming a company under the Nigeria laws.<sup>23</sup> Again an insolvent person cannot take part in the formation and management of a company.<sup>24</sup> A foreigner can join in the formation of a company in Nigeria if he has met the requirement of all the relevant laws.<sup>25</sup>

<sup>7</sup>*Salomon v Salomon* 1897 AC 23

<sup>8</sup>Company and Allied Matters Act 2019. Hereinafter referred to as CAMA.

<sup>9</sup>2007

<sup>10</sup>2018

<sup>11</sup>2018

<sup>12</sup>(n 8) S 1 (1)

<sup>13</sup>(n 8) S 8 (1) (a)

<sup>14</sup>S 1 (3)

<sup>15</sup>S 18 (1)

<sup>16</sup>S 18 (2)

<sup>17</sup>S 19 (1)

<sup>18</sup>S 19 (2)(b) (i-ii)

<sup>19</sup>S 20 (1) (a)

<sup>20</sup>(n 7) S 20 (2)

<sup>21</sup>S 20 (1) (a) (b) (c)

<sup>22</sup>S 20 (3)

<sup>23</sup>S 281 (a) (b)

<sup>24</sup>(n 8) S 279

<sup>25</sup>S 20 (4), Nigerian Immigration Act 2015 Cap 11LFN 2004 S 36 (2)

### **Types of Companies**

Under CAMA, a registered company is either a private or a public company and can take either of the following forms; companies limited by shares, companies limited by guarantee or unlimited company.

- a. **Company limited by Shares:** This is a company where the liability of its members is limited by the memorandum of Association to the amount of unpaid shares held by them.<sup>26</sup> The shares issued by the company are acquired by the company's shareholders and it shows the extent of their commitment and involvement in the company. The shareholders can also determine the extent of their liability and indebtedness to the company.<sup>27</sup> The shareholders only meet the debt of the company only to the extent of the amount of their unpaid shares. Their personal properties cannot be used to meet same.
- b. **Unlimited Company:** Here, the liability of the members of the company is not limited. This implies that the members are personally liable for the full debts of the company. As a result, an unlimited company is limited in its usefulness as it is unattractive for business purposes. Most professional bodies are registered as unlimited companies making the members of the company personally liable for the debts of the company.<sup>28</sup>
- c. **Company limited by Guarantee:** Here the liability of the members is limited to the amount the respectively undertook to contribute to the assets of the company in the event of winding up.<sup>29</sup> This type of company is formed where the purpose of setting up a company is the promotion of commerce, arts, religion, sports, culture, education, charity and any other similar object.<sup>30</sup> In this case, the income of the company shall not be transferred to the members of the company but shall only be applied towards the promotion of the objects of the company.<sup>31</sup> The implication of this is that where the company makes profit, it shall be not be distributed to shareholders in form of dividend but the profit shall be reinvested into the company to further promote its objects.<sup>32</sup> Any contrary provision in the Memorandum of Association which provides for distribution of profits of the company is void.<sup>33</sup> In the event of winding up, the total liability that the members of the company will contribute to the company's assets shall not be less than N100, 000.00<sup>34</sup> and after the discharge of the company's debts and liabilities, any property of the company left after the exercise shall be applied to other companies with similar object or applied to a charitable cause. Same shall not be distributed to the members of the company.<sup>35</sup> The consent of the Attorney General is required in the formation of this category of company and such shall be granted within 30 days from the date of application.<sup>36</sup> Where the consent is not granted within 30 days, the promoters shall advertise in three national dailies inviting objections to its registration from the members of the public.<sup>37</sup> Where no such objection is received, the Commission shall assent to the application and issue a Certificate of Incorporation in that regards.<sup>38</sup>
- d. **Private company:** A private company is one with not more than fifty members<sup>39</sup> which has stated in its Memorandum of Association that it is a private company.<sup>40</sup> Private companies are prohibited by law from transferring its shares.<sup>41</sup> They are also prohibited by the law from public subscription of its shares and debentures. Where two or more persons are joint owners of a share, they shall be treated as a single member.<sup>42</sup> Where a private company fails to meet the

---

<sup>26</sup>S 21(a)

<sup>27</sup>J. O Orojo *Company Law and Practice in Nigeria in Nigeria* (4<sup>th</sup>edn, Lagos; Mbey and Associates 1992) 33

<sup>28</sup>(n 8) S 21 (1) (c)

<sup>29</sup>(n 8) S 26 (12)

<sup>30</sup>S 26 (1)

<sup>31</sup>*Ibid*

<sup>32</sup>S 26 (3)

<sup>33</sup>S 26 (2)

<sup>34</sup>S 26 (12)

<sup>35</sup>S 26 (15)

<sup>36</sup>S 26 (5)

<sup>37</sup>(n 8) S 26 (7)

<sup>38</sup>S 26 (10) (a) (b)

<sup>39</sup>S 22 (3)

<sup>40</sup>S 22 (1)

<sup>41</sup>S 22 (2)

<sup>42</sup>S 22 (4)

requirement of the Act with respect to its status, it shall be stripped of all the rights and privileges of a private company and the Act shall apply to it, not on the basis of a private company.<sup>43</sup>

- e. **Public Company:** Any other company that does not meet the criteria of a private company is automatically a public company.<sup>44</sup> Such a company shall state in its Memorandum of Understanding that it is a public company. This implies that public companies are allowed by the law to transfer its share to the public and can also engage in public offer of shares through offer for sale, offer for subscription, private placements and right issue. This is regulated by the Securities and Exchange Commission under the Investment and Securities Act.<sup>45</sup>
- f. **Small Company:** For the purposes of filing of annual returns, a small company is a private company whose turnover in a given year is not more One Hundred and Twenty Million Naira, its net asset not more than Sixty Million Naira, none of its members is a foreigner or a government corporation and the directors do not hold less than fifty one percent of its equity share capital.<sup>46</sup>
- g. **Holding and Subsidiary Companies:** A holding company is one which holds more than half of the nominal share capital in another company and also controls the composition of its Board of Directors. The other company is a Subsidiary of the Holding Company.<sup>47</sup>

### ***Procedure for Registering a Company in Nigeria***

A promoter who wishes to register a company in Nigeria shall submit an application for reservation of name. The name shall be reserved for 60 days and during this period, no other no shall be registered under the reserved name or any name similar to it.<sup>48</sup> When the reserved name is approved by the Commission, a further application for registration of the company shall be made with the following details; proposed name of company, registered address, limitation of liability clause (whether the company is limited by shares or guarantee or an unlimited company) and whether the company is a private or a public company. The application shall be accompanied the Memorandum of Association; a statement of initial issued share capital and initial shareholdings (for a company with a share capital); a statement of guarantee (for a company limited by guarantee); a statement of the company's proposed directors; a statement of the proposed registered office of the company as well as a statement of compliance.<sup>49</sup> Where the commission is satisfied that all the requirements for incorporation have been met, it shall issue a Certificate of Incorporation accordingly. The Certificate of Incorporation is a prima facie evidence that the provisions of the Act have been complied with.<sup>50</sup> From the date of incorporation stated in the certificate of incorporation, the registered company shall become a body corporate by the name contained in the memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up.<sup>51</sup>

Certain names are prohibited under the Act; names that are identical to that of an existing company, names that are misleading regarding its activities in the opinion of the commission, names that violate an existing trademark, names with prohibited words such as Chamber of Commerce, Federal, Regional, Municipal, Group, Holding or is capable of undermining public peace and national security.<sup>52</sup>

---

<sup>43</sup>S 23

<sup>44</sup>S 24

<sup>45</sup>Investment and Securities Act 2007

<sup>46</sup>(n 8) S 395 (3) (a-f)

<sup>47</sup>S 381 (1)

<sup>48</sup>S 31 (1) (2)

<sup>49</sup>S 36 (1) (2) (4)

<sup>50</sup>(n 8) S 41 (5) (6)

<sup>51</sup>S 42

<sup>52</sup>S 852 (1) (a-g)

The Memorandum and Article of Association: These are documents that regulate the activities of the company.<sup>53</sup> They are referred to as the constitution of the company.<sup>54</sup> The Memorandum of Association states the name and objects of the company, the share capital, registered office, liability of members and the subscribers to the Memorandum. The minister has been saddled with the power to prescribe model articles for various types of companies.<sup>55</sup> Every registered company shall conspicuously append its name and registration number in a legible manner outside its business premises, on its seals, business letters, advertisements, cheques, invoices, receipts and other important company documents.<sup>56</sup> Furthermore, a foreign company that wishes to carry on business in Nigeria shall take every necessary step to be registered as a corporate body in Nigeria and until it has complied with the above requirement, it cannot carry on business in Nigeria.<sup>57</sup> However some categories of foreign companies can apply to the president to be exempted under this requirement.<sup>58</sup>

### **South Africa**

In South Africa, Company formation, registration, organization and management is governed by the Companies Act 2008.<sup>59</sup> Only a registered company formed pursuant to the law can carry on business for the purpose of making profit.<sup>60</sup> Under this Act, there are two categories of companies that can be formed: Profit Companies and Non-profit companies.<sup>61</sup>

- a. Profit Company: This is a company incorporated for the purposes of profit making for its shareholders. It can either be state owned or a private company.<sup>62</sup>
- b. Non-profit Companies: When a company is incorporated for public benefits or for any other purpose under the law, it is a non-profit company. The income and property of this category of company is not distributable to the officers of the company.<sup>63</sup> The object of a non-profit company shall be directed towards public benefits, cultural, social and communal or group interest<sup>64</sup> while its income and accretions irrespective of its source shall be channeled towards the advancement of its object.<sup>65</sup> It may also acquire and hold securities issued by a profit company or carry out business alone or jointly as long as such business is consistent with its object.<sup>66</sup> However, no income earned shall be paid or transferred to any person who is an incorporator, member or director except as payment for goods supplied and services rendered or for the reimbursement of expenses incurred in advancing the objects of the company.<sup>67</sup> In the event of winding up, dissolution or deregistration, the assets of the company shall be transferred to another company with a similar object.<sup>68</sup>

Again, a Non-profit Company shall not metamorphose to a profit company; neither shall it dispose of its assets to a profit company unless the disposal occurs in the ordinary course of its business or for a fair value.<sup>69</sup> This is equivalent to companies limited by guarantee under the CAMA.

Other types of companies include:

- c. Private company: a company is said to be privately owned if it is not owned by the state and its Memorandum of Incorporation forbids it from transferring shares to the public. This category of company is also prohibited for transferring its securities.<sup>70</sup>

---

<sup>53</sup>S 27

<sup>54</sup>(n 27) 36

<sup>55</sup>(n 8) S 33

<sup>56</sup>S 729 (1) (a)(b)(c)

<sup>57</sup>S 78 (1)

<sup>58</sup>S 80

<sup>59</sup>No 71 of 2008. Hereinafter referred to as CA 2008

<sup>60</sup>S (3) (a) (b) (c)

<sup>61</sup>S 8 (1)

<sup>62</sup>*Ibid* S 8 (2) (a)

<sup>63</sup>*Ibid*

<sup>64</sup>Schedule 1 (a) (i) (ii)

<sup>65</sup>Schedule 1 (2) (a)

<sup>66</sup>(n 59) Schedule 1 (2) (b)

<sup>67</sup>Schedule 1 (3) (a) (1)

<sup>68</sup>Schedule 1 (4) (b)

<sup>69</sup>Schedule 2 (1) (a) (b)

<sup>70</sup>S 8 (2) (b) (aa) (bb)

- d. Personal Liability Company: here the company meets the specific requirement for being a private company in addition; it has so stated in its Memorandum of Association that it is a Personal Liability Company.<sup>71</sup>
- e. Public Company: Any other company that does not fall within any of the above listed categories is a public company.<sup>72</sup>
- f. External Company: an external company is a foreign company carrying on business or non-profit activities within the Republic.<sup>73</sup> It is a requirement under the law that an external company shall be registered within twenty days of commencement of business or non-profit activities as the case maybe. The registration will be approved by the Commission if the external company has complied with the applicable laws within the jurisdiction where it is domiciled to operate as such.<sup>74</sup> Activities likely to constitute business or non-profit activities include: meeting of shareholders and the board of the company; opening of and maintenance of a company account; existence of a registered office and the registration of company's securities; acquisition of debt, mortgage or property as well as the employment of staff and maintenance of a contract of employment with them<sup>75</sup>
- g. State Owned Company: This is a company registered under this Act, whose meaning falls within the contemplation of State Owned Company in the Finance Management Act<sup>76</sup> or is owned by a municipality under the Local Government Municipality Act.<sup>77</sup>

### ***The Right to Form a company***

A promoter may reserve one or two names for the purposes of registering a new company or for the amendment of an existing one<sup>78</sup> for a period of six months from the date of application.<sup>79</sup> A reserved name can be transferred to another person by filing a notice of transfer and payment of the prescribed fees.<sup>80</sup> The name of a company comprises of words in any language; letters, symbols or a combination of all.<sup>81</sup> For a name to be approved, it shall not be the same as or similar to an existing company; an existing name, a registered trademark, a registered name under the Business Name Act,<sup>82</sup> a restricted or protected name.<sup>83</sup> Similarly, the name shall not be misleading, shall not include expressions to constitute: propaganda for war, incitement of violence, incitement of hatred on religious, ethnic, gender or religious grounds.<sup>84</sup> Each subscriber completes and signs the prescribed form along with the memorandum of incorporation,<sup>85</sup> filing a notice of incorporation and payment of the prescribed fees.<sup>86</sup> Once the Notice of Incorporation is approved by the Commission, the name of the company is entered into the Company Registrar, assigned a unique registration number and a Certificate of Incorporation issued to the company.<sup>87</sup> Every registered company must make available its name and registration number on demand and shall not misstate same in such a manner likely to deceive.<sup>88</sup> Again, the name and registration number shall be on all the company's notices, official publications, bills of exchange, promissory notes, invoices and receipts in legible characters. Failure to comply is a punishable offence.<sup>89</sup>

<sup>71</sup>S 8 (2) (c) (i) (ii)

<sup>72</sup>S 8 (2) (d)

<sup>73</sup>(n 59) S 1

<sup>74</sup>S 23 (1) (a) (b)C

<sup>75</sup>S 23 (1) (a) (b)

<sup>76</sup>No 1 of 1999

<sup>77</sup>No 32 of 2000

<sup>78</sup>S 12 (1)

<sup>79</sup>S 12 (4)

<sup>80</sup>S 12 (5)

<sup>81</sup>( n 59) S 11 (1)

<sup>82</sup>No 27 1960

<sup>83</sup>S 11 (2)

<sup>84</sup>S 11 (2) (c)

<sup>85</sup>S 13 (1) (a) (b)

<sup>86</sup>S 13 (2) (a) (b)

<sup>87</sup>S 14 (1)

<sup>88</sup>S 32 (a) (b)

<sup>89</sup>S 32 (4)

## United Kingdom

Formation of companies in the United Kingdom is governed by the Companies Act of 2006.<sup>90</sup> The types of companies that can be incorporated under this Act are:

- a. Limited Company: this is a company where the liability of members is limited by the company's constitution.<sup>91</sup>
- b. Company Limited by Shares: Here, the liability of members is limited by the amount of unpaid shares held by them.<sup>92</sup>
- c. Company Limited by Guarantee: Liability of members is limited to the amount they have undertaken to contribute to the assets of the company if the company is wound up.<sup>93</sup> A company limited by guarantee cannot be registered with a share capital.<sup>94</sup>
- d. Unlimited Company: There is no limit to the liability of members.<sup>95</sup>
- e. Public Company: This is a company that is registered with a share capital and which specifies in its Certificate of Incorporation that it is such. It can be limited by shares or by guarantee.<sup>96</sup>
- f. Private company: Any company that is not a public company falls within the purview of a private company.<sup>97</sup>
- g. Community Interest Company<sup>98</sup>: this type of company is created under the Company (Audit, Investigation and Community Enterprise Act 2004). It was created specifically to be used by social Enterprises who wish to use their assets and profits for public benefits. A social enterprise is a company set up for the purposes of promotion and encouragement of social change which have both business and social goals.<sup>99</sup> The goal of this entity is not to maximize profit but to use their business solution to achieve public good.<sup>100</sup>

A company can be formed by one or two persons by subscribing to the Memorandum of Association.<sup>101</sup> The promoters of the company shall submit the Memorandum of Association in the prescribed form bearing the names of the subscribers who have taken at least one share.<sup>102</sup> The memo shall be sent to the Registrar of Companies accompanied by an application stating the proposed name, registered office, liability of members and the nature of company.<sup>103</sup> Also stated in the application are; the statement of share capital or statement of guarantee as the case maybe,<sup>104</sup> proposed officers and Statement of Compliance<sup>105</sup> delivered to the Registrar of Companies.<sup>106</sup> If the Registrar is satisfied with the documents submitted, he will register the company<sup>107</sup> and issue a Certificate of Incorporation as evidence of compliance with the registration requirement.<sup>108</sup>

## Republic of Ghana

Company Law in Ghana is governed by the Company Act 2019.<sup>109</sup> This is an improvement on the Company Act of 1964. What informed the enactment of this new company legislation is to improve the ease of doing business in the country. Under this Act, one or more person can register a company<sup>110</sup> as

---

<sup>90</sup>Companies Act 2006.

<sup>91</sup>Companies Act 2006, S 3(1)

<sup>92</sup>S 3 (2)

<sup>93</sup>S 3 (3)

<sup>94</sup>S 5 (1)

<sup>95</sup>S 3 (4)

<sup>96</sup>S 4 (2) (a)(b)(c)

<sup>97</sup>S 4 (1)

<sup>98</sup>S 6 (1)

<sup>99</sup>Community Interest Companies in the UK < [cicassociation.org.uk](http://cicassociation.org.uk) > assessed on March 18, 2020

<sup>100</sup>*Ibid*

<sup>101</sup>(n 90) S 7 (1)

<sup>102</sup>S 8 (1)

<sup>103</sup>S 9 (2)

<sup>104</sup>S 9 (5)

<sup>105</sup>S 13

<sup>106</sup>S 9 (6)

<sup>107</sup>S 14

<sup>108</sup>S 15 (4)

<sup>109</sup>Act 992 2018. Hereinafter referred to as CA Ghana

<sup>110</sup>S 6

long as the person is 18 years of age and above.<sup>111</sup> An application for incorporation shall be made to the Registrar with the following details: name and type of company, nature of business, registered office, particulars of subscribers, and particulars of directors amongst others.<sup>112</sup> Where the Registrar is satisfied with the application submitted and at the payment of the prescribed fees, the company shall be incorporated<sup>113</sup> and a Certificate of Incorporation issued.<sup>114</sup>

***Types of companies:***

- a. Private Limited Company or Ltd
- b. Public Company Limited by Shares or PLC
- c. Company Limited by Guarantee or LBG
- d. Private Company Unlimited by Shares or PRUC
- e. Public Company Unlimited by shares or PUC<sup>115</sup>
- f. External Company: This is a company formed outside the Republic of Ghana but carries on business in the country. Where a company has a branch, registered office, factory or mine, management, ability to transfer shares, it is deemed to have an established place of business.<sup>116</sup> External companies which establish a place of business in the Republic shall, within one month of the establishment of the place of business, deliver to the Registrar a copy of the certificate of incorporation, its constitution, charter, statutes, regulations, memorandum and articles for registration.<sup>117</sup> The Registrar shall register the documents in the register of external companies.<sup>118</sup>

Where a name is calculated to mislead or is undesirable in the option of the registrar, such a name shall not be registered.<sup>119</sup> Again the name belonging to a company which has been dissolved within the preceding 5 years shall not be registered.<sup>120</sup> A name shall be reserved for a statutory period of two months and may be renewed for a further period of two months.<sup>121</sup> A name that is similar to a reserved name shall not be registered.<sup>122</sup> The law creates the independent office of Registrar of Companies, whose responsibility includes company registration, name reservation, filing of particulars and so on. Registration of business is now done online. The former practice of issuance of certificate of commencement of business was abolished and only certificate of Incorporation can now be issued. Once a company is registered, it can proceed with the commencement of business.<sup>123</sup> Again, there is no minimum capital requirement for the commencement of business.<sup>124</sup>

A company shall have two directors, one of which shall be resident in Ghana.<sup>125</sup> A director of a company shall produce a written declaration at the point of incorporation stating the he has not been charged with a criminal offence relating to fraud, dishonesty, offence relating to promotion, incorporation or management of a company within the preceding five years. He must also state that he has not been declared insolvent and if he has, he shall produce particulars of same.<sup>126</sup> While any person who is 18 years and above can apply for the registration of a company, a person below the age of 18 can be a shareholder. However, a deed of trust shall be prepared for this purpose evidencing the fact that the shares are held in trust for such a person. This applies for the purposes of incorporation and transfer of shares.

---

<sup>111</sup>S 12

<sup>112</sup>(n 109) S 12 (1)(2)

<sup>113</sup>S 14

<sup>114</sup>S 15

<sup>115</sup>S 21

<sup>116</sup>(n 116) S 312 (2) (3)

<sup>117</sup> S 313 (1)

<sup>118</sup> S 313 (2)

<sup>119</sup> S 21 (2)

<sup>120</sup> (n 109) S 21 (3)

<sup>121</sup> S 22 (3)

<sup>122</sup>S 22 (4)

<sup>123</sup>S 14

<sup>124</sup>S 330

<sup>125</sup>S 171

<sup>126</sup>S 171 (2) (a)



## India

Under the Company Act of India,<sup>127</sup> one person or a group of persons can form a company for any lawful purpose as follows:

- a. Public Company: This type of company can be formed by any seven or more persons
- b. Private Company: This is a company formed by any two or more persons but not exceeding seven persons.
- c. One-person Company: This is a private company with only one member. It is a requirement under the law that the subscriber to the memorandum of understanding shall indicate attach the name of another person together with his written consent who shall become a member of the company in the event of the subscriber's death or his inability to contract.<sup>128</sup>
- d. Small Company: a small company is one which is not a public company whose paid-up share capital does not exceed fifty lakh rupees or any higher amount as may be prescribed which shall not be more than five crore rupees; or whose turnover as evidenced in its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.

The above-mentioned company may be a company limited by shares, guarantee or an unlimited company.

### *Procedure for the formation of a Company*

A company is registered when the subscribers file an application to the Registrar of Companies within the jurisdiction of the Registered office of the company. The said application shall be accompanied by the following:

- a. The memorandum of Association
- b. Articles of Association
- c. A declaration by any person authorized by the Act to handle the incorporation that all the requirements of the Act regarding the incorporation have been met
- d. An affidavit filed by the subscribers to the memo that they have not been convicted of any offence in relation to company formation or of any breach under the Act. The affidavit shall also state that all the information provided in relation to the subscribers' personal details as well as information relating to the company's registered address are correct.<sup>129</sup> Proffering of false information and fraud of any kind by any of the subscribers are punishable under the Act.<sup>130</sup>
- e. Where the Registrar is satisfied with the documents submitted, the company's name is entered into the Register of members and also issued a certificate of Incorporation.<sup>131</sup>
- f. The Certificate of Incorporation is bringing the company into existence. It is also conclusive evidence that the requirements of the Act with respect to incorporation of companies have been met.<sup>132</sup>
- g. The company so formed becomes a body corporate from the date of incorporation and shall enjoy all the benefits and privileges associated with incorporation such as perpetual succession, power to hold land, dispose of properties and so on.<sup>133</sup>

## 3. Similarities and Differences within the various Jurisdictions

1. In the United Kingdom, two or more persons can form a company.<sup>134</sup> However presently in Nigeria, Ghana and India, one person can form a company provided that he has met the requirement of the law.<sup>135</sup> However in South Africa, one person can only form a profit company, while two or more persons can form a non-profit company.

---

<sup>127</sup>Companies Act 2013

<sup>128</sup>S 4 (f)

<sup>129</sup>(n 27) S 7

<sup>130</sup>S 448, S 447, s7 (5)

<sup>131</sup>S 7 (7)

<sup>132</sup>*Ariff v Ariff* ILR (1913) 40 Cal 1

<sup>133</sup>S 9

<sup>134</sup>(n 8) S 18 (n 59) S 7(1)

<sup>135</sup>(n 134) S 18 (3)

2. The respective companies' legislation of all the jurisdiction discussed above provide for companies limited by shares; limited by guarantee and unlimited companies which maybe a private company or a public company.
3. In addition to the above, the Republic of South Africa and Ghana provided for external companies<sup>136</sup> which are similar to foreign companies under the Indian company law.<sup>137</sup> This is where a company registered in another country can carry on business in the said countries provided that such company has met the requirement of the law of the country where they are domiciled. The Company Act of UK provides for Community Interest Companies which are incorporated by Social Enterprises mainly for public benefits.<sup>138</sup> There is no such provision under the CAMA.
4. In South Africa<sup>139</sup> and the UK,<sup>140</sup> company names shall comprise of the use of letters, numbers, punctuation marks, enumerated symbols and other symbols. The provision in CAMA and the Company Act of Ghana on names are not as elaborate as the above stated.
5. Under the CAMA, a name can be reserved for sixty days<sup>141</sup> while in Ghana, a name reservation is for a period of two months and extended for an additional period of two months.<sup>142</sup> In South Africa, a name can be reserved for a period of six months and such a name is transferable<sup>143</sup> and in India, the name shall be reserved for a period of sixty days.<sup>144</sup> However in all the jurisdictions, certain names are prohibited or restricted as the case maybe.<sup>145</sup>
6. The Certificate of Incorporation is a conclusive evidence of incorporation which confers legal personality status on the registered companies and bestows on them the right to exercise all the functions and enjoy the privileges of a body corporate in all the above jurisdictions.<sup>146</sup>

#### 4. Conclusion and Recommendations

The activities of corporate bodies in the economic growth of every nation cannot be over-emphasized hence various governments conscientiously find ways of making their formation and operations seamless and Nigeria should not be left out in the scheme of things. The new Companies Act in Nigeria has brought in a lot of innovative and revolutionary provisions in line with current trends at the global level and also to facilitate the ease of doing business in Nigeria. This is indeed a welcomed development. In the light of the above, the writer makes the following recommendations: External companies that have met the requirement of the law in their originating countries should be allowed to commence business in Nigeria with minimal requirements. This will enable Nigeria to be fully integrated into the global trend of economic globalization and trade. The recent provision under CAMA which allows only one person to form a company is laudable. However, since a company is an artificial entity with perpetual succession, what happens when a sole owner of a company dies or is incapacitated? It is recommended that a sole subscriber to the Memorandum of Association should be made to elect a successor at the point of incorporation. Again, the requirement for the consent of the Attorney General and publication in three national dailies for the formation of companies Limited by Guarantee is a cumbersome process that should be jettisoned. The provision relating to company names should be expanded to include; characters, signs, symbols, punctuation and other marks. This will leave promoters of a company with a wider range of options of names to choose from.

---

<sup>136</sup> (n 59) S 313 (1) (n 116) S 1

<sup>137</sup> (n 127) s 379

<sup>138</sup> (n 90) S 6 (1)

<sup>139</sup> (659) S 11(1)

<sup>140</sup> (n 90) S 57 (1) (2)

<sup>141</sup> (n 8) S 32

<sup>142</sup> (n 109) S 22 (3)

<sup>143</sup> (n 59) S 12(4) (5)

<sup>144</sup> (n 127) s 4 (5)

<sup>145</sup> (n 8) S 30 (n 46) S 11 (2) (c) (n 79) S 53 (n 101) S 21 (2) (3)

<sup>146</sup> (n 3) 1