

# The Dilemma of the Shareholders under the Nigerian Company Law

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## Abstract

The Companies and Allied Matters Act<sup>1</sup> is currently the statute for regulating the registration and operation of all types of companies in Nigeria. Under the Act, shareholders are recognized as members of the company and the directors owe duties to both the company and shareholders. The directors therefore do not have any legal liability or power to embark on any other duty apart from their duties to the Company. Despite the provisions of the Companies and Allied Matters Act in relation to shareholders, there have been increasing incidences of abuses by directors and holders of managerial posts. This article seeks to examine the problems and prospects of shareholders under the law. From the research it has been discovered that the shareholders are not allowed to exercise their rights and there is not enough protection of the shareholders' rights under law. Suggestions are proffered in that direction.

**Keywords:** Shareholders, Rights, Company, Directors and Meeting

## 1. Introduction

Under the Companies and Allied Matters Act 1990,<sup>2</sup> there are two principal organs of the company, to wit; the General Meeting and the Board of Directors. The General Meeting is the Shareholders acting in a properly convened meeting. The Board of Directors is given exclusive powers to manage the company. The powers of the shareholders under Companies and Allied Matters Act include default powers to act in any matter if the members of the board of directors are unable to act probably due to a deadlock, or are disqualified from acting in that respect; power to institute legal proceeding in the name of or on behalf of the company, where the board of directors refuse or neglect to do so; they also have power to ratify or confirm actions taken by directors, and to make recommendations to the board of directors regarding actions to be taken by the board of directors. Additionally the shareholders acting in the general meeting have power over the appointment and removal of directors and also to amend the articles of association to alter the powers of directors. Shareholders need to be protected against the increasing incidences of abuse of powers by Directors and holders of managerial posts.

Recent advances in Nigeria have contributed to shareholder involvement in cooperate governance.<sup>3</sup> Nigeria has adequate laws intended to safeguard shareholders' rights.<sup>4</sup> There are numerous regulations and policies for ensuring that management of companies act in the shareholders' interest.<sup>5</sup> The early companies in Nigeria between 1876 and 1922 were virtue of colonization and British based. The applicable laws then were: common law, the doctrines of equity and the statute of general application in England as at January 1, 1900, subject to any relevant statute that had been enacted.<sup>6</sup> This implied that doctrines such as that of separate legal personality of a company were received into Nigeria under the Companies Ordinance of 1912, which was the home enactment of the Companies (Consolidation) Act of England, 1908.<sup>7</sup>

The Companies Ordinance of 1912 was in force only in the colony of Lagos, but by the amalgamation of Southern and Northern protectorates in 1914, the Ordinance was extended to the whole Country. The Companies Ordinance of 1912 was subsequently repealed by the Companies Decree 1922, which had it foundation from the United Kingdom Companies Act 1929. In 1968, a new Companies Decree was promulgated. This Decree replaced the 1922 Companies' ordinance. The Company Act 1968 was mainly based on the United

<sup>1</sup> 1990, Cap C 20 Laws of the Federation 2010

<sup>2</sup> The principal legislation on Company Law in Nigeria, hereinafter referred to as CAMA.

<sup>3</sup> Amao, O. & Amaechi, K., "Galvanizing Shareholder Activism: a Prerequisite for Effective Corporate Governance and Accountability in Nigeria", *Journal of Business Ethics*, 82/1,2008, 119-130 at 122

<sup>4</sup> Okpara, John O. "Perspective on Corporate Governance Challenges in a Sub-Saharan African Economy" *Journal of Business & Policy Research* Vol. 5/1. July 2010 Pp. 110 – 122.

<sup>5</sup> Oyejide, T. Ademola & Soyibo, Adedoyin "Corporate Governance in Nigeria", (Paper Presented at the Conference on CORPORATE Governance, Accra, Ghana, 29 – 30 January, 2001) 1 – 36. Available online at [http://www.nigerianlawguru.com/articles\\_company\\_%20law/CORPORATE%20GOVERNANCE%20IN\\_%20NIGERIA.pdf](http://www.nigerianlawguru.com/articles_company_%20law/CORPORATE%20GOVERNANCE%20IN_%20NIGERIA.pdf). Last accessed on April 19, 2015.

<sup>6</sup> Orojo, J O., *Company Law and practice in Nigeria*, (3<sup>rd</sup> ed, Lagos: Mbeyi & Associates, 1992)17.

<sup>7</sup> Amaeshi, Kenneth M., Adi, Bongo C., Ogbachie, Chris and Amao, Olufemi O. "Corporate Social Responsibility in Nigeria: Western mimicry or indigenous influence?" In Jeremy moon (ed) Research Paper Series, International Centre for Corporate Social Responsibility (Warwick Business School, United Kingdom, 2006),11-44.

Kingdom Companies Act 1948 as part of the recommendations of the Jenkins Committee. Deficiencies in the 1968 Act gave birth to the Law Reform Commission in 1987 headed by his Lordship Hon Justice Dr Olakule Orojo (Rtd) whose Commission ushered in the current Companies and Allied Matters Act 1990.<sup>1</sup>

The Companies and Allied Matters Act 1990, Cap C 20 Laws of the Federation 2010 is currently the statute for regulating the registration and operation of all types of companies in Nigeria.<sup>2</sup> Under the section 79 of Companies and Allied Matters Act, shareholders are recognized as members of the company and the directors owe duties to both the company and shareholders. The directors therefore do not have any legal liability or power to embark on any other duty apart from their duties to the Company.<sup>3</sup> In *Kotoye v. Saraki*<sup>4</sup> the Supreme Court of Nigeria conceded that shares are vested in the company directors but, the director hold such shares in trust for the shareholders.

The Annual General Meeting is constituted by the Shareholders and is provided for under the law.<sup>5</sup> Certain powers are conferred on shareholders by the law,<sup>6</sup> which if exercised, are important in the administration of a company.<sup>7</sup> These powers which are exercised at the General Meeting, including the power to appoint and remove directors, approve the remuneration of authors' and even the power to institute legal proceedings to prevent the directors from entering into illegal or *ultra vires* actions, power to declare dividends, presentation of financial statements and the reports of Directors and Auditors and even the power to institute legal proceedings to prevent the directors from entering into illegal or *ultra vires* actions, power to declare dividends, presentation of financial statements and the reports of Director and Auditors, the election of directors in place of retiring ones, fixing remuneration and appointment of members of the audit committee.<sup>8</sup> The General Meeting thus, affords an opportunity for shareholders to supervise the management of the company. Since the Articles of Association regulates the management of the company, and the power to alter these articles lies in the shareholders, the shareholders can alter the Article for their own protection,<sup>9</sup> and can also prevent the directors from perpetuating fraud. Every member is bound by the decisions of the Directors, who are the majority and this implies that while the majority shareholders will always have their say, the directors will always have their way.<sup>10</sup> It has been observed that most Annual General Meetings in Nigeria are fraught with dishonesty. These AGMs are prearranged in such a way that leaders of the shareholders association are induced by the majority shareholders, rather than look closely into the accounts presented by the Directors.

Private enforcement of shareholders rights has provided means of regulating corporate conduct. Company law principles made recovery by shareholders very complex. At common law, shareholder actions were restricted in scope, fraught by procedural rules of complicated intricacy, and prohibitively costly.<sup>11</sup> By Section 299 of CAMA, where irregularity has occurred in the course of a company's affairs or any wrong has been done to the company, only the company can bring a legal action to remedy that wrong and only the company can ratify that irregular conduct. This is a statutory codification of the Rule in *Foss v. Harbottle*.<sup>12</sup>

The legal derivative action was therefore enacted as legislative response to the apparent failure of the common law to effectively protect the interests of shareholders and the public from inequitable and dishonest company administration, and is contained in Section 310 – 312 CAMA, 1990. These Sections allow a shareholder to bring a derivative action for illegal or unfairly prejudicial and operative conduct, but in spite of these legal provisions, many impediments have discouraged a harmonized shareholder democracy in Nigeria such as "inadequacy of notices of statutory meetings", "lack of information, apathy on the path of shareholders and a weak judicial system" as such impediments. Therefore, the legislative derivative action did not just inherit much of the intricacy of the common law, but also acquired additional obstacles of its own.<sup>13</sup>

<sup>1</sup> Bukola, Akinola "A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law", (NLII Working Paper Series 002, 2008)2.

<sup>2</sup> Alexandra, Chiedu N. Risks in stock Investment, (Law Office: Lagos) 1. Available at <http://www.gamji.com/article6000/NEWS7631.htm>. Last accessed on January 13, 2015.

<sup>3</sup> S. 279 of CAMA.

<sup>4</sup> *Kotoye v. Saraki* (1994)7 NWLR (Pt.357)414 at 467.

<sup>5</sup> S. 213 of CAMA 1990.

<sup>6</sup> CAMA

<sup>7</sup> Adegbite, Emmanuel et al, "Political Analysis of Shareholder Activism in Emergent Democracies: a Case Study of Nigeria", (CSGR Working paper 265/10, CU London: United Kingdom, 2010) 1-24.

<sup>8</sup> Onuoha, R., "The need for investors' vigilance in corporate governance", available at <http://www.proshareng.com/articles/singleNews.php?id=635>. Last assessed on January, 13 2015

<sup>9</sup> Onuoha, R., The need for investors' vigilance in corporate governance, *Op.cit*

<sup>10</sup> Dada, J., *Principles of Nigerian Company Law*, 2<sup>nd</sup> ed (Wusen Publishers: Calabar, Nigeria, 2008)261.

<sup>11</sup> Kaplan, William Q.C. & Elwood, Bruce "The Derivative Action: A Shareholder's Bleak House"? 36 *U.B.C.L. Rev.* 443, 20031

<sup>12</sup> (1843)2 Hare 461; Vincent O. Nmeielle & Enyinna S. Nwauche, (George Washington University School of Law, Washington, D.C. USA,2004) 1-50.

<sup>13</sup> Kaplan, William Q.C. & Elwood, Bruce "The Derivative Action: A Shareholder's Bleak House"? 36 *U.B.C.L. Rev.* 443,

Problems often arise when a shareholder seeks to enforce rights which are enforceable only by the company, and there is a question of *locus standi*<sup>1</sup>. The conditions for initiating a derivative action are codified in Section 303 of CAMA and requires the applicant to apply to court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.<sup>2</sup>

By section 303(2) of the Companies and Allied Matters Act 1990, before leave is granted the applicant to institute or intervene in any action on behalf of the company, the following conditions must be satisfied by the applicant, these include that :the wrongdoers are the directors whom are in control and will not take necessary action;’ the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not diligently persecute or defend or discontinue the action; the applicant is acting in good faith; and that it appears to be in the interest of the company that the action be brought, prosecuted or discontinued.<sup>3</sup>

The question arises on what could constitute good faith. It has been posits that this requirement must be applied with caution, “as it has the tendency to muddle up the interest of the company, a distinct legal personality, with that of the shareholder,” coupled with the fact that Nigerian Courts have not had much occasion to interpret the provisions of Section 303 (1) and (2) of the Companies and Allied Matter Act, 1990. The greatest impediments to a successful derivative action in Nigeria by a company are the requirement to prove the mandatory rudiments of ‘fraud’ and ‘control’ on the part of the wrongdoers, and the ratification powers of the majority required under Section 300 (d), (e) and (f), which can be asserted to frustrate a majority action.

The majority can also take a personal action to enforce duties owed to the company. The conventional legal position is that directors, usually owe “fiduciary duties to the company but they do not owe duties to shareholders, employees, creditors or the members of any other constituency which may have some interest in the company’s affaire” as established by *Percival v. Wright*<sup>4</sup> where the court held that the relationship between directors and shareholders were not fiduciary, and the directors had no duty to inform shareholders of an impending takeover bid for the company prior to the sale of their shares to the directors. The possibility of individual members enforcing duties owed to a company or to ensure the governance of the company in accordance with the terms contained in the memorandum and articles of association and with good corporate governance standards is worthy of consideration.

As a conservatory of personal action, Representative Actions may be brought on behalf of a group of minority shareholders, where identical personal right of a number of shareholders has been infringed upon<sup>5</sup>. The power of accord in representative actions can permit minority shareholders greater control in shaping the management to improve its operations.<sup>6</sup> Section 301(2) in providing for a representative actions stimulates that the plaintiff/member is not entitled to any damages but only a declaration or injunction to restrain the company and /or directors from doing a particular act although the court may award costs to him whether or not the action succeeds under section 201 (3).<sup>7</sup>

Although the majority shareholders have some chances to bring direct and derivative suits, they are burdened with disproportionate restraints and their chances to win are rare, if not utterly impossible. Shareholders have been generally accepted and lawfully recognized as owners of the company with regard to decision making on one hand, and the other hand, the Companies and Allied Matters Act allows shareholders to delete this decision making and control of the firm to the board of directors and company management to the administrators.<sup>8</sup>

There are various rules and policies for ensuring that the boards of directors act in the interest of shareholders and of the firms. Among these are the General meetings which have decision-making functions over the companies; the requirements of certification of financial records of companies by external auditors as

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<sup>1</sup> Nwafor A. O. A. “Commentary on the derivative Action under the Lesotho Draft Companies Bill of 2006”, 6 U. *Botswana L.J.*, 2007, 79.

<sup>2</sup> Nwafor, Anthony O. “Shareholder Derivative Action-Nigerian statutory Innovation-Not Yet a Victory for the Minority Shareholder” *MqJBL*, v. 7, 2010, 214-236.

<sup>3</sup> S. 303 (2) CAMA 1990.

<sup>4</sup> (1902) 2 Ch 401

<sup>5</sup> *Chief Otuguor Ogamioba and Others v. Chief D.O.Oghene and Others*, (1961) All NLR. 411.

<sup>6</sup> Polak, Rob & Hermand, Ruud “International Class Action in the Netherlands after the Morrison and Ahold Decisions” (Global Legal Group Ltd: London, 2011) 1-162. Available online at <http://www.iclg.co.uk/khadmin/publications/pdf/3962.pdf>. Last accessed on January 29, 2015.

<sup>7</sup> Oshio, P. Ehi “The True Ambit of Majority Rule under the Companies and Allied Matters Act 1990 Revisited”, *Modern Practice Journal of Finance and Investment Law*: Lagos, 7/3-4,)386-403

<sup>8</sup> Adegbite, Emmanuel *et. al*, *Political Analysis of Shareholder Activism in Democracies: a case study of Nigeria* (Case Business school, City University Bunhill Row, London; United Kingdom, 2010), 5.

well as the different returns by companies sent to regulatory agencies like the Corporate Affairs Commission (CAC); the securities and Exchange Commission, (SEC); the Central Bank of Nigeria (CBN) and the Nigerian Deposit Insurance Corporation (NDIC), and the National Insurance Commission of Nigeria (NAICOM).<sup>1</sup>

The Companies and Allied Matters Act 1990 provides for two main types of meetings: Statutory and General Meetings.

The statutory meetings are held within six months of incorporating the company, and the directors must within 21 days prior to the meeting, forward a copy of the statutory report to be presented to all members. The conventional roles of shareholders in ensuring shareholder democracy are to question the directors at such meetings and say their opinion.<sup>2</sup>

The minority shareholders appear to be the small fry in corporate governance as they are constantly opened to the elements of domination and marginalization by both the majority shareholders on one hand, and in the main by the management on the other hand. The review of the legal and Regulatory Framework for Corporate entities clearly shows that indeed the regulatory framework in Nigeria is in existence, but the enforcement mechanisms need to be strengthened. Shareholders have in reality hardly exercised the powers guaranteed by the regulatory framework.<sup>3</sup>

## 2. Definition of a Shareholder

When an individual or a group of persons purchase shares in a company, they become shareholders of that particular company. In Nigeria, there are over twenty million shareholders who own shares in public and private companies. A shareholder is a part owner of a company and is entitled to take part in making decisions for the running of the company. He is entitled to access information regarding the performance or otherwise of the company as contained in its annual report at the end of every year. He can vote on company issues at shareholders' Annual General Meetings (AGMs) and other meetings. A shareholder benefits immensely whenever the company is doing well<sup>4</sup>, then his shares would be worth more than when he bought them,<sup>5</sup> and he may receive an income called dividend; as well as participate in the rights issued by the company.

## 3. Rights of Shareholders

The Companies & Allied Matters Act provides for shareholders several basic rights, which are as follows:

- Right to attend any general meeting of the company.<sup>6</sup>
- Right to speak and vote or pass any resolution before the meeting.<sup>7</sup>
- Right to vote in person or in absentia, and equal effect shall be given to votes whether cast in person or in absentia.
- Right to be furnished with sufficient and timely information concerning the date, location and agenda of the general meetings, as well as full and timely information regarding the issues to be decided at the meeting.
- Right of opportunity to ask questions from the board and to place items on the agenda at the general meetings, subject to reasonable limitations.
- Right to be informed of any resolution appointing or approving the appointment of a director.<sup>8</sup>
- Right to sue for dividends.<sup>9</sup>
- Right to a copy of the memorandum and articles, if any, and a copy of any enactment which alters the memorandum<sup>10</sup>
- Right of a preference share to more than one vote.<sup>11</sup>
- Right of conveying or transferring shares.
- Rights of sharing in the residual profits of the company.
- Right to bonus and rights issue of the company.
- Rights to inspect the register of members of the company.
- Right to be issued within three months without any payment of certificate after the close of offer.<sup>1</sup>

<sup>1</sup> Oyejide, T. Ademola *et al*, "Corporate Governance in Nigeria." (Conference on Corporate Governance, Accra,) Ghana, 29 – 30 January, 2001),24.

<sup>2</sup> Elsa (satkunasingam *et al*, "The consequences of Culture on Shareholder Activism in Malaysia" *JAMAR* 4/1 2006, 45.

<sup>3</sup> Particularly CAMA (sections 284(1), 63 (5), 286, 408, 311 and 315.

<sup>4</sup> i.e. making profit

<sup>5</sup> capital appreciation

<sup>6</sup> Subject to s. 228 of CAMA; see also s. 81 of CAMA

<sup>7</sup> *Ibid*, S. 81

<sup>8</sup> *Ibid*, S. 256

<sup>9</sup> *Ibid*, S.385

<sup>10</sup> *Ibid*, S. 42

<sup>11</sup> S. 143 (1) (3) of CAMA

- Right of shareholders vis-à-vis a prospectus that is being issued in an offer for subscription of shares by an Issuer.
- Right of the shareholders to be represented in the audit committee of the company
- Right to seek redress when necessary.

#### 4. Types of Shareholders Meeting

It has been pointed out that a shareholder can only exercise his or her rights effectively when acting as a group in a meeting. Shareholders' Meetings are generally termed as "General Meetings". All shareholders' have the right to attend and vote.

There are three types of shareholders' meetings, namely; Annual General Meetings (AGM), Extraordinary General Meeting (EGM) and Class Meeting (CM).

##### *Annual General Meeting*

Duly registered company shall, in each year, hold a General Meeting as its Annual General Meeting in addition to any other meeting in that year, shall specify the meeting as such in the notices calling its members and must hold its first AGM within 18 months of its incorporation. Thereafter, it must be held once every year as earlier mentioned, in not more than 15 months after the last preceding AGM or not more than 6 months after the end of its financial year.<sup>2</sup>

The Annual General Meeting provides shareholders the opportunity to obtain information and to interrogate management on company performance. It also allows shareholders to meet and pass resolutions without having to face the difficulties associated with calling for an Extraordinary General Meeting (EGM) that is not supported by the directors.

##### *4.1 Extraordinary General Meeting (EGM)*

Extraordinary General Meetings are general meetings of companies other than the Annual General Meeting. EGM are specifically convened to transact "special" businesses that are too urgent to wait until the next Annual General Meeting. An extraordinary general meeting of a company by any shareholder or shareholders of the company as at the date of the requisition not less than one-tenth of the paid up capital of the company as at the date of the deposit carrying the right of voting, or in the case of a company not having a share capital, shareholders of the company representing not less than one-tenth of the total voting rights of all the shareholders having at the said date a right to vote at general meetings of the company. The directors shall on receipt of the requisition forthwith proceed duly to convene an extraordinary general meeting of the company and at this stage; a resolution to the removal of a director shall be heard after a special notice has been sent to the concerned director.<sup>3</sup>

##### *4.2 Class Meeting*

This type of meeting is a meeting of the holders of a class of shares of the company, which issues different classes of shares<sup>4</sup> Class meetings are principally held in connection with situations concerning variation of rights attached to a class of shares. Class meetings shall be convened and held in the same manner/provision of the foregoing sections of the Act, which applies to any class of meetings except where expressly excluded by the Act.

#### 5. Responsibilities of Shareholders

Shareholders should take the attendance of annual general meetings as one of their major responsibilities as this is where they can effectively exercise their rights. Another main responsibility of the shareholders is in taking interest in the implementation of the code of corporate governance, thus acting as watchdogs over the managers of their companies, to avoid misfortunes and to safeguard their investments.

The following under-listed are issues that shareholders have responsibilities of ensuring:

##### *5.1 Resolutions*

A resolution shall be an ordinary resolution when it has been passed by a simple majority of votes cast by such members of the company, as being entitled to do so, voting in person or by proxy at a general meeting.<sup>5</sup>

A resolution shall be a special resolution when it has been passed by not less than three fourth of the voting cast by such members of the company. Also vote in person or by proxy at a general meeting of which 21 days notice,

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<sup>1</sup> *Ibid*, S. 146 (1) & (2)

<sup>2</sup> *Ibid*, S. 213(1)

<sup>3</sup> S. 215 (2) of CAMA.

<sup>4</sup> E.g. capital shares, income shares, preference shares, etc.

<sup>5</sup> S. 233 (1) & (2) of CAMA

specifying the intention to propose the resolution as a special resolution, has been duly given.

### 5.2 Quorum of Meeting

A quorum for a meeting is the minimum number of persons who are entitled to attend the meeting who must be present to validly transact the business of the meeting.

No business unless otherwise provided in the articles, shall be transacted at any general meeting unless a quorum of members<sup>1</sup> is present at the time when the meeting proceeds to business and throughout the meeting.<sup>2</sup> The quorum for the meeting of a company shall be one-third of the total number of members of the company or 25 members (which ever is less) present in person or by proxy, provided that where the number of members is not multiple of three, then the number nearest to one third, and where the number of members is 6 or less, the quorum shall be two members. For the purpose of determining a quorum, all members or their proxies shall be counted.

Every meeting needs a person to act as chairman to control and see the smooth conduct of the meeting; and he or she shall preside at every general meeting of the company except if he/she is not present at the meeting or not present within one hour after the time appointed for holding the meeting, the members present shall choose one of the members to be the chairman of the meeting.

The duties and powers of the chairman shall include: preservation of order and power to take such measures as one reasonably necessary to do so, ensure that proceedings are conducted in an accepted manner, ensure that the true intention of the meeting is carried out in resolving any issue that arises before it, ensure that all questions that arise are promptly decided and act *bona fide* in the interest of the company. The chairman shall cast his vote *bona fide* in the interest of the company as a whole, provided that he/she is also a shareholder; he may cast it in his own interest and shall have power to adjourn a meeting.<sup>3</sup>

### 5.3 Persons Entitled to attend Meetings

Every shareholder is entitled to attend any general meeting of a company. The auditor of the company or his authorized agent is also entitled to attend any general meeting of the company and to be heard on any matter that concerns the company in his capacity as the auditor.

### 5.4 Voting Rights and Other Issues

As owners of the company, shareholders have a unique relationship to the board and management. Unlike other groups that do business with the corporation<sup>4</sup>, ordinary shareholders do not and cannot have contractual protection of their interests. Instead, they must rely on the board of directors, whom they elect, and on their right to vote at shareholders have responsibility to monitor the conduct of the board of directors and exercise their voting rights by casting thoughtful and informed proxy votes that enhance the financial interests of their investors. In view of the importance of the board of directors, shareholders should withhold votes from unopposed directors where the individual or the board as a whole has acted contrary to legitimate shareholder concerns.

Although the proxy vote is the key mechanism by which shareholders play a role in the governance of the corporation, it is appropriate for institutional investors that are entrusted with the investment funds of others to be active shareholders and promote more effective corporate governance in the companies in which they invest. Institutional investors should also ensure that their own internal corporate governance practices meet high standard of accountability, transparency and judicial responsibility.

The following principles are intended to promote shareholder rights and enhance shareholder value, should guide the shareholders in the exercise of proxies:

Each Director represents all shareholders. Shareholders should have the right to expect that each director is acting in the interest of all shareholders and not the interest of a dominant shareholder or a particular stakeholder and to a vote in proportion to their economic stake in the company. Each share of ordinary stock should have one vote.

Shareholders should be able to cast proxy votes in a confidential manner independent of management, except in circumstances of a contest for control. Confidential voting protects shareholders from undue influenced in making voting decisions.

Shareholders should have the right to approve matters submitted for their consideration with a simple majority of the shares voted. The board should not impose supermajority voting requirements, except if necessary to protect the interest of minority stockholders where there is a single dominant shareholder and votes

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<sup>1</sup> I.e. shareholders

<sup>2</sup> S. 2321 & 2 of CAMA

<sup>3</sup> S. 239 (1) of CAMA

<sup>4</sup> E.g. customers, suppliers, lenders and labour

cast “for” or “against” a proposal should be the only votes counted, except for purposes of determining whether a quorum requirement is met. They should have the right to approve increases in the authorized number of ordinary shares and should ensure that such increases are intended for a valid corporate shareholder interests.

Shareholders should have the right to approve any action which alters the fundamental relationship between the shareholders and the board and should have the ability to communicate effectively with the board of directors. Formal procedures should be created to enable shareholders to communicate their views and concerns directly to board members. The board of directors is responsible for representing shareholders’ interest. When the board fails to fulfill its governance responsibilities, shareholders should consider other means to ensure board responsibilities, including challenges to the current board. Shareholders should have the right to vote on separate and distinct issues. The board should not combine different issues and present them for a single vote.

### *5.5 Division of Corporate Powers between Board of Directors and Shareholders*

The decision-making powers of a company lie in the assembly of the shareholders during the general meeting. However, this is only possible if the company is small with few shareholders that are often also the directors. But with big companies, it is impracticable and sometimes impossible for so many shareholders to operate and manage the various functions of a company.

It is therefore necessary to have a definite body of individuals (board members) run the activities and affairs of the company other than the shareholders themselves. Thus, for practical and legal reasons, the corporate powers of companies are divided between the board of directors and shareholders in general meetings, and that ideally vests the major portion of management powers on the board. There are means by which powers are divided between the board and the shareholders in the general meetings.<sup>1</sup> Some functions to either the general meeting or the board of directors<sup>2</sup>

In other words, Directors are responsible for the management of the company except in a case where the matter is specifically assigned to the company in the general meeting. The shareholders, therefore, cannot control the directors directly but instead operates indirectly by acting together in the general meeting. The general meeting can only interfere with the board’s exercise of management power by altering the articles of association by special resolution or refusing to re-elect the directors if the opportunity arises.

However, since very few shareholders turn up at general meetings, the board is consequentially the most powerful organ in the company’s management structure. It is therefore important that the board upholds high standards of corporate governance in managing the company.

### *5.6 Board and Shareholders Relationships*

The board is appointed by and accountable to the shareholders for the performance and affairs of the company and therefore its stewardship of the company and its assets and resources. The company’s article of association usually reserves powers to the board to enable it to fulfill its responsibilities. The board has a collective responsibility to provide effective corporate governance that involves successful balancing of the relationship between the management of all the company, its board, its shareholders and other relevant stakeholders.

## **6. Problems of Shareholders in a Company**

### *6.1 The Position of Minority Shareholders*

The position of the minority shareholders is usually more unstable consequent upon the narrow perception of the rule which allows only a company, through its majority shareholders, to assert the legal rights of the company.

This is the rule in *Foss v. Harbottle*.<sup>3</sup> This rule is intended to circumvent multiplicity of suits and also to protect the courts from prying into the domestic affairs of a company. However, and most often, the wrong to the company is occasioned by the majority shareholders and the law has created exceptions to this general rule.<sup>4</sup> However, the interest of the company – an artificial person – and as a growing concerned cannot be distinguished from those of the persons who are interested in the company.<sup>5</sup> There are various impediments to the minority shareholder’s ability to enforce company’s rights. The minority shareholder has to satisfy the provision of section 303 of CAMA, which provides that:

- (1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company

<sup>1</sup> These are: The Common Law, the Memorandum and Articles of Association and the Companies & Allied Matters Act 1990

<sup>2</sup> E.g. the power to alter the memorandum and articles is specially reserved for the shareholders at the general meeting while the duty to prepare annual reports & accounts for the board.

<sup>3</sup> (1843)2 Hare 461.

<sup>4</sup> Legal Alert – Minority Shareholders’ Rights, (Oserogho Associates, 2010 available at <http://www.Oseroghoassociates.com/news/2010/12/shtml>.) Last accesses on April 25, 2013.

<sup>5</sup> Hick, Andrew & Goo, S.H. *Cases and materials on Company Law*, 6<sup>th</sup> ed. (Oxford University Press Inc; New York, 2008)502

- is a party, for the purpose of presenting, defending or discontinuing the action on behalf of the company.
- (2) No action may be brought and no intervention may be made under subsection (1) of this section unless the court is satisfied that:
- (a) The wrongdoers are the directors who are in control and will not take necessary action.
- (b) The applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action.

Again, a probable applicant can only maintain an action on the incidence of any of the actions set out in section 300 (d), (e) and (f) of the Act, namely.

- (a) Where fraud is being committed on the company or on the minority shareholders, and the directors fail to take appropriate action to redress the wrong; or
- (b) where the company meeting cannot be called to be of practical use in redressing a wrong to the company of the minority; or
- (c) Where the directors are likely to derive a profit or benefited from their negligence or breach of duty respectively. These requirements are not easily met by the minority shareholder, and even where the requirements are met, the action can still be frustrated if the wrong intended to be complained of by the minority shareholder is ratified.<sup>1</sup>

### 6.2 Shareholders' Voting and Proxy Rights<sup>2</sup>

Section 116(1a) of CAMA institutes and highly, a shareholder's vote is comparative to the number of shares owned in the company. This does not however affect the issuance of preference, differed or special rights. However, Section 116 (1) (b) proscribes the issuance of non-voting shares in Nigeria.<sup>3</sup> Any member permitted to attend a meeting is at liberty to appoint another person, - whether or not the person is a member – as proxy to attend and vote as a substitute of him, and such proxy appointment to attend and vote as a substitute confer the same right to speak at the meeting on the proxy. The instrument of appointment of a proxy must be in writing under the hand of the appointer or of his attorney dully certified in writing. If the appointer is a corporation, either under seal, or under the hand of an officer or an attorney duly authorized.<sup>4</sup> Any vote in accord with the stipulations of an instrument of proxy remains valid in spite of the preceding death or insanity of the principal or the transfer of the share in respect of which the proxy is given.<sup>5</sup> However, [I] in the absence of a shareholder and his/her proxy, the directors of the company will act as proxies.<sup>6</sup>

Minority rights exemplify two separates. First are the normal minority rights, applicable to members of racial, ethnic, class, religious, linguistic or sexual minorities, and second, collective rights which are accorded a minority group. The term may also apply to anyone who is not a part of minority decision.<sup>7</sup> In any organization where majority of citizen or members can pass laws or rules that apply, which will bind the entire group, it is necessary to distinguished prospective laws which are rational and fair from those which are oppressive because they are unnecessary, unfair, and reasonably unbearable to the minority who opposed them. There is also need to have formal mechanisms in place, where practicable, to thwart "tyrannical laws from being passed by those whose judgment in such matters might fail".<sup>8</sup>

Such mechanisms in Nigeria which helps to ensure that the administration of companies is in the interest of shareholders and of the firms include:

- The shareholders' meeting which have supervisory functions over the companies;
- The obligation on companies that financial accounts be endorsed by external auditors;

<sup>1</sup> Nwafor, Anthony O "Shareholder Derivative Action – Nigerian Statutory Innovation-Not yet a victory for the Minority Shareholder" *TMqJBL*, 2010, 214-237.

<sup>2</sup> Olayiwola, Wumi K. "Practice and Standard of Corporate Government in the Nigerian Banking Industry" *International Journal of Economics and Finance*, 2/4;2010, 180.

<sup>3</sup> T. Ademola Oyejide and Adedoyin Soyibo, "Corporate Governance in Nigeria" (paper Presented at the Conference on Corporate Governance, Accra, Ghana, 29-30 January, 2001)21.

<sup>4</sup> Olayiwola, Wumi K. *Practice Standard of Corporate Governance in the Nigerian Banking Industry*. *Op.cit* at 180.

<sup>5</sup> *Ibid*.

<sup>6</sup> Nwaiwu, Ikenna C. The Beginner's Guide to investing in the Nigerian Stock Market, (2004)1-5, available online at [http://jivltd.com/news/The beginner's guide on investing in the Nigerian stock market.pdf](http://jivltd.com/news/The%20beginner's%20guide%20on%20investing%20in%20the%20Nigerian%20stock%20market.pdf). Last accessed on May 5, 2013.

<sup>7</sup> What is minority Right? A company is judged by the way it treats minority? Recent assertion by the King that there are no Minority and Majority in Lanka flies on the face of international Law and understanding of Minority Rights, Lanka Newspaper of February 17, 2013. Available online at [http://www.lankanewspapers.com/news/2011/2/64677\\_space.html#Sri Lanka News](http://www.lankanewspapers.com/news/2011/2/64677_space.html#Sri Lanka News). Last assessed on May 1, 2013.

<sup>8</sup> Garlikov, Rick The Need for Formal and Informal Mechanisms to prevent "Tyranny of the Majority" in Any Democratic Governance, available online at <http://www.garlikov.com/philosophy/majorityrule.htm> last accessed on May 1, 2013.



- The advise returns the companies are expected to send to regulatory agencies like the Corporate Affairs Commission (CAC) which registers all incorporated companies;
- The Securities and Exchange Commission (SEC) which register all shares of quoted public companies;
- The Central Bank of Nigeria (CBN) and the Nigeria Deposit Insurance Corporation (NDIC) which have regulatory and supervisory mandates for licensed banks and other financial institutions like finance houses and community banks;
- The national insurance Commission of Nigeria (NAICOM), which has regulatory mandate over insurance companies.<sup>1</sup>
- Shareholders can also utilize their meetings to articulate and implement their collective will as a corporate body on the way the company is run, and suggest how the corporation businesses can be improved.<sup>2</sup>

This proviso can be found in Section 81 of CAMA as follows:

Every member shall notwithstanding any provision in the articles, have a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting.

This section confers on the shareholder, the rights to attend general meetings of the company and also bestow on members present in such meetings, the right to articulate and-vote at such meetings on any issue that is being discussed at such meeting.<sup>3</sup> Section 114(b) of CAMA also provides as follows:

Subject to the Provisions of this Decree, the rights and abilities, attaching to the shares of a company shall notwithstanding anything to the contrary in the terms or the articles, include the right to attend general meeting of the company and vote at such a meeting.

The corporate governance framework should guarantee the impartial conduct of all shareholders, including minority shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.<sup>4</sup>

### 6.3 Position of Majority Shareholders

Tyranny occurs when majority shareholders, who are in control of the company dictate and implement their influence to run and administer the company's affairs for their individual gains in complete disregard or detrimental treatment to and in opposition to the minority shareholders or investors.<sup>5</sup>

Shareholders supremacy and power is not as potent as is frequently believed.<sup>6</sup> The world over, the tyranny of the Majority demonstrated by those who implement the prerogatives of ruler ship raises antagonism, hostility and insubordination to law and others. This can be suppressed for a while, but like a time bomb, they will detonate at the least occasion.<sup>7</sup> Companies, whose majority shareholders are state governments, may also suffer from some level of bureaucracy and inefficiency.<sup>8</sup>

There are various provisions under CAMA for the protection of the minority from the tyranny of the majority.<sup>9</sup> These include: where the majority in a general meeting resolve to do something which is either illegal or *ultra vires*;<sup>10</sup> when the company purports to do by an ordinary resolution, an act which could be effectively done, or is required to be done by special resolution,<sup>11</sup> where it is alleged that the personal rights of the minority

<sup>1</sup> Olayiwola, Wumi K. "Practice and Standard of Corporate Governance in the Nigerian Banking Industry" *International Journal of Economics and Finance*, 2/4; 2010,181.

<sup>2</sup> *Ibid.*

<sup>3</sup> Section 81 CAMA 1990.

<sup>4</sup> Pandey, Om Prakash *Minority Shareholder Rights – The Necessities & The Limitations*, (2009). Available online at <http://www.lawyersclubindia.com/articles/MINORITY-SHAREHOLDER-RIGHTS-NECESSITIES-LIMITATIONS-1464.asp>. Last accessed on May 5, 2013.

<sup>5</sup> Sidek, Abdul Wahab Jaafar "Minority Shareholders: How to protect and Exert your Rights" (Minority Shareholder Watchdog Group (MSWG): Malaysia, 2007)1

<sup>6</sup> Amao, O. & Amaechi, K., "Galvanizing Shareholder Activism: a Prerequisite for Effective Corporate Governance and Accountability in Nigeria" *Journal of Business Ethics*, 82/1,2008, 119-130 at 122

<sup>7</sup> Akinola, S. R. *Resolving the Niger – Delta Crises Through polycentric Governance*, (Workshop in Political Theory and policy Analysis, Indiana University, Bloomington, USA.) 1-105. Available online at <http://www.indiana.edu/~workshop/cilloquia/materials/paper.pdf>. Last accessed on May 5, 2013.

<sup>8</sup> Nwaiwu, Ikenna C. *The Beginner's Guide to Investing in the Stock Market*, (2004)1-50, available online at [http://www.jivltd.com/news/The beginners guide to investing in the Nigerian stock market.pdf](http://www.jivltd.com/news/The%20beginners%20guide%20to%20investing%20in%20the%20Nigerian%20stock%20market.pdf). Last accessed on May 10, 2013.

<sup>9</sup> Ademola Oyejide and Adedoyin Soyibo, *Corporate governance in Nigeria*, *Op. cit.*

<sup>10</sup> S. 300(a) CAMA.

<sup>11</sup> *Ibid*, S. 300(b)

shareholder has been infringed upon;<sup>1</sup> where there is a fraud on the minority;<sup>2</sup> where the company meeting cannot be beneficially held;<sup>3</sup> and where the directors derive benefits from their breach of duty.<sup>4</sup>

The powers of directors however appear to be very extensive as it broadens to all those subjects not covered by the Companies Acts or the Articles provided that such powers are not conflicting with Acts, the Articles and powers conferred upon the shareholders.<sup>5</sup>

This means that general meeting cannot get in the way with a decision of the directors unless they are acting contrary to the provisions of the Act or the article.<sup>6</sup> In the case of *Shaw & Sons (Salford) Ltd v. Shaw*<sup>7</sup> Gree LJ held as follows:

A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its article, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers by the articles in the directors is by altering the articles, or, if opportunity arises, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directed by the articles in the general body of shareholders.

The Nigerian Courts have held that directors of companies owe duties only to the company and its shareholders and therefore do not have any power or competence to embark on any other duty apart from their duties to the company.<sup>8</sup> These power have however been placed in the hands of the majority shareholders, and appropriate remedies have not been granted to minority shareholders.<sup>9</sup>

To start with, the minority shareholders are too weak and there are no comprehensive and practicable rules which would allow the minority shareholders to exercise their rights provided by CAMA. CAMA remains silent in the specific procedures for the minority shareholders to exercise their rights or to seek for remedies when directors commit certain wrongs. There are also no restrictions upon the majority shareholders' control of the shareholders' meeting.

Again, it is extremely difficult for majority shareholders to bring personal suits and impracticable for them to bring derivative suits. The minority shareholders are fraught with undue restraints and their probabilities to win such cases are unusual, if not totally impracticable.

More importantly, the concept of "supremacy of the majority is generally not accepted as long as the conducts of majority shareholders and directors remain technically lawful in principle, even where their conducts are unreasonable and equitable wrong.

It therefore follows that for the minority shareholders; the rights existing within the Companies and Allied Matters Act 1990 remain abstract and exist exclusively on appear. They are not practical ones that cannot be put into effect. It is often predictable and the board of directors.<sup>10</sup>

#### 6.4 Shareholders as Passive or Active Investors

A dilemma occurs because many minority shareholders are in general ignorant of their rights and responsibilities, and even when they become aware they often adopt passive and green approach particularly due to lack of established good corporate governance practices. Even when they decide to take an action, they are not familiar with their rights, alternative and the suitable approaches to put forth their complaints.<sup>11</sup>

In Nigeria, shareholders are passive and have reduced to mere supplier of capital.<sup>12</sup> An active investor can make an accusation offer on any day of the year, and a few days later own a controlling interest in the company.<sup>13</sup>

<sup>1</sup> *Ibid*, S. 300(c)

<sup>2</sup> *Ibid*, S. 300(d)

<sup>3</sup> *Ibid*, S. 300(e)

<sup>4</sup> *Ibid*, S. 300(f)

<sup>5</sup> AngUALIA Daniel, *Balancing the Powers of Shareholders and the Board in Corporate Governance*, (M/s Madiinah & Co. Advocates, (2010) available online at SSRN: <http://papers.ssrn.com/so13/papers.cfm?abstractid=1612962&http://www.goggle.com.ng/9>. Last accessed on May 10, 2013.

<sup>6</sup> *Ibid*.

<sup>7</sup> (1935)2 KB 133.

<sup>8</sup> *Kotoye v. Saraki* (1994)7 NWLR (Pt. 357)414 at 467.

<sup>9</sup> Angualia Daniel, *Balancing the Powers of Shareholders and the Board in Corporate Governance*, *Op cit*.

<sup>10</sup> Daniel, Angualia *Balancing the Powers of Shareholders and the Board in Corporate Governance*, *Op cit*.

<sup>11</sup> Shareholders' Rights & Responsibilities, Securities and Exchange Commission, available online at <http://www.proshareng.com/download.php?item=reports/2625.pdf>. Last accessed on January 2, 2015.

<sup>12</sup> Amupitan, Joash Ojo *Privitazatipn%20and20Corporate%Governance%20in %20Nigeria.pdf*.

Last accessed on March 8, 2015

<sup>13</sup> *Ibid*.

A number of managerial reasons seem to influence the scope to which institutional investors are active shareholders, they includes:

Issues in accounting and finance and size matters ..... Larger investment institutions have more resources available to allow them to focus on corporate governance, issues as voting.<sup>1</sup>

However, a suit was recently been brought against the Central BANK OF Nigeria, Lamide Sanusi, apostle Hayford Alile, the chairman, Cecilia Ibru, the former CEO of Oceanic Bank Plc., and John Aboh, the new CEO; by Stephen Isibor And six others, all shareholders of the bank, for 'actions detrimental to the interests of shareholders' however marks an exodus from the past when shareholders were passive to dealings that affected their ownership stakes in companies.<sup>2</sup>

### 6.5 Shareholders' Powers to Alter the Article of Association

The articles of association constitute the rule for conduct and regulation of the internal affairs and management of the company. Articles provide the rule book of association of members and have to deal with variety of situations and relations.<sup>3</sup>

An important implication of the articles is that its provisions amount to a public notice, known as constructive notice, to all those who deal with the company. The articles bind the company by constituting a contract between the Company and members inter se. it binds all the members present and future.<sup>4</sup>

The content of Articles of Association is provided for in section 33 and 34 of the Companies and Allied Matters Act, 1990. The power to alter the Articles of Association is a legislative authority. Articles of association can be amended by shareholders having the mandatory majority. The articles once altered in accordance with the Act become the articles of associations of the company, and is binding on all the members.<sup>5</sup> The Articles of Association can only be altered<sup>6</sup> in accordance with the provisions of the Act, and by special resolution, particularly, the provisions in sections 27, 47, 141 and 142 of CAMA. Any alteration must be lawful, bona fide and not intended to give the majority an advantage over the minority shareholders.<sup>7</sup>

## 7. Shareholders as Stakeholders

Many shareholders buy shares to make money, but buying a stake in a company offers a shareholder an opportunity to participate in the decision-making process.<sup>8</sup> Shareholders are stakeholders in a corporation, but stakeholders are not always shareholders. A shareholder is a person who owns part of a company through stock ownership, while a stakeholder is merely concerned in the feat of a company for reasons other than just appreciation.

Shareholders may be the biggest stakeholders because shareholders are affected directly by a company's feat; it has become more ordinary for additional group of persons to be referred to as to be stakeholders.<sup>9</sup>

The stakeholders value perspective emphasis productivity over responsibility, and sees organizations primarily as instruments of its owners. Proponents of shareholders value perspectives believe that an organization's successes can be measured by share prizes, dividends, etc., seeing stakeholders' management as a means, and not an end in itself.

On the other hand, the stakeholders value perspective emphasizes responsibility over productivity, and sees organizations coalitions to serve all parties involved. Proponents of shareholder value perspectives believe that an organization's successes can be measured by satisfaction of all stakeholders, seeing stakeholders'

<sup>1</sup> Factors affecting shareholder Activism, Available online at <http://webcache.googleusercontent.com/search?q=cache:5hIBHFrzbSoJ:www.scribd.com/doc/53729872/56/Factors-affecting-shareholder-ctivism+Nigeria+firm+passive+>. Last accessed on May 8, 2013

<sup>2</sup> Onyeaso, Obiora The last heard: A look at deal communications in Nigeria, (2011). Available online at <http://234next.com/csp/cms/sites/Next/Money/Business/5463127-147/story.csp>. Last accessed on January 4, 2015.

<sup>3</sup> S. 31 of CAMA 1990.

<sup>4</sup> Kapur, Neerja Can shareholders' power to amend the Article of Association at a future date be taken away by amending the Articles of Association? (ALG India Law Offices: India, nd) Available online at <http://www.algindia.com/publication3800.psd>. Last accessed on January 7, 2015.

<sup>5</sup> Kapur, Neerja Can shareholders' power to amend the Articles of Association at a future date be taken away by amending the Article of Association? *Op. cit.*

<sup>6</sup> S. 44 of CAMA 1990.

<sup>7</sup> *Re: Westbourne Galleries Ltd.* (1973) AC 360.

<sup>8</sup> Atherton, Mark A boost for shareholder democracy, (The Sunday Times Online: Thomas More Square, London, E98 IX, 2010). Last accessed on March 8, 2015.

<sup>9</sup> What is the different between a shareholder and a stakeholder? Available online at <http://www.investopedia.com/ask/answers/08/difference-between-a-shareholder-and-stakholder.asp>. Last accessed on March 4, 2015.

management both as a means, and an end.<sup>1</sup>

## 8. Prospects of Shareholders under Companies and Allied Matters Act

### 8.1 Shareholders in a General meeting and the Board of Directors

The balance of power in the company often raises the issue of the relationship between the general meeting and the Board of Directors, as these two bodies have divergent powers and controls of the company. This is also provided for in the Companies and Allied Matters Act 1990<sup>2</sup>, the memorandum and articles of Association of the Company.

The general meeting is primarily responsible for election of the directors while directors are primarily concerned with the management of the company. The questions are which of the two bodies (Board and shareholders in general meeting) has more powers in the management of the company and what happens in the event of abuse of these powers to the detriment of the other person?<sup>3</sup>

Shareholders in a general meeting and the Board of Directors are crucial organs in the management of the company, because both appear to have powers bestowed upon them<sup>4</sup> by the Companies and Allied Matters Act.

It is the basic principle of common law that the Articles of Association and memorandum of Association constitute the constitution of the company.<sup>5</sup> The Article constitutes a contract between the Company and the shareholders and between the shareholders *inter se*.<sup>6</sup> In the event of non-observance of the provisions of the Articles of Association, a stakeholder can sue to enforce the observance of the provisions of the Articles.<sup>7</sup>

This shareholder's safeguard was appropriately illustrated in *Wood v. Odessa Waterworks Co.*,<sup>8</sup> [w]here the Company passed a resolution to pay dividend by means of debenture issued to shareholders contrary to the Article which required payment in cash. It was held that the articles constitute a Contract between the shareholders and the Company and among Shareholders themselves and thus, since the articles had not been altered to enable payment of dividend to be made in the manner proposed, it was void.<sup>9</sup>

Although the Directors are always voted in by shareholders, they appear to only owe duties to the company, and in these wise, they sometimes take decisions which are not in shareholders' best interest. It therefore appears that as a result of inequality of powers between the minority shareholders and the board, the shareholders have the propensity of always being at the mercy of the board.

### 8.2 Safeguard between Minority Shareholders and the Majority Shareholders

Time and again, the Minority shareholders have been subjugated and marginalized by the majority Shareholders, who have the propensity to be with the management against the interest of the minority shareholders, through the exercise of their voting power in corporate decision making. If left unchecked, the minority shareholders would be desolate of power of their small investments.<sup>10</sup>

The majority shareholders' oppression to minority shareholders would logically seem to be expected, as the majority could without difficulty turn their own desires into the company resolutions, and the minority shareholders should have expected this before they joined the company. The Shareholders' do not only meet to come to a decision on such undemanding issues at the election, replacement, enumeration, and the approval of final accounts, but also the modification of the company's business form and structure. The company's Articles arm the shareholders with broad powers which help them during shareholders' meetings to seek to verify the behaviors of the administration, without harming their rights and interest.

Nevertheless, these are positioned in the hands of the majority shareholders, without first granting suitable remedies to minority shareholders, and the Nigerian legal system does not appear to safeguard most of the cases, the minority shareholders' rights. These majority shareholders have to fight it out in courts with the

<sup>1</sup> Shareholder values versus Stakeholders, Available online at [http://www.valuebasemanagement.net/fag\\_shareholder\\_perspective.html](http://www.valuebasemanagement.net/fag_shareholder_perspective.html). Last accessed on January 4, 2015.

<sup>2</sup> S. 63 CAMA

<sup>3</sup> Angualia Daniel, Balance of Power shareholders and the Board in Corporate Governance, (M/s Madiianah & Co. Advocates, (2010) available online at SSRN: [http://paper.ssrn.com/so13/papewrs.cfm?abstract\\_id=1612962&http://www.google.com.ng/](http://paper.ssrn.com/so13/papewrs.cfm?abstract_id=1612962&http://www.google.com.ng/)). Last access on January 10, 2015

<sup>4</sup> Daniel, Angualia *Balance of Power shareholders and the Board in Corporate Governance*, (M/s Madiianah & Co. Advocates: Kampala Uganda, 2010)9

<sup>5</sup> Onuoha, Reginald The Need for Investor Vigilance in Corporate Governance, (2010) available at <http://www.proshareng.com/articles/singleNews.php?id635>. Last access on January 10, 2015.

<sup>6</sup> Mantysaari, Petri *Comparative Corporate Governance: shareholder as a Ruler-maker* (2005) available at <http://www.books.goggle.com.ng/books?isbn=3540253807>.

<sup>7</sup> Onuoha, Reginald *The Need for Investor Vigilance in Corporate Governance Op.cit.*

<sup>8</sup> *Wood v. Odessa Waterworks Co* (1889)42 Ch D 636.

<sup>9</sup> Onuoha, Reginald *The Need for Investor Vigilance in Corporate Governance, Op.cit*

<sup>10</sup> *Ibid.*

majority and accompanied, who are represented by the best Senior Advocates of Nigeria, and with better resources than the minority shareholders.

### 8.3 The Extra-Ordinary General Meeting

By section 215 of CAMA 1990, the Board of Directors may convene an extraordinary meeting whenever they deem fit. In addition, any member or group of members holding net less than one-tenth of the paid capital, or in the case of a company not limited by shares, the member(s) representing not less than one-tenth of the total voting rights, may request for a meeting to be convened.<sup>1</sup> On receiving such requisition, the Board of Directors must convene the meeting within twenty-one days. Where the directors fail to convene the meeting, the requisitionist who represent half of the total voting rights may convene the meeting, and all expenses in this regard will be borne by the company, provided they are reasonable.<sup>2</sup>

### 8.4 The Annual General Meeting

All duly registered companies are expected to hold a General Meeting as its Annual General Meeting in each year, in addition to any other meeting in that year.<sup>3</sup> Members are to be notified of such meeting shall rectify the meeting as such in the notices calling its members and must hold its first AGM within 18 months of its incorporation. This meeting must be held not more than 15 months after the previous AGM, or not more than 6 months after the end of its financial year. The AGM provides shareholders an occasion to obtain information and to question management on company performance.<sup>4</sup> Section 218 of CAMA provides for the contents of all notice for meetings and by S.219 (1) it is mandatory that every member of a company should have notice of either the annual general meetings or of the extraordinary general meeting.<sup>5</sup>

The requirement of additional notice is provided by s.222 as follows:

In addition to the notice required to be given to those entitled to receive it in accordance with the provision of this Decree, every public company shall at least give 21 days' notice before any general meetings, advertise a notice of such meeting in at least two daily newspapers

There are mandatory issues which are regarded as the ordinary business of the company, and must be discussed at the meeting. "These include declaration of dividend, presentation of financial statements, the reports of directors and auditors' remuneration, and appointment of members of the audit committee."<sup>6</sup> The authority to vote is a supplementary or defensive right, not an autonomous variety of possessions to be used as to increase supremacy over the investment of others<sup>7</sup>, as every shareholder has an unobstructed power to vote at general meetings of the company on the rule of one vote for every registered share.<sup>8</sup> The Corporate Affairs Commission (CAC) on the application of any powers to ensure a company which defaults in calling an annual general meeting is made to call the meeting, and also give such ancillary directions as the court thinks fit to ensure that the meeting to be held.<sup>9</sup>

### 8.5 Quorum

Quorum is the number of shareholders directors at board meetings who should be present at a meeting, for proceedings to be validly and effectively carried out. The required quorum for a company's meeting is usually two persons present in person or by proxy, and can be varied to suit particular needs and the requirements as contained in the company's Articles of Association. Resolutions passed at a meeting without the required quorum are invalid, but may be sanctioned at a subsequent meeting.<sup>10</sup>

By section 232 (1) and (2) of CAMA 1990, no business except a quorum of members (i.e) shareholders)

<sup>1</sup> Section 215 (2) CAMA 1990.

<sup>2</sup> *Ibid*, S. 215 (4)

<sup>3</sup> *Ibid*, S. 213

<sup>4</sup> Shareholders' Right & Responsibilities, Securities and Exchange Commission, available online at <http://www.proshareng.com/download.php?item=reports/2625.pdf>. Last accessed on March 2, 2015.

<sup>5</sup> Ken B. Kaiser Nwiedoh, The Rights of a shareholder under the Companies and Allied Matters Act 1990, available online at <http://dspace.unijos.edu.ng/bitstream/10485/237/1/pd346.pdf>. Last accessed on January 2, 2015

<sup>6</sup> Nmehielle, Vincent O. & Nwauche, Enyinna S. External-Internal standards in Corporate Governance in Nigeria, (2004) Conference on Corporate Governance and Accountability in sub-Saharan Africa Project of the Institute for International Corporate Governance and Accountability George Washington University Law school, October 29, 2004, Available online at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=627664&rec=1&srcabs=982577](http://papers.ssrn.com/so13/papers.cfm?abstract_id=627664&rec=1&srcabs=982577). Last visited on January 12, 2015.

<sup>7</sup> *Render v. Lusshington* (1877)6 Ch D 70); *Cooks v. Deeks* (1916)1 AC 554

<sup>8</sup> Nwiedoh, Ken B. Kaiser, *Op.cit*

<sup>9</sup> Nmehielle, Vincent O. & Nwauche, Enyinna S. External-Internal Standards in Corporate Governance in Nigeria, *Op.cit*.

<sup>10</sup> Legal Glossary, (2010-2011). Available online at <http://www.clickdocs.co.uk/glossary/quorum.htm>. Last accessed on January 9, 2015.

is formed at the time when the meeting proceeds for business and all through the meeting.

The quorum for the meeting of a company shall be one-third of the total number of members of the company or 25 members (whichever is less) present in person or by proxy, provided that where the number of members is not multiple of three, then the number nearest to one third, and where the number of members is 6 or less, the quorum shall be two members.<sup>1</sup> To determine if quorum has been formed, all members or their proxies shall be counted.<sup>2</sup>

#### 8.6 *The Rule in Foss v. Harbottle*

The statutory codification of the Rule in *Foss v. Harbottle*<sup>3</sup> is in Section 299 of the Companies and Allied Matters Act, 1990. It provides that where irregularity has occurred in the course of a company's affairs or any wrong has been done to the company, only the company can bring a legal action to remedy that wrong and only the company can rectify that irregularity conduct.

There are, however, four exceptions to this rule at common law, as codified in section 300 of CAMA and two extensions in decided cases.<sup>4</sup> These exceptions allow any member of the company (whether minority or majority,) to apply for an injunction or declaration to restrain a company from entering into a transaction that is illegal or *ultra vires*. These exceptions include:<sup>5</sup>

- (a) Entering into any transaction which is illegal or *ultra vires*;
- (b) Purported to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution;
- (c) Any act or omission affecting the applicant's individual rights as a member.
- (d) Committing fraud on either the company or the minority shareholders where the director fail to take appropriate action to redress the wrong doing;
- (e) Where a company meeting cannot be called in time to be benefit, or have profited or benefited from their negligence or from their breach of duty.<sup>6</sup>

#### 8.7 *Locus Standi of Shareholders*

A shareholder is allowed to sue where the act complained of is illegal or *ultra vires*. The common assent of all the members can however ratify and render valid any *ultra vires* or illegal act<sup>7</sup>. This was formulated by Jenkins LJ in *Edwards v. Halliwell*<sup>8</sup> where it was held that where the act complained of is wholly *Ultra Vires* the company, the rule has no application as there is no question of the transaction being confirmed by the majority. By section 39(3) CAMA the application of *Ultra Vires* doctrine to executed transaction has been abolished. However by the same section 39(3) CAMA, the "...court can restrain the *Ultra Vires* executor contract, on application by a member," the minority shareholders need to be vigilant enough to have such *ultra vires* action restrained at the executory stage.<sup>9</sup>

Thus, in *Association Registered Engineering Co. Ltd and Others v. Yalaju-Amaye*,<sup>10</sup> the purported appointment of new directors by the board was held *ultra vires* as there was no such power in the articles of association, the minority shareholder was allowed to sue.<sup>11</sup>

A shareholder can still attack the validity of a resolution that he had been present and voted for, if such a resolution was not authorized by the articles of association, or was illegal at the time of voting for the resolution.<sup>12</sup>

#### 8.8 *Purporting to do by ordinary resolution any act by its constitution or the Decree requires to be done by special resolution*<sup>13</sup>

This is a situation, where the act protested against by the minority shareholder could only be validly done or

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<sup>1</sup> Section 232 (3) CAMA 1990.

<sup>2</sup> *Ibid*, S. 232 (4)

<sup>3</sup> *Foss v. Harbottle* (1843)2 Hare 461.

<sup>4</sup> Oshio, P. Ehi "The True ambit of Majority Rule under the Companies and Allied Matters Act 1990 Revisited" *Modern Practice Journal of Finance and Investment Law*, Lagos,7/3-4, 386-403.

<sup>5</sup> *Ibid*.

<sup>6</sup> S. 300 (a)-(c) CAMA 1990.

<sup>7</sup> Oshio, P. Ehi, The True ambit of Majority Rule under the Companies and allied Matters Act 1990 Revisited, *Op.cit*

<sup>8</sup> (1950)2 all E.R.1064.

<sup>9</sup> Onuoha, Reginald, The Need for Investor' Vigilance in Corporate Governance, *Op.cit*.

<sup>10</sup> *Associated Registered Engineering Co. Ltd and Others v. Yalaju-amaye*(1986)3 N.W.L.R. (pt.31)653.

<sup>11</sup> Oshio, P. Ehi, The True ambit of Majority Rule under the Companies and allied Matters Act 1990 Revisited, *Op.cit*

<sup>12</sup> *Benson Oduduro & anor v. National Union of Hotels and Personal Services Workers & Ors* (Unreported suit No. FCA/L/226/83, F.C.A. decision, referred to in P. Ehi Oshio, *Op.cit*.

<sup>13</sup> S. 300 (b)

authorized by a special majority or special resolution. Such an action would be restrained by the courts.<sup>1</sup> This is one way of “Protecting the minority shareholders against the ultra vires acts of the majority shareholders who would, in a desperate bid to achieve their selfish interest in a company may pass a resolution even in contravention of the provisions of the Article and CAMA”<sup>2</sup>

### 8.9 Invasion of Personal Rights<sup>3</sup>

A shareholder’s right to vote cannot be impeded, because it is right of property. Where such personal rights of a member or shareholder have been infringed on are about to be<sup>4</sup> infringed upon, the rule does not apply, and the minority shareholder can sue in his own name to enforce his right. According to Lord Jessel MR,

A member has a right to say: Whether I vote in the majority or minority, you shall record my vote, as my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you....<sup>5</sup>

### 8.9 Where Fraud Has Been Committed On the Company or On the Minority<sup>6</sup>

It has been posited that this is the most important exception and *that at common law*, “fraud” would include dishonesty and deceit. Consequently, in *Associated Registered Engineering Contractors Ltd. And others v. Yalaju-amaye*<sup>7</sup> the Supreme Court held that in going on a withdrawal spree from the bank account, and forging minutes of meetings to cover lack of a resolution to change the signatories to cheques, the majority have committed fraud on the company.<sup>8</sup>

### 8.10 Where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or minority shareholders<sup>9</sup>

This is a powerful proviso for the protection of the minority shareholders. This because some wrongs done to minority shareholders necessitate urgent action to remedy. Consequently, any form of delay will likely defeat the right. Where the directors fail to call an extra-ordinary meeting, the minority shareholder will be at liberty to bring an action against the directors.<sup>10</sup>

### 8.11 Where the Directors are likely to have profited from their negligence or from their breach of duty<sup>11</sup>

This rule is to the effect that where directors or the majority benefit from their breach of duty, the minority shareholder would be at liberty to sue.<sup>12</sup> This is therefore an extension of section 300(d). In *Daniels v. Daniel*,<sup>13</sup> a husband and wife were the directors and majority shareholders of a company. The company sold land to the wife for £14,250,000 four years later. There was no proof of any intention to defraud the minority shareholders. However, Templeton, J, held that there had been a misappropriation of the company’s land in respect of which an action would lie. His Lordship declared.

The principle which may be gleaned from *Alexander v. Automatic Telegraph co.* (Directors benefiting themselves), from *Cook v. Decks* (1916)1 A.C. 554 (Director diverting business in their own favour) and from dicta in *Pavlide v Jenson* (Directors appreciating assets of a company) is that a minority shareholder who has no other remedy may sue where.....

## 9. Conclusion

Perhaps it is in realization of the complexity in the provisions of CAMA for the minority shareholder to institute an action against the majority that CAMA have also provided for a balance of powers between the shareholders in a general meeting, and the board of directors.

It posited that although the general meeting is very important in corporate governance, most directors

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<sup>1</sup> *Edwards v. Halliwell, supra.*

<sup>2</sup> Onuoha, Reginald, The Need for Investor’ Vigilance in Corporate Governance, *Op.cit.*

<sup>3</sup> S. 300 (C)

<sup>4</sup> *Edokpolo and Company Ltd. V. Sem-Edo Wire Industries Ltd.*(1986)4 NWLR (pt.37)579

<sup>5</sup> Statute: 38. Exemption To Rule Of Foss v. Harbottle, *supra* <http://statutelaw.blogspot.com/2011/03/38-exception-to-foss-v.html#ixzzIM4Y3QmsJ>. Last accessed on March 11, 2015.

<sup>6</sup> S. 300 (D)

<sup>7</sup> *Associated Registered Engineering Contractors Ltd and Others v. Yalaju-Amaye* (1986)3 N.W.L.R. (pt.31)653.

<sup>8</sup> Oshio, P. Ehi The True ambit of Majority Rule under the Companies and Allied Matters Acts 1990 Revisited, *Op.cit.*

<sup>9</sup> S. 300(e)

<sup>10</sup> *Hodgson v. National and Local Government Officers Association* (1972) 1 WLR 130.

<sup>11</sup> Section 300(F)

<sup>12</sup> *Daniels v. Daniels* (1978) Ch. 406; *Alexander v. Automatic Telephone Co.* (1900)2 Ch 56

<sup>13</sup> *Daniels v. Daniels, supra.*

utilize all manner of strategies to reduce the power of the general meeting. A potent general meeting is an indication of shareholders democracy. However, most of the time the shareholders are inactive. CAMA has also provided for two broad levels of safeguard between shareholders in a General Meeting and the Board of Directors, and Safeguard between Minority Shareholders and the Majority Shareholders. The majority shareholders' oppression to minority shareholders would reasonably appear to be expected, as the majority could without difficulty turn their own desires into the company resolutions.

The company's Article of shareholders with broad powers which help them during shareholders' meetings to seek to verify the behaviours of the administration, without harming their rights and interest. Nevertheless, these powers are placed in the hands of the majority shareholders, without first granting suitable remedies to minority shareholders.

To protect shareholders against the increasing incidences of abuse of powers by Directors, and give shareholders a right to be heard in the running of Nigerian corporations, the following recommendations are proposed:

First, the provisions in CAMA should be amended to establish mechanisms where a minority shareholder can convene the shareholders' general meeting and put forward or file resolutions which should gain the attention of management and the board of directors. Such resolutions should also be such that can be adopted, in part or whole by the board.

Secondly, the directors' duties not be limited to fiduciary duties, duty not to make secret profit, care and skill, but should be expanded to include restrictions on the borrowing powers of the directors, as the unrestricted powers of borrowing may be misused or abused.

Thirdly, section 216 of CAMA which provides for the holding of Annual General Meetings in Nigeria should be amended to provide for specific venues for such meetings, as company directors now hold meetings outside usual rendezvous, for instance, holding of such meetings in Lagos, Abuja or Ibadan, and by so doing, disenfranchise a great number of their shareholders who would normally have attended and voted at such meetings.

Fourthly, much significance should be attached to the remedies available to minority shareholders through lawsuits, other than the derivative action and the representative action. Shareholders should be allowed to take legal actions against directors, and be entitled to tyranny remedy, the evaluation remedy, the remedy of insolvency and dissolution of companies, and the compliance of restraining orders by courts.

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