

APPRAISING THE FUNCTIONALITY OF DIRECTORSHIP IN CORPORATE MANAGEMENT IN A DEVELOPING ECONOMY: THE CASE OF NIGERIA*

Abstract

The trite rule underlying the operations of companies is that a company, upon incorporation, has its own legal identity, distinct from that of its shareholders and other stakeholders. Thus corporate purists hold the view that if a company, for instance, is proceeded against for its indebtedness, only the assets of the company can be sequestered to satisfy the debt of the company pursuant to a judgment. The implication is that if a company is insolvent, its debts may well go unsatisfied and creditors will take pot luck in the recovery of its loan. The creditors cannot go beyond this to attach the assets of the individual shareholders. This is predicated on the concept of separate legal personality which cloaks corporate veil over the company. The paper is aimed at appraising the functionality of directorship in corporate management. The paper identified the challenges of inappropriate persons being appointed directors, the undefined and steady remuneration schedule of directors, the malfunctioning of multiple directorship, and the presumption of due appointment of a director as the causes of the malfunctioning of directors in the management of companies in Nigeria. It is therefore recommended that relevant provisions of the CAMA dealing with those challenges as discussed above be amended. For instance, clear qualifications of persons to be appointed company directors touching on educational qualification, morality and experience should be stipulated by the CAMA to create a propensity for good corporate management. The artificial nature of a company demands that the personalities of the directors as alter ego of the company should be propitious to successful operations of a company.

Keywords: Director, Corporate, Management, Developing and Economy

1. Introduction

Incorporated company is in law a different person altogether from the subscribers to its memorandum. Thus, upon incorporation, the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company, including the power to hold land, and having perpetual succession and a common seal, 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. It may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by the law.¹ A limited liability company has an entity separate from its proprietor. Once incorporation takes place, the company becomes a separate legal entity from those who incorporated it and there is no personal liability for any debt incurred by company.² However, the company so incorporated is an artificial person in contrast with a natural person. It is a distinct legal personality and distinct identity from its shareholders, subscribers and promoters.³ Accordingly, the company acquires enforceable legal rights, and become subject to enforceable legal obligations and liabilities. In specific terms, a company can own property, can be a party to a contract, can act tortuously, can be a victim of tortuous behavior, can commit a crime, can be the victim of a crime, can sue and be sued, has a nationality, has a domicile, and has human rights.⁴

Incorporation clothes a company with legal personality capable of exercising the powers of a natural person of full capacity.⁵ Thus, a company can own property, can be a party to a contract, can act tortuously, can be a victim of tortuous behavior, can commit a crime, can be the victim of a crime, can sue and be sued, has a nationality, has a domicile, and has human rights.⁶ The legal incidents or consequences of incorporation are encapsulated in section 37 of the Companies and Allied Matters Act (CAMA). However, since it is not a natural human being and cannot act in *persona*, the necessity arises for human agents. These human agents exist within the company in

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¹ Per Lord McNaughton in the case of *Salomon v. Salomon & Co. Ltd.* (1897) AC 22.

² In the instant case, the property mortgaged is the property of the 2nd respondent who is an individual, not a company. It cannot therefore be said that since the property was used to secure the debt of the company, it is deemed to be a company property. See also the cases of *UBN v Oharhughe* [2000] 2N.W.L.R.(Pt. 645) 495; *Idi v Yau* [2001] 10 N.W.L.R. (Pt. 722) p.640.

³ *Aso Motel Kaduna Ltd. v. Deyemo*, (2006) 7 N.W.L.R. (Pt. 978), p. 87 at 93.

⁴ S. McLaughlin, *Unlocking Company Law*, Fifth Edition (United Kingdom, 2013), pp. 71-72.

⁵ Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2004, section 38.

⁶ S. McLaughlin, *Unlocking Company Law*, *op cit*, pp. 71-72.

different categories according to their functions and importance. The company director is one of such agents and he occupies such an important position in the company's organisation so that he is equated to the mind and brain of the company.⁷ CAMA bestows on him, the management powers in the company and so he is expected to manage the company for the good of all the stakeholders in the company.⁸

Occasionally, the issue arises as to who amongst the various agents in the company can be regarded as a director. To answer this, there is a need to consult statutory judicial and existing learned literature. Unfortunately, CAMA's definition of the director is functional in nature. A company director in Nigeria therefore includes anybody who occupies the position of a director at any point in time in the company and this definition extends to cover a shadow director.⁹ A shadow director according to CAMA consists of directors not formally appointed and without official record of appointment and removal. They include persons on whose instructions and directions the directors are accustomed to act. The test is whether the company's existing directors are obliged to take the direction and instructions of the person. The removal of a shadow director is deemed once the Board of Directors is no longer accustomed to act on his instructions.¹⁰

Judges in different jurisdictions have made notable pronouncements on the identification of the director amongst the different agents in the company. They have accordingly identified the director as the *alter ego*, the brain, the mind,¹¹ and the watchdog¹² of the company. Others have described them as commercial men to whom the company has given the responsibility of managing the affairs of the company on behalf of all the stakeholders.¹³ The Nigerian Supreme Court in *AREC Ltd v. Amaye*¹⁴ described the company director as a person, who because of his unique position in the company is usually referred to as the company's *alter ego*, the head and brain of the company. It was observed in the case of *Bolton (Engineering) Co. Ltd. v. Graham & Sons*,¹⁵ that the directors represent the directing mind and will of the company, and control what it does. Directors, in that sense, become the brain of the company, which harbours the enormous powers of the company. The Nigerian Supreme Court noted in the case of *Longe v. First Bank of Nigeria PLC*,¹⁶ that the employment of a director is one with statutory flavour, whereby the employment is protected by statute. Thus, the office is of great importance to the law in the organization of the company. Thus, the decisions as to who qualifies to occupy the office, how he gets appointed, the powers he may wield as well as the extent to which he may wield them, is regulated by law to a certain extent.

Generally, there may be different types of directors in a company. Directors may be full-time, part-time, executive or non-executive. A company may have executive directors and the non-executive directors who are remunerated by way of allowances on attendance of meetings.¹⁷ The executive directors who are full time employees of the company are persons appointed to run the day-to-day affairs of the company. Their powers are usually circumscribed by the articles. These directors hold service contracts which specify the schedule of his duties. Therefore, executive directors double as both the *alter ego* as well as the employees of the company. This presupposes that the executive directors constitute the board meeting where policy directions are formulated, and proceeds in the implementation of the policy thrust of the company.¹⁸ The non-executive directors who are remunerated by way of allowances on attendance of meetings are not involved in the day-to-day management of the company.¹⁹ They are constituted primarily to advise on issues of management. Unlike the executive directors, non-executive directors are not employees and so are not supposed to resume duties at the company. The chairman of board of directors is elected from this category of directors. This implies that non-executive directors must attend board meetings. They do not have contract of employment and so do not receive salaries. The remuneration paid to them are in the nature of allowances fixed by resolution of the Annual General Meeting, and they can only receive same if they attend meetings of the board of directors.²⁰ Duties and responsibilities in the company are of a part-time nature. By this, non-executive directors can engage in some other businesses whether of part-time or

⁷ Per Viscount, L.C. in *Lennards Carrying Co v. Asiatic Petroleum Co Ltd* [1915] A.C. 705 and Per Denning L. J. in *Bolton (Eng) Co. Ltd. v. Graham and Sons* [1956] 3 All E.R. 624.

⁸ CAMA, section 63.

⁹ CAMA, Section 567.

¹⁰ CAMA, section 567; *Secretary of State v Becker* (2003) B.C.L.C.555.

¹¹ Per Viscount L.C., in *Lennards Carrying Co. v Asiatic Petroleum Co. Ltd* (supra), *Bolton (Eng) Co. Ltd v Graham & Sons* (supra), *Yesufu v Kupper Int. N.V.*, (1996)5 NWLR (pt. 416) 17, at p. 29.

¹² *Re: The North Australian Co. Ltd* (1891)6 IJ Eq. 129 at p. 135.

¹³ Lord Cransworth, in *Aberdeen Railway Co. v. Blackie Bros*

¹⁴ (1986) 2 NWLR (pt. 31) 653.

¹⁵ (1957) 1 Q.B. 159.

¹⁶ (2010) All FWLR 258 at 307, paras. D-F.

¹⁷ *Longe v F.B.N. PLC* [2016] ALL FWLR ,46

¹⁸ Companies and Allied Matters Act, *op. cit.*, section 244(1).

¹⁹ *Longe v F.B.N. PLC* [2016] ALL FWLR ,46

²⁰ *Ginyne Plc v Saunders* (1990) 2 AC, 663 HL.

full-time.²¹ However, this work holds that the utility of inclusion of non-executive directors on the boards may be limited as shown in *Re Polly Peck Int. Plc (No. 2)*²² Also, the court in *Re, Astec (BSR) Plc*²³ have held that their independence should be limited to the executive directors and cannot be stretched to controlling shareholders. This judgment is practically convenient since the non-executive directors are oftentimes the controlling shareholders in their companies.

The concept of directorship is highly fundamental to the life of the company. The directors derive their powers from a delegation by the members, and they constitute the management team within the company. They also represent the brain, the nerve centre and the will of the company. This enormous control within the company led Hicks²⁴ to describe the company director as a modern day prince, a jet age aristocrat whose control of the proxy machinery assists in his self-perpetuating schemes. The director must, in keeping faith to the sanctity of his office, observe his duties to the company conscientiously. In spite of his influence and power, the director is to have regard to the purpose for which the power was delegated to him under the Act.²⁵ In the unfolding discuss, the paper shall attempt to situate the principal features of a company, which determine its legal capacity.

2. Situating the Separate Legal Personality of a Company

The principle of separate legal personality posits that a company is in law a different person altogether from the subscribers to its memorandum although it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by the law.²⁶ This rule was followed by the court in *Aso Motel Kaduna Ltd. v. Deyemo*,²⁷ where the court held that an incorporated company is described as an artificial person in contrast with a natural person. It is a distinct legal personality and distinct identity from its shareholders, subscribers and promoters. Also, in *A.I.B. Ltd, v Lee & Tee Ind. Ltd.*,²⁸ the court held that a limited liability company has an entity separate from its proprietor. Once incorporation takes place, the company becomes a separate legal entity from those who incorporated it and there is no personal liability for any debt incurred by company. In *Okomu Oil Palm Co. Ltd. v. Isehienrhim*,²⁹ the court held that it is immaterial if a member has a controlling number of shares in a company. The court has held that having a controlling number of shares in a company is not synonymous with its ownership once it is incorporated as an entity of its own and having its own separate legal existence.³⁰ Notably, the separate legal personality is therefore a core attribute of incorporation which endows a company the advantages requisite for commercial and industrial enterprise as was held in *Abacha v A.-G. Federation*.³¹ Here, the court held that by virtue of section 37 CAMA, an incorporated company is a creation of law, clothed with independent legal personality from the moment of its incorporation. It has a distinct and separate personality from those that labored to give birth to it. A company registered is a separate and distinct entity from anyone of its shareholders, no matter how many shares he may hold.³² Even a government owned Limited Liability Company possesses a legal personality of its own. It can sue and be sued in its name. Its shareholders, even if the major or sole shareholder is the Government, cannot be sued for debt incurred by the government.³³

Akin to the separate legal personality principle is the limited liability of members of a company at the exclusion of unlimited companies. This is given statutory cognizance in section 65 CAMA. Accordingly, any act of the members, the board of directors or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person. Accordingly, the court held that by virtue of the provision

²¹ *Longe v. F.B.N. Plc* (2010) 6 NWLR (Pt. 1189) p. I; Companies and Allied Matters Act, *op. cit.*, section 244(1), sections 247, 248 and 249.

²² [1994] 1 BCLC 574.

²³ [1999] B.C.C. 59

²⁴ A. Hicks, 'Disqualification of Directors' *Journal of Business Law*, 1988, at p.27.

²⁵ CAMA, section 63(3).

²⁶ (1897) AC 22, per Lord Menaughton in the case of *Salomon v. Salomon & Co. Ltd.*

²⁷ (2006) 7 N.W.L.R. (Pt. 978), p. 87 at 93.

²⁸ [2003] 7 N.W.L.R. (Pt. 819) p. 366.

²⁹ (2001) 6 N.W.L.R. (Pt. 710) 666 ;

³⁰ *Ramanchandi v. Ekpenyong* (1975) 9 NSCC, 269.

³¹ [2014] 18 N.W.L.R. (Pt1438) p. 31 at 35.

³² In the instant case, even though the companies listed for investigation are owned by the appellants' family, the company are at law different persons altogether from the subscribers. The companies are not in law the agent of the subscribers or trustees of them. The subscribers as members are not liable in any shape or form, except to the extent and in the manner provided by the CAMA.

³³ *Ashibuogwu v A.-G., Bendel State* [1988] 1 N.W.L.R. (Pt. 69) p. 138.

of section 65 of the Companies and Allied Matters Act, a company may be liable in crime to the same extent as a natural person. Thus, a company could be prosecuted for the common law offence of conspiracy to defraud even though *mens rea* is an essential element of the offence.³⁴ The company is the proper plaintiff in respect of injuries done to it. No individual will be allowed to bring action in respect of acts done to the companies.

However, the company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing directors, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of such power or of the irregularity. Besides, if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's memorandum. Thus, the court has held in the case of *C.B. Ltd. v. Intercity Bank Plc*³⁵ that the officers and members of an incorporated company are covered by the company's veil of incorporation and that veil cannot be lifted for the purpose of attaching legal responsibility or liability to its officers who are carrying on the usual business of the company, nor the individual members except to the extent of their unpaid shares or the amount they each undertook, *ab initio*, to pay in satisfaction of the company's debt in the event of the company being wound up. However, in *Cooperate Bank Ltd. v. Obokhare*, the court held that a director or managing director of a company shall be held liable or responsible when it is alleged in the statement of claim and it is supported by concrete evidence that the director or the managing director is a surety or a guarantor to the trade debt of the company.³⁶ The court has further held in *Idi v. Yau*³⁷ that it cannot therefore be said that since the property was used to secure the debt of the company, it is deemed to be a company property. On the contrary, there is no personal liability for any debt incurred by company.

3. The Artificial Nature of Company and the Delegation of Powers to its Organs

The recognition of the separate legal personality of a company draws out the artificial nature of the personality of a company. The company, being an artificial legal person therefore, carries out its business activities through the human elements institutionalized as the organs of the company. The principal organs are the board of directors and the members in a general meeting. The organic theory in company management examines the distribution of and exercise of authority in the management of the affairs of a company. A company is designed by law to act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors.³⁸ In drawing the analogy of a company, the courts in *U.T.C. (Nig.) Plc v Philips*,³⁹ and *Batraco Ltd v Spring Bank Ltd & anor*⁴⁰ observed as follows:

A company may in many ways be likened to a human body. It has a brain and nerve centre which control what it does. It has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

The directors, on the other hand, are persons duly appointed by the company to direct and manage the business of the company.⁴¹ The first directors are usually appointed by the subscribers to the memorandum. Subsequent directors are duly appointed by the members in a general meeting who stand to increase or decrease the number of directors.⁴² The directors must act as a board for their actions to be imputed to the company except where the board delegates its functions or any of its functions to any one of them, in which case the director becomes an

³⁴ *Abacha v A.-G. Federation, Supra.*

³⁵ (2009) 15 N.W.L.R. (Pt. 1165) p. 445 at 450; *Agbonmagbe Bank v. G. B. Ollivant* (1961) 4 All NLR. p. 116; *Mailafia v. Veritas Insurance* (1986) 4 N.W.L.R. (Pt. 105) 558; *Ogbodu v. Quality Finance Ltd.* (2003) 6 N.W.L.R. (Pt. 815) 147; *Kurubo v. Zach-Motishn (Nig.) Ltd.* (1992) 5 N.W.L.R. (Pt. 239) 102; *Yusuf v. Adewuyi Brothers* (1991) 7 N.W.L.R. (Pt. 201) 39; and *Tuakli v. N. B. C.* (1970) 2 All NLR 147.

³⁶ (1996) 8 N.W.L.R. (Pt. 468) 579.

³⁷ (2001) 2 N. W. L. R. (Pt. 645) 495.

³⁸ Companies and Allied Matters Act, Cap. C20 Laws of the Federation of Nigeria, 2010, section 63(1).

³⁹ (2012) 6 N.W.L.R. (Pt. 1295) C.A. 136 at 147; *Delta Steel (Nig.) Ltd v A.C.T. Incorporation* [1999] 4 N.W.L.R. (Pt. 597) 53

⁴⁰ [2015] 5 N.W.L.R. (Pt. 1451) p. 107 at 109.

⁴¹ Companies and Allied Matters Act, *op cit*, section 244.

⁴² *Ibid.*, sections 247-249.

agent of the company. In the case of *P.A.I.S.C. Ltd v Jkpeez Impex Co. Ltd.*,⁴³ the court held that a director of a limited liability company is not absolved from liability for action taken on behalf of the company without knowledge and consent of other directors. Although a limited liability company is a legal entity that can sue and be sued, its activities are carried out by its directors. Where however, a director of a company takes action on behalf of the company without the knowledge and consent of other directors, he cannot absolve himself from liability which arises from that action.

It is the view of the traditional legal purists that the ultimate control of the affairs of a company rest on the members in a general meeting. This view dwarfed the position of directors as mere agents of the company prone to removal at any time. This view was overtime held up to derision as it was capable of being exploited by unbridled members to bleed the company to death.⁴⁴ Under the common law, a set of democratic shareholder controls over the board was in vogue. The intended framework of shareholder decision-making and management accountability would, however, be undermined if the board were free to alter the composition of the majority in order to neutralize shareholder power. The most obvious form of manipulation is for the directors to allot additional shares to themselves or their nominees in order to guarantee a majority of votes.⁴⁵ Note that any act of the members in general meeting, the board of directors and of a managing director while carrying on in the usual way the business of the company shall be reputed as the act of the company itself. Accordingly, by the decision in *C.B. Ltd. v. Intercity Bank Plc* (2009) 15 N.W.L.R. (Pt. 1165) p. 445 at 450, a company shall be criminally and civilly liable thereof to the same extent as if it were a natural person.⁴⁶

Undoubtedly, by See section 63(2) CAMA, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles. Also, by section 63(3) CAMA, the residual power of the company is also vested on the board of directors. In *Batraco Ltd v Spring Bank*,⁴⁷ the court stated that by virtue of section 63(1) of CAMA, a company shall act through its members in general meeting or its board of director or through officers or agents, appointed by, or under authority derived from the members in general meeting or the board of directors. A company itself cannot act on its own person, for it can only act through its directors, merely the ordinary case of principal and agent. The director acts as agent of a company and where an agent is liable, those directors will be liable and where the liability would attach to the principal and the principal only, the liability is the liability of the company. Accordingly, the court in *Batraco Ltd v Spring Bank* held that the board of directors acting for a company does not require authorization from the company given to them at the annual general meeting of the company. However, for other persons beneath the board of directors, the power to do so must be given to them by the company at its annual general meeting. The provisions of section 63 CAMA seem to pontificate that if the articles of association give directors the power to manage the company and do all such things as are not by the Act or the articles required to be exercised by the members in general meeting, then the members are forbidden from interfering in the exercise of such powers. In the case of *Shaw & Sons Salford Ltd. v. Shaw*,⁴⁸ members in general meeting resolved that proceedings which have been instituted by the directors in the company's name be discontinued. The articles had clearly delegated management of the affairs of the company to the directors. The court therefore held the resolution of the general meeting invalid. The same position was earlier assumed by the court in *Automatic Self-Cleaning Syndicate Co. Ltd. v. Cunningham*.⁴⁹ Here, the company's articles of association vested the management of the business and the control of the company in the directors. The articles of association of the company also specifically empowered the directors to sell any property of the company on their own determined terms and conditions. The members in general meeting subsequently passed a resolution directing the board of directors to sell the company's undertaking to a new company specifically formed for that purpose. The directors however disapproved this resolution in pursuance of the provision of the articles of association of the company adumbrated earlier. The court held that the members in general meeting could not compel the board of directors to act contrary to the stipulations of the articles. The modern rule therefore appears to give strength to the terms of Table A of the Companies & Allied Matters Act which sets out a typical example of the articles of association. Obviously, the members in general meeting cannot give directives on how the affairs of the company are to be conducted. Therefore, the acts of the directors in conducting the business of the company cannot lightly be overruled by the members in general meeting. In

⁴³ [2010] 3 N.W.L.R. (Pt. 1182) p. 441 at 449.

⁴⁴ *Isle of Wright Railway Co. v. Tahourdin* (1883) 25 Ch. D 320.

⁴⁵ J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press, 1993) p. 137.

⁴⁶ Companies and Allied Matters Act, *op. cit.*, section 65.

⁴⁷ [2015] 5 N.W.L.R. (Pt. 1451) p. 107 at 109.

⁴⁸ (1935) 2 KB 113.

⁴⁹ (1906) 2 Ch. 34.

Odutolu Holdings Ltd. v Ladejobi,⁵⁰ the court held that by virtue of section 63(3) CAMA, the directors of a company have the power to authorize that actions be instituted to protect the interest of the company.

This position is however not a full representation of the prevailing law. The members in general meeting still have reserved power to exercise control over the directors where they appear to manage the affairs of the company in a manner not appealing to the members of the company. The reserved powers as provided in section 63(5) were further elucidated in the case of *Odutola Holdings Ltd. v. Ladejobi*⁵¹ to the effect that the members in general meeting may:

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

4. The Directorship as a Corporate Governance Mechanism

Corporate governance therefore provides the framework for the attainment of a company's objectives. It improves a company's governance structures and processes thereby helping to ensure quality decision making and enhance long-time prosperity of companies. Corporate governance embodies the system of rules, practices and processes by which a company is directed. Corporate governance essentially involves the balancing of the interest of the numerous stakeholders in a company, including the shareholders, suppliers, creditors, management, customers, government and community. Corporate governance structure is built upon the principal-agent relationship between shareholders, directors and or the management. Thus, the shareholders appoint the board of directors which set the business objectives and directions while the day-to-day running of the affairs of the company is conducted by the management led by the managing director. The board of directors therefore becomes accountable to the shareholders otherwise referred to as the members in general meeting. Under the Nigerian company law practice, the principal organs on corporate governance are the board of directors and the shareholders/Members in General meeting.⁵² The Companies and Allied Matters Act, as the major law regulating corporate governance in Nigeria, provides pertinent mechanisms for corporate governance. These mechanisms include the appointment of directors by the company, removal of directors by means of ordinary resolution, duties and liabilities of directors, provisions for auditors and audit committee mandatory involvement of shareholders in critical corporate decisions and minority protection and investigation of companies. The board of directors and members in general meeting play significant roles in the governance of companies in Nigeria. The board of directors exercises management power in the company while some corporate decisions cannot be taken without the resolution of members in general meeting.⁵³

The Companies and Allied Matters Act (CAMA) mandates every company in Nigeria to have at least two directors. Whenever there is a reduction in the number of directors below this statutory minimum, the company is expected to appoint new directors to make up the shortfall or cease to do business. Failure to do this renders the directors or members who knowingly carry on business with this defect liable for the debts and liabilities incurred within the period.⁵⁴ Generally, the first directors are 'determined' by the subscribers to the memorandum of association. By section 247, such appointments should be in writing and the directors may be named in the articles of association. If all the directors and shareholders are dead, their personal representatives or a creditor may apply to the court to convene a meeting for the purpose of appointing new directors.⁵⁵ CAMA has not stated the process through which the determination of the first directors is to be made, but the evidence of such a determination must be in writing according to section 247. It follows logically that if determination is made orally or in any other way other than in writing, it is invalid. The Act seems to be more concerned with publicising those who have been appointed rather than interfere with the appointment process.

Apart from the first directors who are 'determined' by the subscribers to the memorandum of association, subsequent directors are elected or re-elected by company members at the annual general meeting.⁵⁶ This power

⁵⁰ (2006) 8 M.J.S.C. p. 7 at 73.

⁵¹ (2006) M. J. S. C. P. 70 at 73.

⁵² E.A. Udu, *Principles of Company Law and Practice in Nigeria* (Lagos: Mbeyi & Associates (Nig.) Ltd, 2017) p.164.

⁵³ Y.H. Bhadnus, *Corporate Law Practices*, (Enugu: Chenglo Limited, 2009), p. 158; Companies and Allied Matters Act, Cap. C20 Laws of the Federation of Nigeria, 2010, section 63(3).

⁵⁴ CAMA, section 246.

⁵⁵ CAMA, section 248(2).

⁵⁶ CAMA, Section 245(1) see also, *Worcester & Corsery Ltd v. Witting* [1936] Ch. 640.

is expected to be exercised *bona fide*, for the benefit of the company as a whole,⁵⁷ otherwise the court may interfere with such exercise. The court demonstrated this power in *Theseus Explorers N.L. v. Mining and Associated Ind. Ltd.*⁵⁸ It issued an interim injunction to prevent the election of certain persons as directors because it was obvious that they intended to use the company's assets for the benefit of the majority shareholders. In the United Kingdom, section 154 of the Companies Act 2006 provides that public companies should have two directors while a private company can have only one director. Whenever the number falls below two, the director of a public company is only permitted to act for the purpose of appointing another director.⁵⁹ The 2013 Indian Companies Act is more precise than CAMA and the English Companies Act. It seems to be more in line with the needs of modern realities in company practice. Section 149 of the Act expressly indicates that only individuals can be appointed company directors. This in effect excludes the appointment of a corporate body to the board of another corporate body. It provides for a minimum number of three directors for public companies, two for private companies and one for a one-man company.⁶⁰ Interestingly, it provides for a statutory maximum of fifteen directors and requires each board to have at least one female director.⁶¹ The Act further provides in 149(3) that at least one director on the board must be a person who has stayed in India for a total period of one hundred and eighty-two days in the year immediately preceding the appointment. The effect of this is that both Indians and non-Indians may be appointed company directors in India provided they have met the residency criteria.⁶² The Act considers as vital the inclusion of independent directors on the board and so mandates every listed public company to have at least one third of its directors as independent directors.⁶³

The importance of the inclusion of independent directors on the board of public companies need not be over-emphasized. The inclusion of such a category of directors on the board encourages the board's independence and balance. Regulation 4.3 of the Code of Corporate Governance for Public Companies in Nigeria recommends that majority of the members on the board of a company should be non-executive directors out of which at least one should be an independent director. The OECD principles⁶⁴ states that in order for a board to discharge its functions objectively and independently, it should have sufficient members who are independent of the executives. Unfortunately, despite the advantages of independent directors on the board, CAMA is silent on the issue neither has it made any provision for the appointment of female directors like the Indian Act. The Code which recommends the appointment of at least one independent director is only persuasive. It is thus suggested that provisions of the code should be incorporated into the Listing Rules even if peripherally so as to encourage companies listed on the Nigerian Stock Exchange to comply with its provisions.⁶⁵ CAMA also makes no provisions for the maximum number of directors. It is this researcher's opinion that this is better left for the articles to determine in line with the size and business of the company, and also in accordance with section 249(3) of CAMA. The mandatory inclusion of female directors on the board in Nigeria is highly recommended as this would improve objectivity and gender balance.

Section 249 CAMA, gives the directors power to elect new directors to fill casual vacancies on the board created by reason of death, resignation, retirement or removal of a director. This is however subject to the approval by the annual general meeting.⁶⁶ Both sections 248 and 249 tend to suggest that both the board of directors and the general meeting have concurrent powers to appoint subsequent directors. This seems to be the general presumption. The Court of Appeal in *NIB Investment W/A v Misore*⁶⁷ supported this when it held that the appointment of directors is the business of the general meeting or that of the board of directors. Unfortunately, these two sections seem to introduce a clash between the board and the general meeting. The pertinent issue here is how to know when section 248 applies for members' appointment of directors and when section 249 applies for directors to appoint other directors. Unfortunately, CAMA does not define the phrase 'casual vacancy'. Thus, it is taken to imply vacancies created by death, resignation, retirement or removal as stated in section 249, this researcher wonders which vacancies the members can elect directors to fill under section 248.

⁵⁷ *Re H. R. Harmer Ltd* [1959] 1 WLR 62.

⁵⁸ [1973] Q.D.R. 81 (Queensland S. C.).

⁵⁹ *Channel Collieries Trust Ltd v. Dover St. Margaret's RY. Co.* [1914] 2 Ch. 506.

⁶⁰ Indian Companies Act, Section 149(1)

⁶¹ *Ibid.*

⁶² Indian Companies Act, 149 (4)

⁶³ A. C. Ghrana, 'Appointment and Qualification of Director: Law, Governance, Responsibility', www.aishonghrana.me/2013/04/12, accessed on 28th October 2019.

⁶⁴ Principle VI.E.

⁶⁵ Girvin, *et al.*, *op cit.* at p. 403 where they acknowledge that the UK Combined Code has been tangentially incorporated into the listing rules so that listed companies are required to declare their compliance levels.

⁶⁶ CAMA, section 249(2).

⁶⁷ (2006) 4 NWLR (Pt. 969) 172 at 199.

5. Fiduciary Duties of a Director

Directors are the most important officers of the company, and they constitute an organ of the company invested with the power of administration of the company. The duties are the obligations the directors owe the company, and they arise from the nature of the relationship between the directors and the company. Directors are trustees of the company's moneys, properties and their power. Therefore, they are expected to account for all the moneys over which they exercise control and shall refund any moneys improperly paid way. Directors are obliged to exercise their power honestly in the interest of the company and all the shareholders, and not in their own or sectional interests.⁶⁸ Directors may also be regarded as agents of the company when acting within his authority and powers under part III (ss. 63-78) CAMA.⁶⁹ The duties of directors are imposed on them as individual directors or as a board and they include the following:

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

Note that apart from situations where the individual interest of a shareholder is affected, the fiduciary duties of a director(s) are owed to members of the company as a body. Thus, 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. The director is also expected to perform his duties in such a manner as a faithful, diligent, careful and ordinary skillful director would act in the circumstances.⁷⁰ In the instant case, the Supreme Court held that the directors of a company must in the exercise of the management power and duties conferred upon them by s. 63(3) CAMA adhere strictly to the statutory provisions which enjoin them to consider the interest of the company as paramount. Directors shall exercise their powers for the purpose for which it is specified and shall not do so for a collateral purpose.⁷¹ Once the power is exercised for the right purposes, it does not constitute a breach of duty even if it incidentally affects a member adversely. Accordingly, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control over the affairs of the company.⁷² They should not fetter their discretion to vote in a particular manner without the consent of the company.⁷³ This is because the director is in the circumstance a trustee whereas the company is the beneficiary. Therefore, if a director makes an agreement among other directors with shareholders or outsiders to vote in a particular way at the board meetings, that agreement shall be invalid even if it was made in good faith. The personal interest of a director shall not conflict with any of his duties as a director. Thus, directors are not supposed to use their position as directors to engage themselves in activities including businesses where they have interest. However, 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.⁷⁴ The law requires every director of a company to 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.⁷⁵ This is an improvement over the common law position that a director need not exhibit the performance of his duties with a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. This is a subjective standard envisaged under the common law.⁷⁶

6. The Challenges of Directorship as Corporate Governance Mechanism

Qualification of directors

The Companies and Allied Matters Act requires no professional or educational qualification as part of the criteria for the appointment of company director whether in private or public companies. However, it disqualifies certain persons from becoming company directors.⁷⁷ Accordingly, fraudulent persons, insolvent persons, minors, persons

⁶⁸ Companies and Allied Matters Act, *op. cit.*, section 283(1).

⁶⁹ *Ibid.*, section 283(2).

⁷⁰ *Artra Industries Nigeria Ltd v. Nigerian Bank for Commerce and Industry* (1998) 4 NWLR (Pt. 546) p. 375; Companies and Allied Matters Act, *op. cit.*, section 279(3).

⁷¹ Companies and Allied Matters Act, *op. cit.*, section 279(5).

⁷² *Piercy v. S. Mills & Co. Ltd* (1920) 1 Ch. 77 84; See also *Punt v. Symons & Co.* (1903) 2 Ch. 506.

⁷³ Companies and Allied Matters Act, *op. cit.*, section 279(6).

⁷⁴ *Ibid.*, section 280(4).

⁷⁵ *Ibid.*, section 282(1).

⁷⁶ *Re City Equitable Fire Insurance Company* (1925) Ch. 40.

⁷⁷ CAMA, section 257.

of unsound mind and persons without share are prohibited from being appointed directors.⁷⁸ This is justified by the fact that since companies can only act through the agency of human persons as its alter ego, persons of unquestionable character and permanent disability whether of body or mind should not be allowed on sentimental grounds to take advantage of investors' business. The challenge remains as to the requisite uniform criteria for the appointment of persons as directors to achieve optimum and effective corporate management, It is submitted that clear qualifications inclusive educational qualification, moral turpitude and a measure of experience should be stipulated by the CAMA to prospect good corporate management.

Presumption of Due Appointment

Directors are persons appointed to run the business of a company, and who are not bound to obey the instructions and directives of the members in a general meeting.⁷⁹ There is a rebuttable presumption of due appointment of directors, and this presumption is in favour of third parties dealing with the company.⁸⁰ This later provision is meant to protect an innocent third party dealing with a person held out by the company as its director. Thus, the company should be estopped from denying the agency or the due appointment of such a person. It is trite in the law of agency that if a person holds out another as his agent and an innocent third party deals with such a person based on that holding out, the person who held out that other as his agent will be estopped from denying the agency except to the extent that the agent's act is not within the ostensible powers of the principal.⁸¹

Multiple Directorships

The Act allows a person to hold multiple directorships and does not regulate the number of such directorships owing to the shortage of experienced or skilled personnel capable of running the business of a company.⁸² However, in spite of this, it expects the directors to observe utmost good faith in to each of the companies, including the protection of the properties of each of the companies. He is expected observe all the statutory duties, including not to divulge information derived from one company to another company. It is practically unrealizable for a director, who is eager to make profit in all his companies, to ascertain the boundaries of his faith to each of the companies. The director owes the duty not to make secret profit to all companies wherein he is a director. A director should not be involved in making secret profit and unauthorized abuse of confidential information from one company in favour of the other. The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company. This obligation includes the duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company or to the advantage of any other person including the director.

Remuneration

The remuneration of the director shall from time to time be determined by the company in general meeting and such remuneration shall be deemed to accrue from day to day.⁸³ They are also entitled to allowances paid to cover expenses incurred in the course of their duties.⁸⁴ Monies that accrue to directors through these allowances most often are much more than their fixed remunerations in the articles. But the remuneration of the managing director is to be determined by the directors.⁸⁵ CAMA prohibits the payment of tax-free remuneration and the provision of loans to directors.⁸⁶ A director has no automatic right to payment of remuneration, unless and until such remuneration is fixed by either the company or the articles.⁸⁷ This creates uncertainty as to expected incentives available to directors to enable them perform optimally. On the other part, leaving that to probability could also create avoidable opportunity for gullible directors to exercise their management powers to pay themselves bloated allowances to the detriment of the other members of the company.

7. Conclusion

The legal position of directors in Nigeria has been statutorily settled by section 283 of CAMA. By the section, the director is both an agent and a trustee of the company. This automatically makes the company both his principal and a beneficiary of the exercise of his power. He is an agent of the company once he is acting within his authority

⁷⁸ Companies and Allied Matters Act, *op. cit.*, sections 254, 253, 258 and 251.

⁷⁹ *Ibid.*, sections 244(1) and 63(4).

⁸⁰ *Ibid.*, section 244(2).

⁸¹ M. C. Okany, *Nigerian Commercial Law* (Onitsha: African First Pub. Ltd., 2009) p. 462. See, also *MTN (Nig) Comm. Ltd. v. C.C. Inv. Ltd.* [2015] 7 NWLR (Pt. 1459) 437 at 446 where the court upheld this principle.

⁸² Companies and Allied Matters Act, *op. cit.*, section 281. See also the Indian Act Section 165, which limits the number to 20 companies and 10 in public companies.

⁸³ E. A. Udu *Principles of Company Law and Practice in Nigeria* (Lagos: Mbeyi & Associates (Nig.) Ltd, 2017) p. 175

⁸⁴ CAMA, Section 267.

⁸⁵ Companies and Allied Matters Act, *op. cit.*, section 268.

⁸⁶ *Ibid.*, sections 269 and 270.

⁸⁷ *Ibid.*, section 267 (4).

and provided his act is also *intra vires* the company. The section declares him a trustee of the company's monies and properties. The powers vested in him as a director is held in trust for the company. As a trustee, he is expected to exercise utmost good faith in the management of the company's monies, properties and power. He is held accountable whenever he falls short of this high expectation. Thus, the general principles of the law of agency which governs the relationship between the principal and his agent apply. Consequently, he incurs no personal liability in the course of the company's business provided he acts within the scope of his authority.⁸⁸ The director is therefore functionally placed in a fiduciary position towards the company.⁸⁹ Thus, he is expected to exercise his powers *bona fide* in the interest of the company, and will be held accountable in default of his fiduciary duties. However, owing to the challenges of inappropriate persons being appointed directors, the undefined and steady remuneration schedule of directors, the malfunctioning of multiple directorship, and the presumption of due appointment of a director even without formal appointment have contributed in bedeviling the successful operation of some companies. It is therefore recommended that the relevant provisions of the CAMA dealing with those challenges as discussed above be amended. The qualification for persons to be appointed as directors, for instance, should be hinged the the following indices: educational qualification, morality and experience to create a propensity for good corporate management. The artificial nature of a company demands that the personalities of the directors as alter ego of the company should be propitious to successful operations of a company.

⁸⁸*Okolo v. Union Bank of Nigeria Ltd.* (2004) All F. W. L. R. (pt 197) P. 981, *Yesufu v. Kupper Int. N. V.* (1996) 5 NWLR (pt 446) 17, and *Batraco Ltd. v Spring Bank Ltd.*, (2015) 5 NWLR (PT 451), 107.

⁸⁹ Companies and Allied Matters Act, *op. cit.*, section 283.