

EFFECTIVE MANAGEMENT OF COMPANY BY DIRECTORS IN NIGERIA: ISSUES AND CHALLENGES*

Abstract

Directors are among the other officers of the company who are in charge of corporate governance of the company. Corporate governance refers to the processes by which corporate entities particularly limited liability companies are governed. It is the exercise of power over the enterprise, direction, supervision, management and control of enterprise actions, with the concern for the effect of enterprise on other parties, particularly the stakeholders and accountability of corporate administrators.¹ Directors play cardinal roles in the administration of a company. They are regarded as trustees of the company as well as its agents.² Directors also have the general duty to manage the company, to display utmost good faith in accordance with the provisions of the law and the constitution of the company.³ In this article, we are going to look issues and challenges of Directors and settlement of company dispute in Nigeria.

Keywords: Company, Effective Management, Directors, Issues, Challenges, Nigeria

1. Introduction

Directors have been on top of the management of companies all over the world as a reaction to corporate collapses and as a concern to increased global corporate power. The pervasiveness of uncontrolled Directors' power has given rise to the formulation of numerous corporate governance codes and guidelines hoping to curb the excesses of management. Effective directorship inhibits expropriation of profits thereby attracting investors to the company. In a free enterprise economy, sound directors' management reduces the prevalence of corruption and mismanagement. The need to guard against accounting deceptions, market manipulation, selective disclosure, earnings management, insider abuse, fraud, etcetera, cannot be overstated. Because of its important role in capital formation, corporate governance has important consequences for economic efficiency and growth. In Nigeria, directors' challenges influencing business practices are multifarious and multifaceted. They include regulatory laxity, political instability, endemic corruption and fraud, breach of duties, mismanagement and incomplete disclosure amongst others. These factors constitute barriers to the effective discharge of sound directors' management practice in Nigeria and shall, in no particular order, be used to evaluate and espouse in greater details specific directors' challenges as they relate to Nigeria. In this article, we would attempt to critically examine the duties of directors, legal and regulatory challenges that are inhibiting sound directors' management practice in Nigeria paying particular attention to the challenges settlement of company disputes.

2. Duties of Directors under Companies and Allied Matters Act 2020

It must be noted that the abuse of corporate power is pronounced where the Board is too powerful and the members are either too weak to exercise their rights or too ignorant to understand its full extent. Interestingly, the CAMA, 2020 aims to balance the powers of the various organs of the company, but as we have observed in practice, this has failed to a large extent. Even where shareholders are prepared to exercise their rights, the existing legal and institutional framework is almost always non-existent, thus frustrating any remedy which would have been obtained by complainants. As part of its effort to secure shareholder protection, the CAMA, 2020 provides shareholders with safeguards by imposing duties on directors. The duties are:

Fiduciary Duty

Directors occupy a fiduciary position in the exercise of their management powers.⁴ Directors owe fiduciary duties⁵ to the following persons:

- a. The company: The Directors must observe *utmost good faith* in any transactions with it or on its behalf.⁶ See; Eso JSC in *Okeowo Miglore*.⁷
- b. Shareholders in any transactions affecting their interest.
- c. Any person dealing with the company's securities.⁸

The directors of a company individually and collectively as a board are expected to observe the following fiduciary duties as directors:

- (a) Duty to act *bona fide* for the benefit of his company;
- (b) Exercise power for proper purpose;
- (c) Not to fetter discretion to vote in a particular way;
- (d) Not to conflict duty and interest. Not to make secret profits by appropriating corporate assets or opportunities

*By **C. J. UBANYIONWU, PhD**, Professor of Law, Department of International Law and Jurisprudence, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbaram Campus, Former Chairman (2018 – 2020) and Former Secretary (2004 – 2006) of the Nigerian Bar Association, Aguata Branch. Tel: 08036660646; Email: barcuba@yahoo.com.

¹ *CBN v Aribo* (2018)1 NWLR (Pt.16).

² Section 309 (1) (2) of the Companies and Allied Matters Act 2020 (hereinafter referred to as "CAMA 2020").

³ Section 305 (1); *Ibid*, See *Walleistener v.Moir* WLR 991.

⁴ Section 305 (1) and (2) of the CAMA 2020.

⁵ *Ofordum v. Easy GEO International Ltd* (2019) LPELR- 46832.

⁶ *EMCO &Partnees Ltd &Oes v.Dorbeem(Nig) Ltd & Anor* (2017) LPELR-43453; *Usman &Anor v.Jubril &Ors* (2019)LPELR-48792.

⁷ (1979) 1 SC 133.

⁸ *NDIC v. Rabo Farm.s Ltd &Anor* (2019) LPELR-42032.

Duty to Act *Bona fide* for the benefit of the Company

A director shall act at all times in what he believes to be the best interest of the company as a whole, so as to preserve its assets, further its business and promote the purposes for which it was formed, and in such manner as faithful, diligent and careful as an ordinary skillful director would act in the circumstances.⁹ In *Artra Industries Nig. Ltd. v. Nigerian Bank for Commerce and Industry*,¹⁰ the Supreme Court of Nigeria while interpreting the scope of *section 305 (3) of the CAMA, 2020*, held that "in exercise of the management power and duties conferred upon them by *Section 87* of the Act, the directors of a company must adhere strictly to the statutory provisions which enjoins them to consider the interest of the company as paramount."¹¹ While carrying out their duties, directors are also enjoined to note generally the interest of the company's employees and members. As regards employees, that is a mere pious declaration since the right to enforce observance of the provision is not available for employees under *Section 305 (9) of the CAMA 2020*, unlike members who can enforce the rights of protection under *Sections 344, 346 and 353 of the CAMA 2020*.

Duty to Exercise Power for a Proper Purpose

Directors are enjoined to exercise the powers conferred for the purpose it was conferred and not for collateral purpose.¹² However, such powers once exercised for proper purpose, is valid even if it turned out that it incidentally affected a member adversely. The test is therefore to ascertain the controlling motive behind the director's action. If legitimate, it is valid, even if it adversely impacted on the members.

Duty not to fetter Discretion to vote in a particular way

By virtue of the position of a director as a trustee of his company, he shall not exercise his discretion to vote in a particular way without the consent of the company, being the beneficiary.¹³ As a result, a director cannot make a valid agreement among other directors with shareholders or outsiders to vote in a particular way at board meetings. Any such agreement is invalid even if made in good faith and for good motive. However, such arrangement can be made by the directors or shareholders or a class of them in respect of general meeting.

Duty Not to conflict duty and interest

On no account should a director conflict his personal interest with his duties as a director.¹⁴ Thus, company directors are not supposed to use their position as directors to involve in other things including business where they have personal interest. The inability or unwillingness of the company to perform any functions or duties under its Articles and Memorandum shall not constitute a defence to any breach of duty of a director under the *Act*.¹⁵ Although, a director can be permitted by the Articles of the company to contract with the company, but the director must comply with *section 303 of the CAMA 2020* in respect of disclosure of his interests in the contract. The section provides thus that subject to the provisions of this section, it shall be the duty of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company. *Section 303 (2) of the CAMA, 2020* provides that the time for director to make the disclosure of interest in a contract involving the company sets out various periods the director's disclosure to the board of directors can be made. They are:

- i. Proposed contract – The director shall declare his interest at the Board meeting where the issue of entering into the contract is first considered.
- ii. Where the director was not interested at the date of first consideration of the contract but before award of the contract, he shall make his declaration of interest at the first board meeting after he has become interested in the contract.
- iii. If the director becomes interested in the contract after it has been awarded by the company, he must declare his interest at the first meeting of the board after he becomes interested. The provisions of *section 303* will not be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.¹⁶

Other Provisions made to prevent directors from taking undue advantage of their position by conflicting duty with interest are:

- (i) Prohibition of entry into guarantee or provision of security.¹⁷
- (ii) Payments made to a director of a company by way of compensation for loss of office or retirement must be disclosed to members of the company in general meeting and approved by them.¹⁸
- (iii) Restrictions on acquisition of non-cash asset of his company.¹⁹ The company or its directors or of its holding company or person connected with the director is restricted from entering into an arrangement when such director or person is to acquire from the company or sell to it, non-cash asset of a requisite value without the approval by the resolution of the general meeting. Such non-cash asset must not be less than N2,000 or 20% of the company's asset value. Thus, any non cash asset of value above N2000 must first be presented to the general meeting before it can be purchased by the director or person acting through him.

Duty not to make Secret profits and exploit corporate assets, information and opportunities

⁹ Section 305 (4) of the CAMA, 2020.

¹⁰ (1998) 4 NWLR (Pt. 546) 375.

¹¹ Per Sylvester Umaru Onu, JSC (as he then was) 382 para-B.

¹² Section 305 (5) of the CAMA, 2020.

¹³ Section 306 (6) of the CAMA, 2020.

¹⁴ Section 306 (1) of the CAMA, 2020.

¹⁵ Section 306 (4) of the CAMA, 2020.

¹⁶ Section 303 (4) of the CAMA 2020.

¹⁷ Section 296; *ibid*.

¹⁸ *Ibid*, section 299.

¹⁹ Section 310 of the CAMA, 2020.

Perhaps, this is the most challenging obligation of directors. The rule against secret profit and necessary benefits is wide and covers three aspects to wit:

1. Bribery and Corruption
2. Abuse of Confidential information
3. Corruption based on Multi-directorship

Bribery and corruption

The provision in section 313 (1) of the CAMA, 2020 frowns at bribery and corruption, by expressing prohibiting directors from receiving bribes, gifts or commission, either in cash or kind from any person or a share in the profit of that person in respect of any transaction involving his company in order to introduce his company to deal with such a person. However, where the gift unsolicited in the form of gratitude after the transaction has been completed, the director may be allowed to keep the gift provided he declares it before the board and ensures that the declaration and decision of the board approving his keeping gift are entered in the minute's book of directors.²⁰

Abuse of Confidential Information

It should be noted that directors are not allowed, either during or after termination of their service with the company to use confidential information for their own benefit, anything, property, trade secret or confidential information entrusted in them by virtue of their position. This rule does not only affect the directors, it also affects other officers of the company. The duty subsists even after resignation/termination of appointment. The directors and such officers remain accountable and can be restrained by an injunction from misusing the information received by the virtue of their previous position in the company.²¹

Corruption based on Multi-Directorship

Directors are not expected to be involved in unauthorized abuse of confidential information from one company in favour of the others and undue exploitation of one company's corporate opportunities in favour of the others.²² It is not a defense that the company was unwilling or fails to carry out any function or duty under its Memorandum and Articles of Association.²³ While examining the onerous duties/obligations thrown upon multiple directorship allowed even among competing companies, Lord Denning MR. in *Scottish C. W. S. Ltd. v. Meyer*,²⁴ warned that: "a director holding interlocking directorships is walking a tight rope." In the *Meyer's case*,²⁵ the nominee directors of a co-operative society were held to have conducted the company's affairs in a manner oppressive to the minority by conducting the company's business sluggishly to the benefit of the society's competitor's business.

Director's Duties of Skill and Care

The duty of care and skill is not a fiduciary duty; it is a statutory statement of a common law duty of care governed by the normal Common Law rules as to liability for negligence. The most often cited explanation of the distinction between fiduciary and other duties is that given by Millett LJ in *Bristol & West Building Society v. Mothew*²⁶ where he emphasized that fiduciary are duties peculiar to fiduciaries, breach of which attracts legal consequences different from those consequent upon the breach of other duties. Breach of fiduciary duties attracts equitable remedies which are primarily restitutionary or restorative rather than compensatory, as would be the case on a breach of duty of care. His Lordship went further to make the point that the core of fiduciary duties is loyalty and a breach of fiduciary duty is primarily about disloyalty; so mere incompetence is not enough. The duty of care and skill in the Companies Act²⁷ is therefore a reflection of the Common Law duty of care and liability for breach may lie in Tort or additionally in contract where a director has a contract of employment as it is an implied of contractual term that an employee will exercise reasonable care and skill in the performance of his duties.²⁸ Be that as it may. The position under the CAMA differs from that of the Common Law. Section 308 (1) of the CAMA 2020 introduced professionalism and objective standard of care and skill on the part of a director of Nigerian company, when it provides that: 'every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company, and shall exercise that degree of care, diligence and skill which a responsible, prudent director would exercise in comparable circumstances'.

Unlike the subjective standard at Common Law, the CAMA, 2020 Act imposed the objective professional standard: Comparable degree of care, skill and diligence expected of reasonably responsible and prudent director in a similar circumstance. The professional standard is in line with the enormous powers vested in the company directors under section 87(3) of the (M4 2020). In *Delta Steel Nigeria Ltd v. American Computer Tech Inc.*,²⁹ the court held that since directors and managers control what the company does, the state of the mind of this special class of employees is the state of the company, and thus, the company is bound by the acts of its directors and managers, shareholders and stakeholders of the company ought to have best of services. By

²⁰ Section 313 (3); *ibid*.

²¹ Section 306 (95) of the CAMA 2020.

²² Section 307 of the CAMA, 2020.

²³ Section 306 (5) of the CAMA, 2020.

²⁴ 91989) AC 324.

²⁵ *Ibid*.

²⁶ (1960) 4 All ER 698 711-712.

²⁷ Section 174 of the Act.

²⁸ *Lister v. Romford Lee & Cold Storage Ltd.* (1957) 1 All ER

²⁹ *Secretary of State for Trade and Industry v. Goldberg* 920040 1 BLC 557, 608, per Lewison J.

section 308 (2) of the CAMA 2020, a failure to take such reasonable care renders the directors liable in an action for negligence and breach of duty. It is actually as a way to avoid the liability that the board usually hires professionals as Executive Director of the company.

It is important to state that the starting point is the collective responsibility of the Board for the Collective and Individual responsibility management of the company's affairs, but equally, directors' duties are 'personal and inescapable' duties,³⁰ and so within that collective responsibility, each director must meet the appropriate standard of care, skill and diligence. Much cited on this point is the statement of Lord Woolf MR. in *Re Westmid Packing Services Ltd.*,³⁰ *Secretary for Trade and Industry v. Griffiths* as follows: collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under the English Company Law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them." The standard expected is well stated in the Companies Act, under section 174: (1) A director of a company must exercise reasonable care, skill and diligence. (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with-

- (a) The general knowledge, skill and experience that reasonably be expected of a person in relation to the company, and
- (b) The general knowledge, skill and experience that the director has.

The standard set is an objective minimum standard that of a reasonably diligent person, who has taken on the office of director, set in the context of the functions undertaken, with that objective minimum standard capable of the particular attributes of the director in question.³¹ For example, if a director is a professional person, such as a Chartered Accountant, section 174 (2) of the Companies Act requires him to meet the standard to be expected of a reasonably diligent director earning out the functions carried out by him in that company and having that personal attribute. The personal attributes of the director cannot lower the standard set in section 174 (2) (a) for that would mean that a subjective standard would always apply, determined by those personal attributes. On the other hand, the standard set is of the reasonably competent director in the position undertaken with those personal attributes and the courts will not allow the test to be used to impose unrealistically high levels of skills. For example, non-executive directors of an insurance company can be expected to appreciate the general accounting requirements applicable to insurance companies, but cannot be required to be specialists in sophisticated accounting issues pertaining to insurance companies, even if they possess accounting qualifications.³² While section 168 of the Act appears to be quite a straightforward route for removing a director, in practice, it may not always be an easy thing for ordinary members to achieve. For one thing, a company which is presented with the special notice required by the Act is not actually obliged to convene the necessary meeting to consider the resolution. This means that the members who wish to remove a director may be required, additionally, to muster sufficient support, that is, members representing 10% of the company's paid-up share capital or (in the case of a company without share capital) 10% of its membership - to require the company's directors to convene a general meeting under section 303.³² Alternatively, in the case of a public company,³³ the members may opt to oblige the company to table the resolution at a forthcoming AGM in which case the threshold of support they will need to muster in order to require the inclusion of the resolution on the agenda will be 5% of the total voting rights in the company or at least 100 members with voting rights who have paid up an average of at least £100 each on their holdings³⁴ while the members may have power under section 168³⁵ to remove a director from office, this could prove an expensive matter for the company where the director has a contract with the company entitling him or her to compensation or damages for dismissal during the period of the contract.

3. Consequences of breach of duty not to make Secret Profit, exploit Corporate Assets, Information and Opportunities

The consequences which arise from the above heading is wide and of strict application. It is immaterial that the company also benefited from the secret profit or that the gift was received in good faith.³⁶ The affected director must account for such secret profit and unnecessary benefits³⁷ and may be sued by the company to recover such secret profit or benefit.³⁸ It is immaterial if the director acted *bona fide*. Thus, in *Regal (Hasting) Ltd. v. Gulliver*,³⁹ it was held immaterial that the directors acted in good faith as they saw no way of raising money, when they used their own money to float a subsidiary company and reinforce the company to the level of a good going concern and issued shares to themselves which were later acquired by another company at a profit. The court further held that liability is upon breach of the rule that a director must not make a secret profit out of the property acquired by reason of his relationship in the company. The effect of *section 306 (4) of the CAMA 2020* appears to have stretched the rule further since the unwillingness or inability of a company to pursue a particular business under its Memorandum of Association is not an excuse for the Director to engage in the business and make secret profit without using the fund of the company. Resignation is not also a defense for breach of duty, as he shall still be accountable and can be restrained by an injunction from misusing the

³⁰ (1998) 2 BCLC 646,653.

³¹ *Pelley v. Inland W. Waterways Association Ltd.* (1977) 1 All ER 209.

³² Section 338 CA 2006.

³³ Which is required by law to hold an Annual General Meeting.

³⁴ Section 338 CA 2006.

³⁵ *Ibid.*

³⁶ Section 313 (4) of the CAMA 2020.

³⁷ Section 306 (3); *ibid.*

³⁸ Section 313 (2) *ibid.*

³⁹ (1967) 2 Act 13.

information received by virtue of his previous position.⁴⁰ However, a window of defence is allowed for a director who discloses to the General Meeting his interest before the transaction and before making the secret profit, as he could be exculpated from liability. Otherwise, he shall not escape liability if he declares his interest after making the profit, and he is obliged to account for the profits.⁴¹

Wide Discretionary Powers of Directors

Directors, by virtue of certain provisions of the statute that accord them exclusive powers, even if for a second, to perform certain acts, may abuse that power which will be at the detriment of the company and its members. Accordingly, *section 274 and 275* of the CAMA 2020, which provide for appointment or nomination for appointment of directors by the Board of Directors may lead to abuse of office by the Board of Directors, as there may be the temptation of the intending directors trying to pressure them into accepting bribe, for them to be accepted as the favoured ones. More so, the position of Independent Directors is hallowed and well respected, as they ought to act as watch dogs on the directors. Where the persons they are coming to put checks on are the ones that nominated them for appointment, it will generally affect their input, output and overall independence in the company.

Remuneration of Directors

The provision for the determination of the remuneration of the Managing Director by other Directors under *section 294 of the CAMA 2020* is also not acceptable by the writer. The office of the Managing Director is a well-respected office and his remuneration should not be left to the whims and caprices of the directors, rather an independent body, like the Corporate Affairs Commission should handle such delicate responsibility.

Wrongful Trading

Section 673 of the CAMA 2020 provides that subject to subsection (3), if in the course of the winding up of a company, it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court deems proper. This is a novel provision in our company law and must be applauded. The CAMA 2020, only made provision for fraudulent trading, which is very cumbersome or difficult to prove, because of the criminal mandate of establishing proof beyond reasonable doubt. *Section 658 of the CAMA, 2020* which provides for fraudulent preferences is vague as it was not able to fully define the meaning of "connected persons" under (6). Also, the lack of specificity in defining relevant time under *section 658 (6) of the CAMA, 2020* is still another sensitive issue to be determined. A period of years is no time and ought to be corrected or specified.

4. Negative Attitudes of Directors

Apart from profit making objective, all business concerns share one fundamental objective, that is, to remain as going concern. As businesses strive hard to perpetuate, one of the most significant threats, irrespective of their size and nature of operation is illiquidity and insolvency. Extant evidence shows that in past decades, business failures have occurred in higher rates than at any time. It is also disinteresting to note that during 1990s, certain sectors of Nigerian economy, ranging from Small industrial businesses, financial sector (especially banking industry), and manufacturing sector of the economy experienced overwhelming distress. This eroded the confidence of general public in engaging on long term economic activities, thereby dwarfing economic development. The factors that led to business failure while many economists attributed this phenomenon to high interest rates, recession, squeezed profit, macroeconomic instability, bad political atmosphere, excessive deregulation policies, dubious practices, heavy debt burden, and deteriorated financial discipline, among others. Furthermore, industry specified characteristics, such as government regulation and the nature of operations can contribute to a firm's financial distress. The economic cost of business failure is relatively large. From the academic world various efforts were made still on to devise and suggest ways to prevent directors' laxity or failure as well as provide scientific models that can provide early warning signal of failure before it occurs. Recent studies associate failure to mismanagement and lack of good corporate. In as much as there are many exogenous fundamental causes of corporate failure like: Excessive competition; operation of the business circle; change in public demand; casualties; excessive shift in government policies; socio economic /political unrest, the main concern of this work is on the endogenous factors which include: mismanagement; excessive expenses; inadequate revenue *etcetera*.

Directors fixing humungous Salary

The directors pay heavy salaries to themselves, their relatives, friends, acquaintances, which usually affect the profit balance of the company.

Nepotism in Appointments

The directors do appoint their relations, friends and cronies into top management positions with fat salaries. Most of these persons are not competent and cannot justify the heavy salaries and perks of office which they enjoy.

They do not add any value to the company; rather they act as drain pipes attached to suck away the companies' finances.

Constant Overseas Trips

It is not uncommon to witness frequent journeys outside the shores of the country. Their journeys are embarked using first class tickets and lodging in five-star hotel. All these extravagant expenses, take their tolls on companies' income.

Awarding mouthwatering contracts to their companies or companies where they have interests

⁴⁰ Section 306 (5) of the CAMA 2020.

⁴¹ Section 306 (6).

In order to achieve this, the directors manipulate the award of contract to an inflated or exorbitant amount. All these are aimed towards receiving high percentage of the contract awarded to friends or to maintain a family relationship or woo a difficult paramour into submission. However, if it is to their personal companies, it will amount to financial pay out to the directors and also a depletion of the income of the company. The act of awarding contracts to themselves, family members, paramours or friends is a serious conflict of interest with that of the company and indirectly that of the shareholders who are invariably affected because of lack of declaration of dividends due to reduced profit declaration.

Non-Collateralized Loans

The directors sometimes treat the savings of the customers as their private fund which they can allocate without due process. **Golden Parachute** This is fat severance benefits. It includes huge stock or share options which these directors award themselves to the detriment of the company.

Entrenchment Shareholding

Most directors are entrenched because of their shareholding interest based on the concept of par-voting which has made it difficult to remove such directors from office.

Refusing Declaration of Dividends

Most directors will rather plough back profits; expand corporate control by buying new subsidiaries than declare profits.

Fraudulent manipulation of figures

Some directors may resort to publishing false manipulated accounts, depicting profitability and good financial performance when actually there was nothing to show for it.

Taxation

In order to avoid much tax, the Board of Directors may decide to pay very high salaries, allowances and compensation to themselves. This is because compensation is tax deductible, but this works at the expense of the shareholders, who prefer high profit declaration which may culminate to dividend payments and bonus.

Disputes

Most directors are not trained in the proper means of resolving disputes. This sometimes makes them to destroy the peaceful relationships they enjoy with the shareholders, creditors and other members of the company, once there is any iota of conflict.

Inadequate Revenue and over Capitalization

This can be traceable to promotion or later financing, perhaps to over expansion. The sales of corporation securities may have been poorly timed, the financial plan may be ill fitting, or subsidiaries or other units may have been acquired at unwarranted costs.

Excessive Floating Debt

This could be induced through malfunctioning of the credit department, through expansion of the business without provision for adequate working capital, through the acquisition of fixed assets by short term notices, or even by the effect of inadequate banking facilities.

Unwise Dividend Policy

This often goes hand in hand with inadequate maintenance, may so badly deplete the resources of a concern as to show the seeds of failure. Funds which should be used for maintenance or as reserves are sometimes distributed to shareholders in order to make "good news" which may turn out to be bad news to the company.

Fraud and embezzlement

Fraud may arise in many ways. It may consist simply of embezzlement, which if very serious may set off spark of failure. The sale of properties, directly or indirectly by directors or their associates to the corporation at highly inflated value may cause failure to the corporation.

Income Smoothing

Management oftentimes engages in income smoothing activities in order to post higher profit figure than expected, this will in turn earn those rewards and bonuses. Smoothing income in the long run affects business operations and lead to failure.

Weak Corporate governance

Corporations are artificial beings created by law. They hold assets, conduct transactions, and sue and are sued. The business of corporations is usually managed by the Board of Directors appointed by owners of the company. Corporate Governance should provide a structure and processes within which shareholders, directors and management conduct a business of a concern with the ultimate aim and objective of realizing long term shareholders' value while taking into account interest of other stakeholders. Good corporate governance demands not only transparency, accountability and probity but, also, a sense of conviction and commitment to ensure that the interests of all parties are protected. Weak corporate governance has contributed too many business failures.

Lack of skills

This could be across the whole of the board or specific to an individual, where the skill set isn't broad enough or lacks the requirements needed to direct the business or contribute to good governance. Recruitment of any future board members should address this issue as a matter of urgency, by first conducting a skills audit to help ascertain the required skills needed in a new recruit. The need for a leader to be in tune with company's employees, to show empathy and reflect a firm's value to the outside world is more important than ever.

Lack of confidentiality or trust

Leaking unauthorized 'sharing' of information outside of the board is unlikely to cause anything other than problems, especially in a world where reputational damage is a key risk for all organizations. Board members need to be aware of the Codes of Conduct in place and it should be made clear what information should and shouldn't be kept confidential. **Conflicting Agendas**

Boards led by individuals who do not have the best interests of the business at heart (or indeed who do not have the right skills) and are motivated by a personal or political agenda, are likely to incite conflict and ultimately impact upon the running of the business itself. It is

imperative that directors are aware and reminded of their legal duty to act in a way that is most likely to promote the success of the company for the benefit of its members as a whole and not for any other reason, personal or otherwise.

Lack of Order and Respect

It's important that Board members operate in an orderly and respectful way in their dealings with each other, staff and other key stakeholders; that the firm's key values are reflected both inside and outside of the firm. Ensuring order and respect helps to build a framework for the business and to hold the Board itself to account.

Hostile Environment

A hostile atmosphere will not enable a Board and its members to thrive and drive the business in the right direction. Creating a respectful, open, hardworking culture, in order to create a stable environment from which to govern, should be a priority for every Board.

5. Way forward and Remedies for the Effective Management of the Company

Due to the potential issues associated with an ineffective Board of Directors, a Board's continued effectiveness is a key risk facing any organization. An ineffective Board of Directors can lead to a multitude of problems, from the business failing to meet its objectives, poor management and failure to seize opportunities, through to poor profits or regulatory failure. Some of the actions to be taken by the company to ensure the efficacy of its directors include:

- i) Holding effective meetings.
- ii) Setting out clear roles for each Board member.
- iii) Putting working groups and committees in place to support the work of the Board.
- iv) Effective Board Policies. It is helpful to create some core policies that clearly state how the Board works.
- v) Having an Annual Plan of Work for the Board, so that members are fully aware of what is expected of them.

Remedies against a Defaulting Director

Any duty imposed on Directors shall be enforced against the Director by the company. Thus, the following remedies may be pressed against the defaulting Directors.⁴²

- a) Injunction as remedy may be primarily adopted to prevent a director from further breach or where a breach is threatened but has not yet occurred. Moreover, the prospect of being sued is in itself a substantial deterrent for many corporate executives or being enjoined for failure to perform one's duty. The court can use its injunctive power in imaginative way such as to improve the management of corporation either by removal⁴³ of a fraudulent Director or in pursuance of their inherent equitable powers. Therefore, suits for equitable relief can motivate a director to act prudently and in the best interest of the company.
- b) Damages or Compensation under the Common Law. Damages are for breach of duty of care, whereas compensation is the equitable remedy for breach of fiduciary duty. The distinction between these terms seems to be vague as indicated in *Barlett v. Barclays Bank Trust Co*⁴⁴ where the court held that the obligation of a fiduciary to restore the asset of which he had denied the beneficiary may involve payment of a considerable larger sum than what would normally be payable as damages for loss caused by a tort or breach of a contract.
- c) Revision of contract in which the Director is interested. Where there has been an arrangement, which derogates from the rules regarding entering in to contract in which the Director is interested, may be avoided at the instance of the company, provided *restitution in integrum* is possible and the rights of a *bona fide* third party havenot accrued.
- d) Accounting for Profit: A Director who makes secret profit out of the performance of his duty without the knowledge or consent of the general meeting will be held accountable for the profit made from such transaction. The company may claim an account of any profit made by Director whether or not he rescinds the contract, if the profit arises out of the contract with the company.

⁴² Section 305 (9) of the CAMA, 2020.

⁴³ Section 288 of the CAMA, 2020; *Oni v. Cardbury Nigeria Plc* (2016) All FWLR (Pt. 827). 605 SC: *Ighofose v. Sipol Agriculture and Fishing Industries Ltd* (2017) LPELR-46237; *U.O.O. (Nig) Ltd v Okafor & Ors* (2020) LPELR- 49570