

EXAMINATION OF THE PRE AND POST RECOGNITION OF THE COMPANY SECRETARY UNDER CAMA 2020: AN OVERVIEW OF PRIVATE AND PUBLIC COMPANIES IN NIGERIA*

Abstract

Secretaries are confidential employees of any company and they are aware of all that goes on in any company that they are a part. Therefore, their positions in the company are crucial and critical in the light of the growing economic and commercial activities. Their position is very important because they are in charge of the company documents on behalf of the directors and the company. They are also the compliance officers with the Commission on behalf of the company. However, secretaries' prehistoric function is that they were seen as mere servants taking up an administrative duty and orders from the directors who were their superiors. This view has changed now that the business sector, the law guiding and regulating businesses and coupled with advancement in business activities has made the office of the secretary an important position in the company. The courts and parliaments have intervened in the description of a company secretary in line with the roles they play in the day to day running of the company. The role of the company's Secretary can be linked to the efficient functioning of the Company, particularly in an organization with few or no paid staff members. This is because they are seen now as officers of the company with a lot of responsibilities to all stakeholders and the company in general. This paper examines the pre and post recognition of the company secretary under the law. To achieve this aim, this paper examines sections 330 to 340 of the Companies and Allied Matters Act (CAMA) 2020. The doctrinal method is utilized as the research methodology to achieve the aim of this paper.

Keywords: Pre and Post, Recognition, Secretary, Private, Public, Overview, Nigeria and CAMA 2020.

1. Introduction

A cursory look at the new CAMA 2020, applicable to companies' registration and regulation in Nigeria, shows that all public companies are mandated,¹ except private and small companies, to make provisions for a company secretary in their corporate organizations.² The fact remains that a company is distinct from its members³ but it is a fact that a company cannot operate itself without the function of human beings as its agents.⁴ Some scholars have highly placed the secretary of a company as one of the principal officers as well as a company's agent to do most of the company's administrative work.⁵ The company secretary is also loaded with great responsibilities in both public and private companies. This high ranking officer of a company is responsible for the smooth running of the company by making sure that the company effectively and efficiently implements the decisions of the board of directors⁶ and keeps them informed of their legal responsibilities. They also make sure there is compliance with statutory and regulatory requirements and make sure directors and shareholders operate within the laws. Their role is no longer merely clerical or secretarial in nature, because they are company's representative on legal documents and matters. They are responsible for the maintenance of the company's records such as the register of directors, shareholders' register, annual returns and other accounting documents just to name but a few; that is why secretaries are referred to as the company's secret keepers.⁷

Before now the company secretary was, however, seen as a mere administrative company servant, made to handle tasks assigned by her/his superiors. It is good to note that the narratives have changed to the new status of highly respected officers with statutory flavour as a company secretary. Curiously, the mandatory requirement for every company to have a company secretary in CAMA 2004⁸ has been watered down by the provision in CAMA 2020 whereby it is only mandatory for public companies to have a secretary.⁹ Is this provision in tandem and compliance

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¹ Companies and Allied Matters Act (CAMA) 2020, s. 330(2).

² Ibid, s. 330(1).

³ *Salomon v. Salomon and Co. Ltd* (1897) AC 22.

⁴ *Lennards Carrying Co. v. Asiatic Petroleum Co. Ltd* (1955) AC 705, 713.

⁵ Nicholas Bourne, *Company Law 5th ed.* (New York: Routledge, 2008), 281.

⁶ Devendra Jarwal, The Role of Company Secretary as Governance Officer 41st National Convention of Company Secretaries, November 7, 2013, Available at SSRN:<https://ssrn.com/abstract=3514505> .Accessed 9th August, 2021.

⁷ Aniebiet-Abasi Ubon and Innocent Abidoye, The Role and Status of a Company Secretary in Modern Corporate Governance in Nigeria: A Case of 'A Mere Errand Boy' (November 26, 2015). Available at SSRN:<https://ssrn.com/abstract=269578> or <http://dx.doi.org/10.2139/ssrn.2695678> accessed 2nd September, 2021.

⁸ CAMA 2004, s. 293 (1).

⁹ CAMA 2020, s. 330 (1).

with international best practices in corporate governance? It is very doubtful. In the 21st Century, companies and other corporate bodies perform crucial roles in national development and company secretaries perform critical functions in this regard. Nigeria cannot afford to operate in a penumbra of doubt as to the status and functions of a company secretary especially in corporate administration in the 21st Century.

2. Who is a Company Secretary?

According to the provisions of the Companies and Allied Matters Act (hereinafter referred to as CAMA) 2020, the body corporate in relation to the word 'officer' refers directors, managers and secretaries of a company. Section 330 (1)¹⁰ provides that except in the case of a small company, every company should have a secretary. This statement confirms that it is not mandatory for every company to have a secretary and that a company secretary is one of the officers of such company. It is a fact that the Act did not expressly define the word secretary, but made provisions to the qualifications,¹¹ appointment,¹² duties and liabilities¹³ and even the removal of a company's secretary.¹⁴ In the past, the role and position of the company's secretary was relegated to the position of a mere servant with no specific purpose. This position can further be explained using the decision of the court in the case of *Barnet v. South London Tramways Co.*¹⁵ where Lord Esher posits thus: 'A secretary is a mere servant; his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all, nor can anyone assume that statements made by him are necessarily to be accepted as truth worthy without further enquiry...'

More so, same view was held in the case of *Newlands v. National Employer's Accident Association*¹⁶ where the secretary's functions were seen as 'Clerical and Ministerial' and with limited duties and humble character.¹⁷ Lord Denning, however, developed the current view of the status of the company's secretary when he noted in the case of *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics*¹⁸ thus:

Times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in modern companies Act, but also by the roles which he played in the day to day business of the companies. He is no longer a mere clerk. He regularly makes presentations on behalf of the company and enters into contracts on its behalf which come within the day to day running of the company. He is certainly entitled to sign contracts connected with the administrative side and so forth. All such matters are now come within the ostensible authority of a company secretary.

The above position has been well expressed in a plethora of decided cases such as *Okeowo v. Migliore*¹⁹ and *Adebisi v. May and Baker (Nig) Ltd.*²⁰ So judicially, this view has been adopted in Nigeria as well. Statutorily, this view has also been provided for under sections 330 and 340.²¹ The view of Gower equally reflects the current position of the company secretary. The secretary cannot, however, be regarded as an organ of the company without the backing of a legislative intervention. Gower's observation is reported below thus: It is arguable, therefore, that the secretary has also graduated as an organ of the company. Though appointed by the directors he is not their servant but an officer of the company with substantial authority in the administrative sphere and with powers and duties derived directly from the articles and the companies Acts. And in the performance of his statutory duties, he is clearly entitled to resist interference from the members: Board of directors or Managing Director. Where he differs from them is that he has no responsibility for corporate policy or for making managerial decisions as opposed to playing administrative role in ensuring that the policy and managerial decisions are implemented.

The new status of the company secretary is well known due to various provisions which include qualification, appointment, and his/her removal subject to the laid down procedures provided by the Act.

¹⁰ CAMA 2020.

¹¹ Ibid section 332.

¹² Ibid section 333 (1).

¹³ Ibid section 335.

¹⁴ Ibid section 333 (2).

¹⁵ (1887) 18 QBD 817 at 818

¹⁶ (1888) 54 LJ QBD 428

¹⁷ *George White Church Ltd v. Cavanagh* (1902) AC 117

¹⁸ (1971) 2 QB 711 at 716-717

¹⁹ (1979) 11 at 138

²⁰ (1973) FRCR 232.

²¹ CAMA 2020.

3. The Qualification of a Company Secretary

It is mandatory for all public companies to appoint a qualified secretary. It is, however, not so with private companies and other smaller companies.²² A company can decide to take an individual as the company's secretary or a firm as its secretary. When the secretary to be appointed is qualified, he or she will be appointed by the company's directors having been convinced that the secretary merits such appointment. This position is essentially for a public company.²³ Once appointed, the general meeting or any member of the company cannot remove him without due process. The board of directors as an important organ of the company can, however, only remove him under their general and express powers.²⁴ The public company has standard requirements for the appointment of a company secretary in addition to experience and knowledge about a company's operations. This view is different from the requirement of a private company which does not have any guideline in CAMA 2020 but whose criteria may be experience with requisite knowledge of company's operations. The appointee, as a secretary in a public company, must possess the additional qualifications as enunciated in CAMA 2020. Under CAMA 2020, the provision is that it is the duty of a director of a company to take all reasonable steps to ensure that the secretary of the company is a person who appears to have the requisite knowledge and experience to discharge the functions of a secretary of a company, and in the case of a public company, he shall be:

- (a) a member of the Institute of Chartered Secretaries and Administrators;²⁵ or
- (b) a legal practitioner within the meaning of the Legal Practitioners Act;²⁶ or
- (c) a member of the Institute of the Chartered Accountants of Nigeria or such other bodies of accountants as are established from time to time by an Act;²⁷ or
- (d) any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company;²⁸ or
- (e) a body corporate or firm consisting of members each of whom is qualified under paragraphs (a), (b), (c), or (d) of this section.²⁹

Looking at the above criteria in the qualification and appointment of a company's secretary, it is now the sole and collective responsibility of the board of directors to appoint and discharge their duty by taking the right decision to appoint qualified and capable hands in the interest of the company and all stakeholders. None other, not even the company's board chairman or an individual director can take over this function. The decision in *Atewologun v. Metro Motors Ltd*³⁰ per Justice Karibi Whyte says it all thus: 'In the absence of any power in the Articles of Association of a company authorizing the powers of the board to be so delegated to the individual director, neither the chairman of the board nor the managing director of the board can, on his own authority, appoint a solicitor to act for the company, and a resolution of the board is necessary to make the appointment'.³¹ In addition, the appointment of the company's secretary is a collective responsibility of the company's board and this responsibility should be in the interest of the entire company when discharged eventually.

4. Attributes of a Company Secretary

The position of the secretary in a corporate organization is very critical, especially as the company's secret keeper. Therefore, the secretary should possess the following qualities or attributes which should be demonstrated in carrying out these roles in order to carry out her/his role effectively. These qualities³² include the following but not limited to them:

²² This is because private companies are different from public companies; private companies are not mandated to open their accounts to the public for public scrutiny; small companies' annual returns are small and less than 120 million naira. CAMA 2020, s. 394 (3).

²³ CAMA 2020 section 332.

²⁴ A. Emiola, *Nigerian Company Law* (Ogbomosho: Emiola Publishers, 2001), 345.

²⁵ CAMA 2020 Section 332 (a).

²⁶ CAMA 2020 Section 332 (b).

²⁷ CAMA 2020 Section 332 (c).

²⁸ CAMA 2020 Section 332 (d).

²⁹ CAMA 2020 Section 332(e).

³⁰ (1978) 2 L..R. 46.

³¹ *Ibid*

³² QS Study Learn and Study, <https://qsstudy.com/qualification-qualities-company-secretary/> Accessed 10th November, 2021.

Organizational Knowledge:³³

It is extremely necessary that the company secretary should be efficient with extensive common knowledge about the various units related to run the company activities. She/he requires extensive and proper knowledge of information and communications technology (ICT) for effective documentation, conservation and potential use of data or information within and outside the organization. More so, she/he should have strong ability to be well organized, keep track of every detail especially on essential files and also keep a clear head. This way, plans and implementation of important policies and procedures to run the company to its goal will be achieved.

An Eye for Details

The secretary should be methodical in her/his dealings as a company secretary. For a good secretary, an eye for detail simply means that, the secretary must ensure all her/his job/role to play is executed correctly without mistakes and promptly. Such works for and of the board and that of the company in general. The company secretary keeps and manages seamlessly the role as first point of contact for the shareholders, dividends, notices, its correspondence/ circulation and registration of shares ownership.

Multitasking Skills

A company secretary has to have a multitasking skill at all the times. She/he has to do a lot of tasks simultaneously. For instance, to organize both board meetings and take minutes; prepare for meetings while making sure that corporate governance compliance is up to date; supporting communications between management and the board of directors, etc. A good secretary also needs to communicate well with everyone, so that the people she/he is working with understand what the secretary have got on her/his plate and that they let stakeholders know what is most important to get done first. Therefore, she/he must possess the capacity to handle various tasks and responsibilities at the same time and should collaborate with different people at the same time. Looking at this quality and how important it is, it is one quality of a secretary that should not be compromised when hiring a company secretary.

Planning Skills

Just as having the ability to multitask, the company secretary must also be ahead of the game in her/his job. She/he should have well thought-out plans in place at all times. This skill is very important to her/his job, because meetings are scheduled and planned driven with external and internal compliance obligations met on time for the appropriate meeting. Project management skill is not left out because the planning and multitasking skills also come to play here since there are always several ongoing projects that require the secretary's attention at the same time.

Solid Judgment

A sound judgement skill is very essential as a good quality of a company secretary. It is a fact that should not be overlooked, because in an organization there is bound to be conflicts and conflict of interest. So in such circumstances where there are conflicting issues and interest in the company (issues bothering on conflicting shares, dividends unpaid, communication with external stakeholders, chairman and the board and even other staff of the company). The secretary must be on ground to render sound judgement in such situations. The secretary should work closely with all and ensure effective relationship amongst all with his sound judgement since she/he is the first point of call for queries and enquiries.

Effective Communication

A good company secretary should have a good relationship with all the people she/he gets in contact with. She/he needs effective communication skill to be able to carry everyone along. This is a very important attribute because the secretary works with different ranks of workers in the company: the chief executive officers of the company, external and internal stakeholders (funders, investors and regulators) and co staff/members of the company. With the above personalities to interact with, diplomacy, discretion and good communication skill should be the watchword of the company secretary. Company secretaries must be able to listen effectively, and communicate well in both oral and written methods.

³³Diligent 'Boardroom Best Practices: 6 Skills Required to be a Great Company Secretary' <https://www.diligent.com/en-gb/blog/6-skills-required-to-be-a-great-company-secretary/> Accessed 10th November, 2021.

Integrity and Independence

In addition to these general attributes of a company secretary, she/he should also possess personal qualities. So as a high ranking officer, she/he should have integrity, honesty, loyalty, tactfulness, courteous, punctual, cooperative minded and strong personality, etc. These qualities are needed in a secretary in the interest of the company and the stakeholders. A good secretary, therefore, will possess the following qualities and do the following:

- (1). Be organized;
- (2). Keep proper records of all correspondences;
- (3). Check that quorum is met for meetings;
- (4). Respect confidentiality;
- (5). Work closely with the chairperson;
- (6). Make it easy for others to take over by keeping clear records;
- (7). Prepare for meetings well in advance;
- (8). Summarize discussions effectively;
- (9). Keep people informed; and
- (10). Ensure accurate minutes of meetings are kept;³⁴

On the other hand, a bad secretary will most likely do the following:

- (1). Ignore correspondence;
- (2). Keep information to her/himself;
- (3). Be late for meetings;
- (4). Dispose of important documents;
- (5). Write down trivial details of all discussions at every meeting;
- (6). Rely on his/her memory;
- (7). Repeat private conversations; and
- (8). Organize meetings at the last minute.

5. Appointment of a Company Secretary

The Act has made it mandatory for every public company to have a company secretary.³⁵ In the light of this statement, public companies are required to appoint a company secretary. As stated earlier, the provisions of CAMA 2020 does not seem to make it mandatory for every company to have a company secretary. This is by virtue of the express provision in the opening sentence of section 330 (1) of CAMA 2020. There are, however, criteria for the appointment of a company secretary for a public company. For a public company, the secretary must either be a legal practitioner, chartered accountant, chartered secretaries, a firm of any of the list given above and anyone that have held the office of secretary for at least three years of the five years immediately preceding the new appointment as a company secretary. The CAMA 1994 made provisions for the appointment of the secretary of a private company in section 295.³⁶ That section of the Act provided for the appointment of a company secretary in every private company, which does not need any special qualification for appointment. However, the director was expected to consider such person fit by possessing the requisite knowledge, experience and the general requirements to perform all the functions/duties of a company secretary. In public companies, pursuant to section 332 (a) to (e) of the Act,³⁷ the secretary of a public company must be a member of the Institute of Chartered Secretaries or Administrators; a legal practitioner within the meaning of the Legal Practitioners Act; a member of a professional body of accountants established from time to time by an Act of the National Assembly; must have held office as a secretary of a public company for at least three years of the five years immediately preceding this appointment; and or a body corporate or a firm consisting of members each of whom is qualified under paragraph (a), (b) or (c) of this same Act.³⁸ In addition, the appointee must also possess the requisite knowledge and experience to perform the functions of a company secretary. Finally, the appointment of a company secretary is the sole responsibility of the board of directors³⁹ and not the board chairman or an individual director. This collective responsibility must be done in the interest of the company. So the directors must be satisfied and

³⁴DIY COMMITTEE GUIDE 'Characteristics of a Good Secretary'
<https://www.diycommitteeguide.org/resource/characteristics-of-a-good-secretary>. Accessed 24 November, 2021

³⁵ CAMA 2020 Section 333(1).

³⁶ CAMA 2004.

³⁷ CAMA 2020.

³⁸ CAMA 2020 Section 332 (a) to (e).

³⁹ CAMA 2020 Section 333(1).

convinced that the person appointed is qualified to hold the position in the company, especially for a public company.

6. Roles/Duties of Company Secretary⁴⁰

As there are different companies so are the duties of each company's secretary. This view is well represented in the case of *Taiwo Okeowo v. Migliore*.⁴¹ The responsibilities of a company secretary are both statutory and administrative. Under statutory duties which are duties towards the company, the secretary is mandated to do and perform the following duties as enunciated under the Act:⁴²

- (a) attending the meetings of the company, the board of directors and its committees, rendering all necessary secretarial services in respect of the meeting and advising on compliance, by the meetings, with the applicable rules and regulations;
- (b) maintaining the registers and other records required to be maintained by the company under this Act;
- (c) rendering proper returns and giving notification to the Commission required under this Act; and
- (d) carrying out such administrative and other secretarial duties as directed by the director or the company.

Under administrative and other secretarial duties under section 335 (1) (d),⁴³ are the duties to directors and general secretarial duties. The under-listed can be distilled from that provision and they include:

- (a) Maintaining the statutory registers of the company (register of directors and secretary, register of members, register of directors' and secretaries' interests and register of debenture holders) and making them available for inspection to those entitled;
- (b) Preparing and filing the annual return and notices of other matters such as changes in directors and secretaries or in their particulars, change of registered office address, a return of allotments, passing of special and certain ordinary resolutions, etc. within the prescribed limits with the Commission;
- (c) Preparing and issuing notices of board and general meetings in accordance with instructions given by the Chairman or the Board;
- (d) Attending and taking minutes of meetings and maintenance of the related minute books;
- (e) Ensuring that the decisions of the board are properly communicated and that actions circulated to the board members after each board meeting;
- (f) Ensuring that guidance is provided to the board on corporate governance generally and that the provisions of the memorandum and articles of association and of any shareholders' agreement, to which the company is a party, are observed; and
- (g) Providing support to the executive and non-executive directors.

Providing support to the executive and non-executive directors include:

1. Providing them with a copy of the most recent memorandum and articles of association of the company;
2. Ensuring that they are aware of their statutory obligations;
3. Providing them with a schedule of board meetings;
4. Providing them with any other information they may validly require to achieve their functions;
5. Ensuring that the company complies with its disclosure requirements such as information contained on company letterhead, websites and electronic communications;
6. Communicating with company shareholders/stakeholders; and
7. Safeguarding of the Company seal and, where authorized, countersigning and, where authorized, countersigning its affixation with one of the directors.

It is important to emphasize that the duties of the secretary under the Act are couched in an inclusive manner. This means that the duties of the secretary, as enunciated under the Act, are not exhaustive. As a result, the miscellaneous duties of the secretary can be distilled from that provision to include the following:

- (a) To correspond on behalf of the company on social functions;
- (b) To act with authority and uphold the secrecy of confidential matters; and
- (c) To execute his/her duties truthfully and industriously.

⁴⁰ CAMA 2020 Section 335 (1).

⁴¹ (1978) NCLR 274.

⁴² CAMA 2020 Section 335 (1) (a) to (d).

⁴³ CAMA 2020.

However, section 335 (2)⁴⁴ provides that the secretary shall not, without the authorities of the board, exercise any powers vested in the directors. In addition, it shows that unauthorized act is expressly prohibited by this section; therefore, such act cannot be ratified by the board of directors because such act was void *ab-initio*.⁴⁵

7. Fiduciary Interests of a Secretary

Section 334 of the Act⁴⁶ provides that a company secretary should not owe any fiduciary duties to the company. This section provides that:

A secretary shall not owe fiduciary duties to the company, but where he is acting as its agent he shall owe fiduciary duties to it, and as such shall be liable to the company where he makes secret profits or lets his duties conflict with his personal interest, or uses confidential information he obtained from the company for his own benefit.⁴⁷

The above position was confirmed in the case of *Re Morvah Colnsole Tin Mining Co*⁴⁸ where the company secretary was asked to pay over the value of the shares to the liquidator because he was in breach of his fiduciary duty. However, she/he can so owe a fiduciary duty if acting as an agent to the company. This is when the secretary is held out by the company under section 334.⁴⁹ It should be noted that when a company secretary is acting as an agent to the company, she/he owes the company the duty not to let his duties conflict with his personal interest as an agent. Also, she/he will be liable to the company where he makes secret profits and whenever she/he uses the company's confidential information for his benefit.⁵⁰ Section 67 of the Act⁵¹ provides for the indemnity of the company's secretary for an act, against which he is wrongly accused or sued. Below is the provision of the Act exempting officer from liability to the company is void.

(1) Any provision, whether contained in the articles of the company or in any contract with a company or otherwise, for exempting any officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, or breach of trust of which he may be guilty in relation to the company, shall be void.

(2) Notwithstanding the provisions of subsection (1) of this section-

(a) a person shall not be deprived of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision as mentioned in that sub section was in force; and

(b) a company may, in pursuance of any such provision as mentioned in sub section (1) of this section, indemnify any such officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section 641 of this Act in which relief is granted to him by the court.

8. Powers of the Company Secretary

The company secretary has both implied and express authority to carry out her/his duties.⁵² Her/his statutory duties are given expressly by the Act and also from the directors. On the other hand, her/his implied authority is due to his position as a high ranking officer of the company and so has the power to function effectively in such capacity.

9. Limitations on the Powers of the Company Secretary

Section 335 (2) of the Act⁵³ provides that a company secretary cannot exercise any power of the directors without the express authority by the board to so do. For instance, the secretary can only call for a meeting at the instance of the directors.⁵⁴ Most of her/his duties must be authorized such as using the company's seal, registration of a share transfer, which cannot be carried out without the approval of the board of directors. This was the decision

⁴⁴ CAMA 2020.

⁴⁵ J. Olakunle Orojo, *Company Law and Practice in Nigeria* 5th ed. (Durban: Lexis Nexis, 2008), 290.

⁴⁶ CAMA 2020.

⁴⁷ Ibid.

⁴⁸ (1875) 2 Ch. D 1.

⁴⁹ CAMA 2020.

⁵⁰ CAMA 2020 Section 334.

⁵¹ Ibid.

⁵² J. O. Orojo, *Company Law and Practice in Nigeria* 5th ed. (Durban: Lexis Nexis, 2008), 290.

⁵³ CAMA 2020.

⁵⁴ *Haycraft Gold Reduction v. Mining Co.* (1900) 2 Ch.230.

reached in the case of *Chida Mines Ltd v. Anderson*.⁵⁵ An individual cannot act both as a director and company secretary in a public company.⁵⁶ In the case of *Adelaide Guarantee Co. Ltd v. Meyers*⁵⁷ where it was held that where one person stands as both director and secretary of a company, the duty assigned to a director and a secretary to carry out cannot be done by same person acting for both the director and the secretary. This is because the requirement will not be fulfilled and so the function will not be satisfied. More so, the powers of the company secretary are limited in the area of seeking for loan on behalf of the company, neither is she/he qualified to enter into loan agreement on behalf of the company.⁵⁸

10. Liabilities of the Company Secretary

The Act provides for the liabilities of the company's secretary. The company secretary will be liable to the company when she/he breaches her/his duties especially her/his statutory duties. Some of these duties that will make her/him liable is when the company's confidential information is divulged by the secretary, make secret profit from the company's trade secrets and allows her/his interest to conflict with the company's interest.⁵⁹ These liabilities will surface due to her/his position as an agent of the company, thereby having fiduciary duties to the company. Under her/his statutory liabilities, each officer, include the company secretary, is liable for failure to give a report within fourteen days of the appointment or removal of a secretary to the Commission.⁶⁰ Others include failure to file notices of any importance to the Commission. These are provided for under sections 339(1) to (2).⁶¹ A company secretary has the limitation of not being the company's auditor.⁶² Section 339(3) of the same Act prescribes a penalty for the secretary's liabilities to company and the Commission, for the number of days the default subsists.

11. Vacancy in the Company's Secretary's Office

Section 330 (3)⁶³ provides for what should be done if the secretary's office is vacant. The section provides thus: Anything required or authorized to be done by or of the secretary may, if the office is vacant or there is for any other reason no secretary capable of acting, be done by or of any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting or by or of any officer of the company authorized generally or specially in that behalf by the directors.⁶⁴

By the above provision, one can infer that when there is vacancy in the position of company secretary, by any reason, that position can be filled by the following officers: assistant or deputy to the company secretary or any officer of the company authorized by a director or by the board. It is also inferred that anyone to act for the office of the secretary when vacant should necessarily have the required qualification for the appointment as a company secretary. This view is in tandem with the provision of section 332 of the Act, concerning the qualification required for the appointment of a company secretary in a public company.⁶⁵ Furthermore, the case of *Adelaide Guarantee Co. Ltd v. Meyers*⁶⁶ reflects the position of the provision of section 331 of the Act,⁶⁷ where it was held that where one person stands as both director and secretary of a company, the duty assigned to a director and a secretary to carry out cannot be done by same person acting for both the director and the secretary. This is because the requirement will not be fulfilled and so the function will not be satisfied. The section reads thus: 'A provision requiring or authorizing a thing to be done by or of a director and the secretary shall not be satisfied by its being done by or of the same person acting both as director and as, or in place of a secretary'. The position therefore is that one person cannot double as both secretary and a director in a company.

⁵⁵ (1905) 22 TR 27.

⁵⁶ CAMA 2020 Section 331.

⁵⁷ (1932) S.A.S.R.382.

⁵⁸ See The Case of *Re Cleadon Trust Ltd.* (1938) 4 All E.R 518.

⁵⁹ CAMA 2020 Section 334.

⁶⁰ CAMA 2020 Section 339.

⁶¹ CAMA 2020.

⁶² K. D. Barnes, *Cases and Materials on Nigerian Company Law* (Ibadan: Samadex Printing Works, (1992), 289.

⁶³ CAMA 2020.

⁶⁴ *Ibid.*

⁶⁵ Nelson C. S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Lagos: Novena Ltd. 2010). 404.

⁶⁶ (1932) S.A.S.R.382.

⁶⁷ CAMA 2020.

12. Removal of a Company Secretary

The company secretary is appointed by the board of directors and also removed by them but subject to the provision of section 333(2) of the Act.⁶⁸ This section provides that to remove a company secretary of a public company, the board shall give her/him notice because a company secretary can be removed from office if she/he breaches any of her/his duties and responsibilities to the company. The board can remove her/him through the set down procedure or the Court can restrain her/him from performing further duties and may ask the board to do the needful by removing him through the general meeting. However, there are laid down procedures for removal, especially, of a public company secretary as stated under section 333 (2) (a-d) (3) (a-b) and (4) of the Act. There is no stated procedure for the removal of the secretary of a private company. However, the removal of a private company secretary is that recourse can only be made to his contract of service⁶⁹ and must be done in the interest of the company and also should not be arbitrary done by the directors. For a public company, when the board intends to remove its secretary, the board must do the following to make it satisfactory with the provisions of the Act:

1. Give notice of such intendment to the secretary stating the following:
 - (a) The intendment to remove him or her;⁷⁰
 - (b) The grounds of removal;⁷¹
 - (c) Providing for a period of not less than 7 working days to make a defence⁷² or resign voluntarily.⁷³
2. If the secretary did not within the period specified in the notice make a defence or reply, the board of directors may remove him/her and make a report to the next general meeting.
3. In the alternative, if the secretary made a defence and the directors considered it insufficient:
 - (a) If the ground of removal is fraud or serious misconduct, the board may remove him/her from office and make a report to the next general meeting; and
 - (b) If the ground is that other than fraud or serious misconduct, the board shall not remove him/her without the approval of the general meeting but may suspend him and report to the next general meeting.⁷⁴
 - (c) Notwithstanding any provision of law, where a secretary suspended under section 333 (3) (b) is removed with the approval of the general meeting, the removal may take effect from such time as may be determined by the general meeting.

The above processes are the procedure for legally removing the secretary of a public company. If this due process is not followed, it becomes wrongful removal and *ultra vires* the powers of the board. The requirements for the removal of a company secretary of a public company are mandatory as the Act uses the word 'shall' which the court believes is 'mandatory.' It is important to note that when a public company fails to follow due process in the appointment and removal of the secretary of a public company, it is unconstitutional and *ultra vires*; and would be struck down by the court. The case of *Ashibogun v. Afprint Nigeria Ltd*⁷⁵ Per Longe, J. clearly stated the position of wrongful removal of the company secretary. Below is the holding of the case:

That the managing Director had wrongfully removed the secretary and that the board of directors could not subsequently ratify the act ... It is an act *ultra vires* the Managing Director to have sacked the plaintiff with a letter about two months before taking his matter before the policy makers (board of directors) of the company.

The board of directors has super authority to remove the secretary and give same notice to the members in general meeting of their actions, when fraud is in question. On the other hand, when the issue is not of fraud, the general meeting determines the fate of the secretary. This position was upheld in the case of *Daily Times (Nig) Plc v. Akinjide*⁷⁶ that a secretary will always be protected under section 296 of the Act⁷⁷ even if he holds dual positions in the company as secretary and legal adviser.

⁶⁸ CAMA 2020.

⁶⁹ Bhadmus, *Corporate Law Practice* (Enugu: Chenglo Ltd., 2009), 242.

⁷⁰ CAMA 2020 Section 333 (2) (a).

⁷¹ CAMA 2020 Section 333 (2) (b).

⁷² CAMA 2020 Section 333(2) (C).

⁷³ Ibid, Section333 (2) (d).

⁷⁴ Ibid, Section 333 (3) (b).

⁷⁵ (1985) H.C.N.L.R 400.

⁷⁶ (1998) 13 NWLR (Pt. 580) 22.

⁷⁷ CAMA 2004.

13. A Good Company Secretary: Career Path and Enhancement

A good secretary should always improve and enhance the quality of his skill, especially when his present skill has been well mastered. This is the quality of an ambitious secretary who wants to be correct and current always.⁷⁸ When one is not current, one is definitely not correct.

14. Conclusion and Recommendations

The current position of the company secretary is that she/he is the eye of the company with proper guardian to obeying the rules and obligations of the Act both for best practices, the law and its compliance. Therefore, the importance of the company secretary cannot be overemphasized in today's corporate world. Indeed, the position of the company secretary is very crucial to the setting and running of the day to day activities of the company, especially now that her/his status has been enhanced from the position of a mere servant to a very high ranking officer. This is why this paper had to examine the position of the company secretary in the 21st century corporate world and conclude that the old position is no longer relevant, looking at the duties and obligation to both the shareholders, all stakeholders and the board generally and the company in particular. The paper further examined the qualifications of the new company secretary as an officer of a company that is saddled with high responsibilities, mode of her/his appointment in private and public companies as well as her/his removal. However, since the new status of the company secretary entails other responsibilities, such as drafting and reviewing contractual agreements mostly for private companies, there is the need to appoint one in every company. Seeing the enormous benefits a company will have in having a secretary, it is therefore advisable that all companies, both private and public, should appoint a company secretary to their companies. A private company can appoint an external individual lawyer or a firm to represent the company as company's secretary and solicitor.

From the discussions concerning the qualification, appointment, limitations, duties and obligations and their removal of the secretary of private and public companies in Nigeria, these give an idea of what to expect as recommendations. Firstly, all companies should be made to appoint company secretary, instead of making it discretionary for both private and small companies due to their annual turnover returns. These companies should not be exempted from appointing a company secretary looking at the enormous benefits that will be accrue to them from the duties and obligations of a secretary. Secondly, the appointment of a company secretary for both private and public companies should be given the same criteria/qualifications and procedure for appointment as provided for in the Act; there should be no discrimination between private and public companies. Thirdly, the same procedure should also be employed for the removal of the secretary of both private and public companies in Nigeria. This is because, in course of writing this paper, it was discovered that the Act did not provide for the removal of the secretary of a private company. The Act should provide for similar laid down rules for the removal of the secretary of a private company. Since the Act makes it discretionary to appointment the secretary of a private company, it means removal is also discretionary, thereby leaving such important duty to the whims and caprices of the directors in charge. Fourthly, in the course of this paper, it was discovered that any secretary acting for a director and maintaining her/his position as a secretary cannot carry out some function that requires the signature of the director and the secretary, this requirement will not be satisfied if one person acts in those dual capacities. So, one individual should not be made to act in both positions at the same time. Fifthly, company's secretaries should be given suitable trainings and seminars to gain more experience; and professional qualifications in view of the important roles they play in today's business world. Sixthly, the company secretary can be appointed with share capital like the directors. This is what is obtained in other jurisdictions like South Africa, under section 268 of the Act⁷⁹ which provides that the public companies secretary be appointed with mandatory share capital. Finally, there should be a timeframe for companies to appoint their secretaries, their resignation and their office vacancy and reoccupied. Furthermore, section 333 (2) (d)⁸⁰ serves no relevance and so should be expunged from the Act.

⁷⁸ Page Personnel 'What it takes to be a Successful Secretary' <https://www.pagepersonnel.com.sg/advice/career-and-management/success/what-it-takes-be-successful-secretary> Assessed 23th June, 2021.

⁷⁹ Republic of South Africa Companies Act (71/2008) which became operational on 1 May, 2011.

⁸⁰ CAMA 2020.