

**UPDATE ON CURRENT LIABILITIES OF OFFICERS, DIRECTORS
AND STAKEHOLDERS OF PRIVATELY AND PUBLICLY HELD
COMPANIES**

***BEING A PAPER PRESENTED BY YUSUF ALI SAN¹ AT THE
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INTRODUCTION

The concept of investment in companies, either private or public is one hinged upon trust. As a matter of fact, in most instances in Nigeria, people choose to invest in businesses without any knowledge about those behind the business as directors or officers. It is therefore not surprising that the law seeks to protect the unwary public from loss by imposing liabilities on officers and directors of corporations to ensure that they are held accountable for the outcome of their decisions.

Today, more than ever, individuals serving on boards of directors of public corporations, private companies and non-profit organizations are being held accountable for the actions and inactions of the businesses they oversee. The law on liabilities of officers and directors of corporations in Nigeria is extensively covered by the Companies and Allied Matters Act CAP C20 Laws of the Federation of Nigeria 2004 (hereinafter referred to as CAMA). This shall be heavily relied upon alongside judicial decisions in the discussion of this topic.

It must be pointed out at this juncture, that I had earlier delivered a paper titled 'Recent Trends in Liabilities of Officers and Directors of Public and Private Corporations' at the IBA Annual General Conference held in Tokyo on 23RD October, 2014. The focus of this paper is to give an update on the earlier presentation, hence the topic 'Update on Current Liabilities of Officers, Directors and Stakeholders of Privately and Publicly Held Companies. However, for the benefit of those who did not witness the earlier

¹ LLM, FCIArb (UK); FCIArb(Nig); FSPSP,F.DRI, Principal, Yusuf o. Ali & Co., Ghalib Chambers, Ilorin and Abuja, Nigeria;
www.yusufali.net

presentation, the content of the earlier paper will be recaptured before the update is given.

Accordingly, this paper will begin by looking briefly at the concept of directorship and being an officer of a company in Nigeria, that is ‘who can be regarded as a Director or Officer of a company?’ It then highlights the duties of officers and directors of companies to investors, customers and employees, both in private and public companies, the different instances where liability will be imputed, means of seeking redress where such liability arises and the possibility of limiting liability of officers and directors for loss arising from their actions or inactions. The paper concludes by pointing out what is new as regards the liabilities of officers, directors and stakeholders of privately and publicly held companies in Nigeria.

WHO ARE OFFICERS AND DIRECTORS OF PUBLIC AND PRIVATE CORPORATIONS?

Under Nigerian company law, a director has been statutorily defined in the CAMA. Section 244 (1) of CAMA defines directors of a company as “persons who are duly appointed by the company to direct and manage the affairs of the company”. The operative words here are “appointed” and “to direct and manage”. Two things are distillable from this definition. One is that, the Act provides for the appointment criteria as the means of identifying a director. That is a person is a director as long as he is appointed as such. Second, is the fact that no matter the nomenclature or title of the person, whether President or Governor, etc., as long as he is appointed to direct and manage the affairs of the company, he is a director.² This position was endorsed by the court in the case of **Bernard Longe v. First Bank of Nigeria Plc**²

² http://www.nigerianlawtoday.com/2013/08/who-is-company-director_8678.html (2010) 2-3 MJSC 128; or (2010) 5 NSCR 1

Thus under Nigerian law, an officer of a company is still a director even if he is not nominally referred to as such, as long as he is appointed by the company to direct and manage the affairs of the company. This means that appointment is *prima facie* evidence that a person is a director of a company and can be dealt with as such. Some categories of persons are, however, exempted from being directors. Section 257 of CAMA provides that the following persons shall be disqualified from being directors-

- (a) An infant, that is, a person under the age of 18 years;
- (b) A lunatic or person of unsound mind;
- (c) A person disqualified under sections 253, 254 and 258 of this Act;
- (d) A corporation other than its representative appointed to the board for a given term.

From the above, it is evident that under Nigerian law, the words officers and directors mean the same thing, though an officer may be extended to include other persons in the company like the company secretary.

In the case of a private company, the company secretary, as an officer of the company, shall be a person who appears to have the requisite knowledge and experience to discharge the functions of a secretary of a company, and in the case of a public company, he shall be-

- a. a member of the Institute of Chartered Secretaries and Administrators; or
- b. a legal practitioner within the meaning of the Legal Practitioners Act³; or
- c. a member of the Institute of the Chartered Accountants of Nigeria or such other bodies of accountants as are established from time to time by an Act; or
- d. any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company; or
- e. a body corporate or firm consisting of members each of whom is

³ Cap. L11. Laws of the Federation of Nigeria 2004.

qualified under paragraphs (a), (b), (c), or (d) of this section.^{4 5 6}

DUTIES OF OFFICERS AND DIRECTORS

The law is that the board of directors is the sole organ of the company responsible for the management of the company.⁶ The Nigerian Court of Appeal, in the case of **U.T.C. (Nig.) Plc v Phillips**⁷, acknowledged the importance of directors to the running of a company, when it was held 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!

Some of the specific duties of a director under Nigerian company law are extensively covered by section 279-283 of the CAMA. The sections provide thus:

279(1) A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.

(2) A director shall also owe fiduciary relationship with the company in the following circumstances -

- a. where a director is acting as agent of a particular shareholder;
- b. where even though he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities.

⁴ See Section 295 (1) of the Companies and Allied Matters Act

⁵ Section 63(3) CAMA

⁶ (2012) 6 NWLR (Pt 1295) 136,

(3) A director shall act at all times in what he believes to be the best interests of the company as a whole, so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.

(4) The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.

(5) A director shall exercise his powers for the purpose for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose, does not constitute a breach of duty, if it, incidentally, affects a member adversely.

(6) A director shall not fetter his discretion to vote in a particular way.

(7) Where a director is allowed to delegate his powers under any provision of this Act, such a director shall not delegate the power in such a way and manner as may amount to an abdication of duty.

(8) No provision, whether contained in the articles or resolutions of a company, or in any contract, shall relieve any director from the duty to act in accordance with this section or relieve him from any liability incurred as a result of any breach of the duties conferred upon him under this section.

(9) Any duty imposed on a director under this section shall be enforceable against the director by the company.

280. Conflicts of duties and interests

(1) The personal interest of a director shall not conflict with any of his duties as a director under this Act.

(2) A director shall not-

- a. In the course of management of affairs of the company; or
- b. In the utilisation of the company's property, make any secret profit or achieve other unnecessary benefits.

(3) A director shall be accountable to the company for any secret profit made by him or any unnecessary benefit derived by him contrary to the provisions of subsection (2) of this section.

(4) The inability or unwillingness of the company to perform any functions or duties under its articles and memorandum shall not constitute a defence to any breach of duty of a director under this Act.

(5) The duty not to misuse corporate information shall not cease by a director or an officer having resigned from the company, and he shall still be accountable and can be restrained by an injunction from misusing the information received by virtue of his previous position.

(6) Where a director discloses his interests before the transaction and before the secret profits are made before the general meeting, which may or may not authorise any resulting profits, he may escape liability, but he shall not escape liability if he discloses only after he has made the secret profits, and in this case, he shall account for the profits.

281. Multiple directorships

The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company, including a 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 his own or other person's advantage.

282. Duty of care and skill

(1) Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company, and shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.

(2) Failure to take reasonable care in accordance with the provisions of section 282 of this Act, shall ground an action for negligence and breach of duty.

(3) Each director shall be individually responsible for the actions of the board in which he participated, and the absence from the board's deliberations, unless justified, shall not relieve a director of such responsibility.

(4) The same standard of care in relation to the director's duties to the

company shall be required for both executive and non-executive directors: Provided that additional liability and benefit may arise under the master and servant law in the case of an executive director if there is an express or implied contract to that effect.

283. Legal position of directors

(1) Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests.

(2) A director may, when acting within his authority and the powers of the company, be regarded as agents of the company under Part III of this Act. The Act is silent on the day to day role and power of the directors and has left those to the company articles. There is also no mention of the way and manner the board ought to be organized and it follows that each company apart from appointing members of the board must also specify the structure, role and powers of its directors in the articles of association.⁷ In general, the courts have held that a director has a continuing duty to acquire and maintain sufficient understanding of the company's business to enable him to discharge his duties as a director and that the question of whether a director has discharged his duties shall depend on the facts of each particular case, the articles of association and the director's role in the management of the company.⁸

In the past, the status of the secretary in a company was regarded as a mere servant whose functions were only clerical and ministerial. His duties were of a limited and somewhat humble character. However, under the Act the status has changed. Thus, a company secretary, though not a director, is the chief administrative officer of the company⁹, responsible along with the directors, for certain tasks under the Act. Company secretaries are now seen

⁷ Board of directors and corporate governance in Nigeria Kunle Aina. IJBFMR 1 (2013) 21-34.

⁸ Olawepo v S.E.C. (2011) 16 NWLR (Pt 1272) 122.

⁹ Okeowo & Ors Vs Migliore & Ors (1979) 12 NSCC 210

as the primary source of advice on the conduct of business and this can span everything from legal advice on conflicts of interest, through accounting advice on financial reports, to the development of strategy and corporate planning.¹⁰

The Act also provides both specific and general duties for secretaries. Section 298(1) provides that; the duties of a company secretary include;

- (a) Attending the meeting of the company, the Board of Directors and its committees, rendering all necessary secretarial services in respect of the meeting with the applicable rules and regulations;
- (b) Maintaining the registers and other records required to be maintained by the company under the Act;
- (c) Rendering proper returns and giving notifications to the commission as required under the Act; and
- (d) Carrying out such administrative and other secretarial duties as directed by the directors or the company.

The company secretary advises on changes to a company's share structure, capital issues and restructuring. He/she ensures that all documents are properly executed and authenticated and properly filed with relevant regulatory bodies.

Additionally, the company secretary is also saddled with the responsibility of advising on the importance of the balance of powers between the company's board of directors, management, shareholders and other stakeholders. The company secretary must provide facilities for the public inspection of documents. In the performance of these duties, a company secretary must ensure that the provisions of the Articles of Association, all statutes regulating the operations of the company, rules and regulations and international or sector specific corporate governance policies are complied with. The immense role of the company secretary cannot be understated.¹²

¹⁰ <http://www.bloomfield-law.com/publications/Outsourcing%20Company%20Secretarial%20Services%20in%20Nigeria.pdf>

The role of the company secretary has thus moved away from that of being a mere administrative assistant to being a necessary official for ensuring the corporate success of a company.

From the above, it is clear that the directors and secretary, as officers of a company have duties imposed upon them by law and are the ones responsible for the actions and inactions of the company. They are, thus liable to be proceeded against in the event of a breach of any of their duties.

INSTANCES OF LIABILITIES OF OFFICERS AND DIRECTORS

A company being an artificial person can only incur liability through organs, agents and officers. This position was explained by the Court of Appeal in Nigeria in the case of **Kurubo v. Zach- Motison(Nigeria)Ltd**¹³ where TobiJCA observed as follows:

'In view of the fact that an artificial person or company vested with legal or juristic personality- lacks the natural or physical capacity to function as a human being, those who work in it do all things for and on behalf of it. It is therefore the law and the tradition for the human beings authorized to ^{11 12} negotiate agreement for and on behalf of the company. Where an agreement is so executed by a person in authority, the company is liable or deemed to be liable for the act or acts of the person

It is on this basis that a company is at common law, generally liable in crime, tort and contract like an individual. This is now made statutory in Nigeria. Section 65 of **CAMA** provides that any act of the members in general meeting, the board of directors or of the managing directors while carrying on in the usual way the business of the company, shall be treated as an act of the company itself and the company shall be criminally and civilly liable

¹¹ THE COMPANY SECRETARY IN NIGERIA - PERTINENT ISSUES. http://www.acas-law.com/cipxprobe/publications/The_Company_Secretary_in_Nigeria_-_Pertinent_Issues_-_November_2013.pdf

¹² (1992)5NWLR(Pt.239)102@115

therefore, to the same extent as if it was a natural person.

Liabilities of directors and officers can arise in many ways, including allegations of breach of common law duties, breach of duties owed to shareholders, and statutory liabilities imposed by federal or state laws.

Some provisions of CAMA also impose liabilities on directors and officers of a company. For example, section 128(2) provides that if any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of the Act with respect to allotment of shares, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby.¹³

Also, section 246(3) of the Act provides that a director or member of a company who knows that a company carries on business after the number of directors has fallen below two for more than 60 days shall be liable for all liabilities and debts incurred by the company during that period when the company so carried on business.

Section 250 covers liability of a person who is not duly appointed as a director but acts as such, when it states that where a person not duly appointed as director acts as such on behalf of the company, his act shall not bind the company and he shall be personally liable for such action.¹⁴

Section 290 specifically provides for the personal liability of directors where a company fails to apply money for the purpose for which it was received.

REMEDIES FOR BREACHES OF DUTIES OF AN OFFICER AND DIRECTOR

Under Nigerian law, once a director has been guilty of a breach of duty and has no grounds for relief from liability, one of the following remedies may be resorted to.

⁴ Liability under this section is however limited to proceedings brought to recover such loss within two (2) years of allotment.

¹⁴ where it is the company which holds him out as director, the company shall be bound by his acts

A. INJUNCTION(S) OR DECLARATION(S) Injunction as a remedy may be primarily adopted to prevent a director from further breach or where a breach is threatened but has not yet occurred. Moreover, the prospect of being sued is in itself a substantial deterrent for many corporate executives or being enjoined for failure to perform ones duty. The court can use its injunctive power in imaginative way such as to improve the management of corporation either by removal of a fraudulent director or in pursuance of their inherent equitable powers. No removal of director except guilty of fraud. Therefore, suits for equitable relief can motivate a director to act prudently and in the best interest of the company.

B. DAMAGES OR COMPENSATION

At common law, damages are for breach of duty of care, whereas compensation is the equitable remedy for breach of fiduciary duty. The distinction between these terms seems to be vague as indicated in **Barlett v. Barclays Bank Trust Co**¹⁶ where the court held that the obligation of a fiduciary to restore the asset of which he had denied the beneficiary may involve payment of a considerable larger sum than what would normally be payable as damages for loss caused by a tort or breach of a contract.

It is unlawful for a company to make to any director of the company, any payment by way of compensation for loss of office, or as consideration for or in connection with his ¹⁵

retirement from office unless particulars, with respect to the proposed payment and the amount, have been disclosed to members and the proposal is approved by the company.¹⁶ Similarly, if in connection with the transfer of the undertaking or property of a company it is proposed to make any payment to a director by way of compensation for loss of office, or as consideration or in connection with his retirement from office, the payment will be unlawful unless particulars of the proposal and the amount have been disclosed to members of the company and approved by the company.¹⁷ Disclosure must be to all the members. If a director receives payment in contravention of this provision, the amount received by him will be in trust for the company.¹⁸

Where, in connection with a take-over bid, payment is to be made to a director as compensation for loss of office, or as consideration for his retirement from office, it is the duty of that director to do all things reasonably necessary to ensure that particulars of the proposed payment are included in or sent with the notice of the offer made to the shareholders.¹⁹ Payments prohibited under this head do not include any *bona fide* payment by way of damages for breach of contract or by way of pension.²⁰

C. REVISION OF CONTRACT IN WHICH THE DIRECTOR IS INTERESTED: Where there has been an arrangement, which derogates from the rules regarding entering in to contract in which the director is interested, may be avoided at the instance of the company, provided restitution in integrum is possible and the right of a bonafide third party have not accrued.

D. ACCOUNTING FOR PROFIT

A director who makes secret profit out of the performance of his duty

¹⁶ Section 271

¹⁷ Section 272(1)

¹⁸ Section 272(2)

¹⁹ Section 273(1)

²⁰ Section 274(3)

without the knowledge or consent of the general meeting will be held accountable for the profit made from such transaction.

The company may claim an account of any profit made by director whether or not he rescinds the contract, if the profit arises out of the contract with the company. Also, if a director sells his own property to the company, the right to an account of profit will be lost if the company elects not to rescind or is too late to do so. But if profit arises out of contract between the director and a third party, there will be no question of rescinding the contract since the company cannot be said to be a party to the contract.

RELIEF FROM LIABILITY

As long as there is full disclosure to the general meeting and ratified by the passing of an ordinary resolution, a director will be relieved of any liability arising thereto. He could equally be indemnified against liability in respect of breaches of duty if he acted on the orders of the company and within its powers. The court is empowered to relieve any officer from liability for negligence, default, breach of duty or trust if it appears to it that he acted honestly and reasonably and ought fairly to be excused having regard to all the circumstances. Directors are neither liable for not attending board meeting nor, as a corollary, for failing to prevent their colleagues from negligent act. Liability is based on personal wrongdoing.

In all the circumstance, there should be an over-riding qualification to the effect that the director's conduct must have been honest and well intentioned. In the case of **Engineer Vassil Vassiler v. Paas Ind Ltd.**²¹, the plaintiff now respondents filed a suit before the Plateau State High Court, claiming against the defendants jointly and severally for a certain sum of money per-day, as per the agreement executed by both parties, in 16th July, 1992. The case was heard without the defendants attending court and judgment was entered against the defendants jointly and severally. The 2nd defendant, who was the

²¹ (2002)FL WE Pt 19 418 CA

managing director of the 1st defendant/judgment debtor, filed an appeal challenging the judgment on the ground that the claim against the defendants was jointly and severally and thereby occasioned a serious miscarriage of justice. The Court of Appeal Per Akpabio JCA held as follows:

“It is trite law, in this country, that a limited liability company is a Juristic person "and can sue or be sued on its corporate name. It is separate and distinct from its shareholders and directors, it is unnecessary, therefore to have joined the present appellant as co-defendant at the court below.”

However, the following conducts appear not to be rectifiable. Insurance claim in respect of a criminal or fraudulent conduct cannot be ratified, as this will be contrary to public policy. A director who has fraudulently deceived the company, or who through, otherwise deliberately pursuing his own interest of or those of outsiders" has failed to act in the company's interest, cannot plead the approval of the general meeting as a defence to an action for breach of duty, breaches involving fraud on the minority is not rectifiable. Any breach of duty which result in the company performing an act which although lawful and intra vires, but could not be done under the company's article without some special procedure being carried out are not ratifiable. A breach of duty bearing directly upon the personal right of individual shareholders as defined in the article or refusal to register a transfer of share for an improper purpose cannot be ratified by the general meeting.

Finally therefore, whereas under some circumstances a director may be relieved or not relieved from liability, the directors are more vulnerable now in the management of the affairs of a company than at any time before. Hence prudent directors may consider safeguarding their position qua director in respect of negligent acts of omission.

POSSIBILITY OF LIMITING LIABILITIES OF OFFICERS AND DIRECTORS FOR BREACH OF DUTIES

The above highlighted reliefs from liability notwithstanding, the current

litigation climate for companies continues to be challenging. It has become increasingly apparent that almost everything directors and officers of companies do create the potential for second guessing and claims by persons adversely affected by their decisions and actions. Consequently, the current trend in other climes is to apply caution by taking out Directors and Officers insurance.

This is yet to be adopted in Nigeria as the only option of relief for Directors and Officers is still limited to indemnity by the company after ratification of their actions. Other than that, they are still largely exposed to the huge sums that arise from cost awarded as damages in litigation. Though the companies are covered by insurance policies, the Directors cannot be adequately covered by such in respect of personal actions taken against them.

WHAT IS NEW

Without a doubt, the passage of time and development in both the Nigerian and global economies have made some of the provisions of CAMA impracticable and inadequate to meet current challenges in company regulation and administration. Unfortunately, since coming into force in 1990, more than 20 years ago, CAMA has not witnessed any major amendment. Accordingly, Corporate Affairs Commission (CAC), the body which regulates the formation and management of companies in Nigeria has carried out an in-house review of the provisions of the CAMA, with a view to bringing it up-to-date with current global best practices in company regulation and administration. To this end, the Commission has put together a Draft Bill for the repeal of the Act and enactment of the CAMA 2016.²²

However, the draft Bill is more geared towards strengthening the regulatory and enforcement powers of CAC, with very little amendments made to the extant provisions on liabilities of officers and directors of public companies.

²² 'Draft Bill for the Repeal of CAMA and Enactment of New Act' (Draft Bill) <<http://new.cac.gov.ng/home/>> accessed on 09 September, 2016

The first significant provision may be found in Section 252 of CAMA which deals with the duty of a director appointed or proposed to be appointed as director of a public company and who is 70 or more years old to disclose this fact to the members at the general meeting and also criminalises impose a fine of N500 for failure to do so has been replaced with Section 249 of the draft Bill. The said provision, in addition to the duty of directors to disclose age, imposes on a director of public company, the duty to disclose any position he holds as a director in any other public company at the meeting in which he is proposed for appointment as a director. Any person who fails to disclose his age or multiple directorship as required under this section shall be liable to a penalty of N50,000.²³ But the liability hereunder is not criminalised.

Likewise, Section 281 of the extant law which contain provisions dealing with multiple directorships merely states that the fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company, including a 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 his own or other person's advantage, without more. However, the draft bill went further to provide that a person shall not be a director in more than five public companies. Any person who is a director in more than five public companies shall, at the next annual general meeting of the companies after the expiration of two years from the commencement of the Act, resign from being a director from all but five of the companies. A director of public companies who acts in contravention of the provisions of the section shall be liable to a daily penalty of N2,000.00 and shall refund to each of the companies every remuneration and allowances paid to him as a director in each of the companies.²⁴

²³ See Section 249 of the draft Bill

²⁴ See Section 279 of the draft Bill

CONCLUSION

In view of the above, it is apparent that the need to give more protection to individuals acting as officers of corporation to enable them carry out their duties as specified under the law appears not to have been adequately catered for, even with the proposed Bill. The current trend in other climes is to apply caution by taking out Directors and Officers insurance is conspicuously absent.

Nigerian law makers should take the cue from other jurisdictions and make provisions for insurance of director and officers of corporations from liability. Everyone will be the better for it in the long run.