

MODULE 2

COMPANY FORMATION

OUTLINE

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How a company is formed, types of company that may be formed

Engage a Chartered Accountant or Lawyer or Company Secretary to check for the availability of the proposed company name with the Corporate Affairs Commission. We recommend you suggest at least 2 names that are acceptable. If the name is approved, Corporate Affairs Commission will reserve it for 60 days and if not approved a notice of denial will be issued by the Commission. The Memorandum and Articles of Association (MEMART) of the proposed Company will be drawn up by the consultant with input from the client, stating the objects of the company, that the company is a private limited liability company and its authorized share capital in not more than one page. Similarly, the names of the subscribers to the MEMART, their full names, description, addresses and number of shares taken up.

Furthermore, the Complete Set of forms will be completed and endorsed by the shareholders and first director appointed by the company. They are

- a **Form CAC 3, Notice of registered address;**
- c. **Form CAC 7, Particulars of directors;**

Formation of company cont'd

- d. Form CAC 4, Declaration of compliance and the prescribed registration fees;**
- f. Form CAC 2, Statement of share capital and return of allotment of shares(2)**

The Stamp Duty will be paid at the Federal Inland Revenue [Service](#)-Stamp Duties units normally located at the offices of Corporate Affairs Commission. The Duty payable is dependent of the authorized share capital of the company. The Stamped copies of The MEMART (2) are filled with Corporate Affairs Commission after the payment of filing fees(dependent on the authorized share capital), accompanied with the approved availability form, set of incorporation forms together stated earlier.

The Corporate Affairs Commission issues a Certificate of Incorporation, CTC of Form CAC 2, CAC 7 and CTC of Memorandum of Association.

The role of the Corporate Affairs Commission in Company formation

- **The role of Corporate Affairs Commission**

The roles of the Commission as set out in section 7 of the Companies and Allied Matters Act, includes the following:

- ✓ To administer the Act, including the regulation and supervision of the formation, incorporation, management and winding up of companies;
- ✓ To establish and maintain companies registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act or any law in respect of which it is charged with responsibility;
- ✓ Arrange and conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand;
- ✓ To undertake such other activities as are necessary or expedient for giving full effect to the provisions of the Act.

Memorandum of association, articles of association and their effects

Memorandum of Association

A company's memorandum of association sets out the the company's structure and aims. These are the fundamental conditions upon which the company is incorporated upon. Section 22(1) of the [Companies Act](#) provides that, among other things, the company memorandum has to state

- the name of the company
- whether the liability of the members is limited or unlimited (in the case of a company limited by guarantee) the maximum amount that the members may be called upon individually to contribute in the event of a winding up of the company
- the personal particulars of the subscribers to the shares
- a clause stating that the subscribers are desirous of being formed into a company in pursuance of the memorandum and (where the company is to have a share capital) respectively agree to take the number of shares in the capital of the company set out opposite their respective names

Memorandum of association, articles of association Cont'd

Articles of Association?

A company's articles of association set out the internal regulations by which the company is governed. They set out the rights, powers and obligations of the parties involved in the company. The articles of the company can govern everything from the conduct of board and general meetings to the appointment of directors.

Companies limited by guarantee and unlimited companies must register articles of association, while for companies limited by shares, registration of articles is optional. If no articles are registered, then [section 36](#) of the Companies Act states that [Table A](#) in the Fourth Schedule of the Companies Act will be applicable as the articles of the company. Table A is a 'default' set of articles that will apply even if articles of association have been registered, so long as the registered articles do not exclude or modify the regulations contained in Table A.

Practically, companies tend to register their customized versions of Table A which explicitly exclude the applicability of Table A.

Memorandum of association, articles of association and their effects

Effect of Memorandum and Articles of Association

The memorandum and the articles of association serve as contracts between the company and its members, and among the members themselves. A member therefore has a personal right to have the memorandum and articles of association observed.

It is important to note that both the memorandum and the articles of association are public documents. In the case of companies limited by shares, members may decide to have a shareholders' agreement in addition to the memorandum and the articles. A shareholders' agreement is a separate private contract among the shareholders. It helps in keeping sensitive company details away from the public eye as some details can be stated in the shareholders' agreement rather than in the memorandum and articles of association.

Nature of a share, rights of the shareholder, duties of the shareholders

A **shareholder** of a company enjoys a number of rights and powers in a company in exchange for its investment in the company. This article will look at the role a shareholder plays in the running of a company, as well as a shareholder's rights and liabilities.

Role of shareholders

A shareholder is a part owner of a company. A shareholder must be a legal entity (that is, can own property, sue or be sued) and may be a natural person or a corporation. All companies must have at least one shareholder, with a proprietary company only being able to have fifty shareholders who are not also employees.

As a company is a separate legal entity, the company, not the shareholder, owns the assets of the company. As the shareholder is a part owner, the shareholder can have a say in the running of the company by, for example, voting on key issues. Majority shareholders, and smaller shareholders voting in blocs, can therefore play a significant role in influencing the direction of the company.

Right of the shareholders

The usual situation is that in return for investing in a company a shareholder receives a bundle of rights in the company. These shareholder rights differ from company to company and within companies depending on the class of shares held. Most companies only have one class of share (ordinary shares) but Australian law allows for the creation of different classes of shares. The rights which attach to the different classes of shares is a matter for the company to determine and are usually set out in the company's constitution.

As a general rule, shareholders enjoy the following rights:

voting on key issues (for example, election and dismissal of directors) and attendance at shareholder meetings;

right to transfer ownership (often in restricted circumstances);

receive company reports and announcements;

entitlement to dividends and other distributions;

entitlement to a final distribution on winding up;

participation in corporate actions such as further issues of shares, share buybacks, mergers and de-mergers; and

right to sue to make the company act lawfully.

Further rights and powers of a shareholder can be found in company

Right of the shareholders cont'd

- legislation, the company's constitution (or the replaceable rules, to the extent applicable) and any shareholders' agreement.

Rights that could be found in a shareholders' agreement?

- A shareholders' agreement often fills in the gaps in areas not covered by company legislation or a company's constitution and can be a useful tool to define the commercial arrangements between shareholders and assign personal rights to those shareholders. Such additional rights may include:
 - the right to be employed by the company;
 - the right to ensure other shareholders do not compete with the company;
 - the right to confidentiality in respect of information provided by a shareholder;
 - detailed rights and obligations protecting the interests of minorities
 - 'drag along' and 'tag along' rights in the event of a proposed sale; and
 - termination, forced sale and other exit provisions

liabilities of a shareholder

- Due to the separate legal existence of a company, shareholders are not responsible for the company's obligations merely by reason of being a shareholder.
- The liability of a shareholder is usually limited to:
 - any unpaid amounts on the shares held by that shareholder;
 - any liability or obligations expressly provided for in the company's constitution or shareholders' agreement; and
 - liability for breach of directors' duties if shareholders are considered to be directors (for example, if shareholders are provided with powers that would ordinarily be exercised by directors).

Company Officers; types of directors appointment, removal, eligibility, resignation

The first category of persons to be considered in the management of a company are the directors; section 244 of Nigeria's Companies and Allied Matters Act (CAMA) Cap C20 LFN 2004 describes 'directors' as persons duly appointed by the company to direct and manage the business of the company. The Nigerian Supreme Court also restated the definition given in section 244 as to who a director is in the case of *Bernard Ojeifo Longe v. First Bank of Nigeria* (2010) 5 NSCR 1. Section 567 of CAMA further states that director includes any person occupying the position of director by whatever name called, and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act. Directors occupy a very crucial position in every company and their efforts in carrying out their duties reflects on the wellbeing of the companies they govern and shows whether such companies are heading in the right direction. We have different types of directors governing the affairs of a company in one way or the other. They include:

1. Shadow director – this refers to any person on whose instructions and directions the directors of a company are accustomed to act. This we see by the provision of section 245 of CAMA.

Company officer cont'd

2. Managing director – this director is appointed by the other directors from among themselves. He or she usually oversees the day to day running of the company.
3. Executive director – this is a director who has a contract of employment with the company.
4. Life director – this type of director is one who is not subject to the rule of rotation that applies to other types of directors

Appointment of Directors

Section 246 (1) of CAMA provides that there shall be a minimum of two directors. In the event that the number of directors falls below two, the company shall within one month appoint more directors. In appointing directors, the mode of appointment will depend on the classification below, namely:

First directors – section 247 of CAMA makes provision for the appointment of first directors, which is to be done in writing by the subscribers of the Memorandum of Association or the directors be named in the Article of Association.

Subsequent directors – these types are appointed at Annual General Meetings (AGM), as seen under section 248 of CAMA. They could also be appointed where there is a casual vacancy (i.e. death, disqualification, resignation or retirement of a director). Other directors may fill the vacancy to be approved by the general meeting as stated under 249 of CAMA.

Removal of Directors

- In removing a director, the first step is to look at the Articles of Association of the company or any other agreement to ascertain if it provides for the procedure for the removal of a director. In the event that there is no such provision in the Articles or any other agreement, the procedure shall be in accordance with section 262 of CAMA. Section 262 (1) states that a company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its Articles or in any agreement between it and him. The Supreme Court also buttressed this in the case of *Francis Adesegun Katto v. Central Bank of Nigeria* (1999) 7 NWLR (Pt 607) 390 and *Mobil Oil Nig. Ltd v. Abraham Akinfosile* (1969) NMLR 217.

Resignation of Director

The Companies Act is silent with respect to resignation of Directors. However, in a majority of cases, the Articles provide for Directors to resign. Even in cases where the Articles are silent, there is no absolute bar on Director's resigning, which becomes effective upon submission of such resignation letter and the filing of the necessary form for such resignation with the Registrar of Companies (whether or not the Board formally accepts the same, unless the Articles provide otherwise). The filing of such resignation related form with Registrar of Companies is an obligation to be discharged by the company in question.

The only exception to the above rule is in the case of Managing, Whole-time and Executive Directors who are employees of the company, and where the terms of their respective service contracts will ordinarily refer to resignations, notice periods and / or compensation in lieu thereof.

Eligibility of director

To be qualified as a Director, a person must possess the following qualifications:

- 1. must be of sound mind;
- 2. must not be a bankrupt;
- 3. should not be an ex-convict.

Director duties, fiduciary, statutory and care and skill

Directors & Their Duties?

Section 244 of the Companies & Allied Matters Act, 1990 ('CAMA') provides that the Directors of a company are appointed by the company to direct and manage the business of the company. All underlinings in this paper are made by the Author unless stated otherwise.

Fiduciary Duty

Section 279 of CAMA provides that '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 benefit'.

Section 279 (3) of CAMA provides that "a Director shall act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful Director will act in the circumstances".

Director duties cont'd

Thus it was held in the case of *OKEOWO v. MIGLIORE* [1979] NSCC 210 @ 263 that the Directors' fiduciary duty is not for any individual Director's advantage but for the advantage of the company. Also see the Supreme Court decision in *ASTRA INDUSTRIES v. NBCI* [1998] 3 SC 98 @ 119 where it was held that “*In the case in hand, the Directors of the Defendant Bank therefore alert to their responsibilities, could not have exercised their discretion in favour of the Plaintiff, the proper effect of which would be to further dilute the Defendant's security when the Plaintiff was already in breach of its previous undertaking*” .

Section 279 (9) of CAMA makes any duty imposed on a Director under Section 279 enforceable against the Director by the company and not its shareholders. This provision follows the rule in *FOSS v. HARBOTTLE* [1843] 2. Hare. 461, which states that the proper Plaintiff in an action in respect of a wrong allegedly done to a company is the company itself, and not its shareholders. The exceptions to this rule are stated later on in this Newsletter.

Secret Profits By Directors

Section 280 (1) of CAMA provides that the personal interest of a Director shall not conflict with his duties as a Director in a company. Section 280 (2) goes on to provide that “A Director shall not:

In the course of management of affairs of the company; or

Director duties cont'd

In the utilisation of the company's property make any secret profit or achieve other unnecessary benefits ”.

Section 280 (3) of CAMA goes on to state that where any secret profit is made or unnecessary benefit is derived, the Director shall be accountable to the company and liable for the secret profits. The exception is if he disclosed his interest to the company before entering into such a “secret” transaction.

A Director is also restrained by Law from misusing his company's confidential information upon his ceasing to be a Director of the company. See Section 280 (5) of CAMA. Where a breach occurs, the company has the right to obtain a restraining injunction, against the Director, so that the information is not misused by virtue of the Director's previous position. This rule was followed to the letter in the matter of *NASR v. BEIRUT-RIYAD NIGERIA* [1968] 5 NSCC 218 where it was held that a Director must not negotiate a contract with his employer company as would put him in a position to profit at the expense of the company. Should he do so, the company can maintain an action for damages and or restitution.

Duty of Care & Skill

Director duties cont'd

It is a known principle that persons who stand in a fiduciary relationship to another must exercise a duty of care when managing that relationship. Section 282 (1) of CAMA therefore provides that “Every Director of a company shall exercise the powers and discharge the duties of his office honestly , in good faith and in the best interest of the company , and shall exercise that degree of care, diligence and skill which a reasonably prudent Director would exercise in comparable circumstances”.

Section 282 (2) goes further to provide that a “failure to take reasonable care in accordance with the provisions of Section 282 of this Act shall be ground for an action for negligence and breach of duty ”.

Subsection 3 of the above Section makes each and every Director of a Board, individually and collectively liable for actions of the Board save where the Director can for example justify his absence at a Board meeting at which the alleged decision was reached.

Trusteeship

The Blacks Law Dictionary defines a Trustee as “One who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary”.

Section 283 of CAMA also makes the Directors of a company, whether a private company or a public company, Trustees of the company. Subsection 1 of Section 283 says “Directors are Trustees of the company's moneys and their powers and as such must account for all moneys over which they exercise control and must refund any moneys improperly paid away, and they must also exercise their powers honestly in the interest of the company and all the shareholders and not in their own or sectional interest”.

The ultra vires rule

The term *Ultra Vires* is a Latin phrase which literally means “beyond powers”. In corporate law, *ultra vires* describes actions of a company that are beyond the scope of powers conferred on the company by its object clause. As a statutory requirement, every registered company must file a Memorandum of Association with Corporate Affairs Commission. The Memorandum of Association is made up of various clauses one of which is the object clause. The object clause indicates the extent of business the company is allowed to engage in. Where the company goes beyond its objects clause to engage in any business, which it is not authorized to carry on, the company is said to act *ultra vires*.

Before Company and Allied Matters Act (CAMA) of 1990, the position of the law in Nigeria was a reflection of the position in England. Acts attempted by a corporation that are beyond the scope of its object clause are null and void of no legal effect. In *Ashbury Railway Carriage & Iron Co V Riche*, the company was formed for the purpose of making and selling railway wagons. It secured a contract to build a railway system in Belgium. Riche by agreement was made a sub-contractor. The company went into difficulties and thereby attempted to put an end to the contract between it and Riche.

The ultra vires rule

The English House of Lords held that the contract which the company had made to construct a railway system and of which Riche was a sub-contractor was void since this was not included in the company's object clause.

The Nigerian Supreme Court adopted the same attitude in *Continental Chemists Ltd V Dr. Ifekandu*. Here a drug dispensing company purported to train medical doctors for the purpose of setting up and running hospitals. Though the memorandum had a clause, which allowed it to carry on any other business, which could be conveniently carried on with its main objects the transaction was declared *ultra vires* and therefore void.

Concomitant with the doctrine of *ultra vires* is that of constructive notice. It states that every person who deals with a company is deemed to have knowledge of the contents of its registered documents. Thus he is not allowed to plead a defense of not knowing the extent of the business of the company.

Where a transaction is *ultra vires* the shareholders cannot ratify it.

The above position of the law with respect to the effect of *ultra vires* on those dealing with companies led to an outcry in Nigeria as a result of the hardship and injustice occasioned by it. As a result, the doctrine together with its collateral of constructive notice were revisited under the CAMA 1990 (now 2004).

The ultra vires rule cont'd

The CAMA has not abolished the *ultra vires* doctrine under the Nigerian Company Law. Rather all it has done is to modify the effect of the doctrine on an ultra vires transaction by a company in Nigeria.

The present position of the law on the subject is as follows:

- The ultra vires doctrine is still part of Nigerian Company Law
- By section 39(4), where the company is about to engage in an ultra vires transaction, any member of the company or any of its debenture holders secured by a floating charge over the company's property can bring an application in court for an order of injunction restraining the company from engaging in such an act.
- By section 300 CAMA, a member can apply for an order of injunction or declaratory action to restrain the company from entering into an illegal or ultra vires transaction.
- The provisions of section 39(3) CAMA is most profound on this subject. It makes clear that the mere fact that a transaction entered into by a company is ultra vires does not render it void or invalid. It is clear from the provision that where any act or a conveyance or transfer of property has been concluded, it cannot be declared invalid by any court.

The ultra vires rule cont'd

- Where the court grants an order setting aside a contract or act of a company or prohibits its performance, it may allow compensation to the company or other party for any loss or damage sustained by them thereby but no award shall be made for loss of anticipated profits.
- By section 68 CAMA, the doctrine of constructive notice of the contents of registered documents of a company have been abolished, i.e nobody is now presumed to know the contents of the Memorandum and Articles of a company simply because it is registered at the Corporate Affairs Commission.
- Further, section 69 CAMA raises the presumption of regularity in favour of any person dealing with a company in Nigeria. Where the directors act contrary to the provisions of the Memorandum and Articles of the company, their acts bind the company and the third party is not affected by the excesses of the directors.

Liability of a company in respect to unauthorized or irregular transactions in both tort and criminal law

The general disposition of the law is that an employer is liable for the wrongful acts of his employee **authorized** by him or for wrongful modes of doing **authorized** act if the act is one of which, if lawful would have fallen within the scope of the employee's employment, as being reasonably necessary for the discharge of his duties or the preservation of the employer's interests or property, or otherwise incidental to the purposes of his employment, the employer must accept responsibility in as much as he has authorized the employee to do that particular class of act and is therefore precluded from denying the employee's authority to do the act complained of. If on the other hand, the act is one which, even lawful would not have fallen within the scope of the employee's employment: the employer is not bound unless the act is capable of being ratified and is in fact ratified by him. See **R. O. IYERE v. BENDEL FEED & FLOUR MILL LTD** (2008) 7 - 8 SC 151; (2008) 18 NWLR [pt.1119] 300 sc; citing with approval **JAMES v. MID-MOTORS (NIG) Co. LTD** (1978) 11 - 12 SC 31 at 68.

Corporate Offenses; fraudulent trading, reckless trading, insider dealing and money laundering

In today's ever changing world with corporations creating and managing capital that sometimes supersedes that of some countries and the investing public being keenly interested in investing in these companies, corporate crime and company fraud is increasingly coming to the fore of most business discourse. Governments and law enforcement agents around the globe have tried to curb the alarming rate of corporate crime and company fraud which manifests itself in ways like manipulation in the stock market, corporate bribery, misrepresentation and misappropriation of funds.

Fraud is simply the crime of cheating somebody; the crime of obtaining money or some other benefit by deliberate deception. Fraud in its broadest sense is deception made for personal gain or to damage another individual. Section 419 of the Nigerian Criminal Code defines obtaining property by false pretenses and cheating which could be synonymous with fraud as:

Liability of a company cont'd

Any person who by false pretence and with intent to defraud obtains from any other person anything capable of being stolen, or induces any other person to deliver to any other person anything capable of being stolen, is guilty of a felony and is liable to imprisonment for three years.

Its specific legal definition varies by jurisdiction. Fraud is a crime and is also a civil law violation. Many hoaxes are fraudulent, although those not made for personal gain are not technically frauds. Defrauding people of money is presumably the most common type of fraud. Generally, in criminal law, fraud is the crime or offence of deliberately deceiving another in order to damage him/her usually to obtain property or services unjustly. Fraud can be accomplished through the aid of forged objects.

In criminology, corporate crime refers to crimes committed either by a corporation (i.e. a business entity having a separate legal personality from the natural persons that manage its activities), or by individuals acting on behalf of a corporation or other business entity. Corporate crimes are defined as, illegal acts, omissions or commissions by corporate organisations themselves as social or legal entities or by officials or employees of the corporations acting in accordance with the operative goals or standard operating procedures and cultural norms of the organisation, intended to benefit the corporations themselves.

Liability of a company cont'd

- Edwin Sutherland's definition of white collar crime also is related to notions of corporate crime. In his landmark definition of white collar crime he offered these categories of crime:
- Manipulation in the stock market
- Commercial bribery
- Misrepresentation in advertisement and salesmanship
- Misappropriation of funds
- In the past, it was inconceivable that a corporation could be held liable. The argument generally advanced was that a corporation as an artificial person had no physical existence and could therefore not be subjected to the prescribed penalties attached to the offences. Alongside this thinking, there were also those who felt that a corporation had all the attributes of a natural person and should therefore be capable of receiving all the punishments attached to all offences including physical punishment. The hallowed principle of corporate legal personality in law was established in the landmark case of *Salomon v. Salomon & Co. Ltd*, where it was decided that a company upon incorporation or registration under the relevant Act becomes a legal person distinct from its members (i.e. the shareholders).

Liability of a company cont'd

This case has statutory backing in Nigerian Company Law as reflected in Sections 37 and 65 of the Companies and Allied Matters Act (CAMA) Cap C20 LFN 2004. Section 65 specifically states that:

Any act of the members in general meeting, the board of directors or of a Managing Director while carrying on in the usual way the business of the company shall be treated as the act of the Company itself and the company shall be criminally and civilly liable thereof to the same extent as if it were a natural person.

The import of this provision of our statute is that where an innocent third party has dealt with the organs or officers of the company in good faith, without knowledge of the true state of their relationship with the company, the company shall be primarily liable for any wrongful act of its organs or officers.

The fundamental principle of Company Law is therefore founded upon the norms of a distinct legal existence (or corporate legal personality) and

Liability of a company cont'd

limited liability which is a direct consequence of incorporation or registration. The Nigerian Legal system which is fashioned along the English Legal system accommodates the position at Common Law to the effect that corporations could be criminally liable but not for all offences.

In spite of the various merits of the doctrine of corporate legal personality, there are exceptions to this principle. These exceptions are borne out of the recognition that the 'corporate legal entity' and 'limited liability doctrines' could be abused and therefore, the benefits of such abuse should not be enjoyed by the abusers. In certain cases, the veil of incorporation of a company shall be lifted or pierced and personal liabilities of members or directors of a company as against corporate liabilities shall inure. The practical problem is that courts are reluctant to accept such general arguments as above in so far as they are not based on infractions of particular statutes or the terms of particular statutes or the terms of particular contracts.

Liability of a company cont'd

In consideration of the above, it does appear that the extant company laws generally including those of Nigeria, failed to envisage complete remedies for corporate crime outside statutory infractions. As a result of this, corporate crime can only be treated under the realm of general criminal jurisdiction and not strictly an aspect of corporate law.

The provisions of CAMA under section 315 (a-d); as with the provisions under section 311(2); provide for the protection of minority members of the company from illegal and oppressive conduct of the majority members. It does not provide any serious statutory solution or remedy against a company for corporate crime committed against public interest. Even the Criminal Code provision (under sections 434-439) relating to frauds by Trustees and Officers of Companies and corporations through false accounting is largely intended to protect the company itself and not the general public (including the government). As mentioned earlier, the vicarious liability of a company for the acts of its organs and officers is a common law principle that has been statutorily acknowledged in Nigeria by the provision of section 65 of CAMA. Also, in recent legislative history in Nigeria, the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Act is an example of such law. The law imposes criminal liability on both the individual corporate officer and the corporate body.

Liability; restriction and disqualification orders

Liabilities

The Directors of a company can be held personally liable for their executive actions where such actions are not in conformity (i.e. ultra vires) with the company's charter or its objects as set out in its Memorandum and Articles of Association. Also, Directors are personally liable for executive actions aimed at a particular group of shareholders where those actions are fraudulent or illegal.

Traditionally, the liability of Directors and Shareholders of a company are limited. Conversely, a company can by its Memorandum And Articles of Association make the liability of its Directors unlimited from the time of the registration of the company. See Section 288 (1) of CAMA.

Following from the last paragraph above, where a company is already registered, it can by special resolution amend its Articles of Association to make the liability of its Directors unlimited subject to such unlimited liability becoming extinguished on the dissolution of the company.

Liability of a company cont'd

A Company's Remedies for Breach of Duty

A Company, and not its Shareholders, have numerous remedies open to it where a Director's breach of duty occurs. They include:

An order of injunction. This is primarily employed against a threatened breach of duty or a continuing breach of statutory duty.

Compensation and or damages. This is appropriate where a breach has occurred and compensation in the form of restitution is made.

Rescission of the contract. This is possible where the company is able to show that the alleged contract was ultra vires its objects and it cannot be ratified to the prior knowledge of the third party.

Restoration of the company's property.

An order for the Director to render an account of the profits made.

Summary dismissal of the Director as has been done in some recent cases in Nigeria; some of these cases are presently in Court.

Liability of a company cont'd

Who Can Challenge A Breach Of Duty?

The general Company Law rule is that it is only the company itself and not its Directors or Shareholders that can contest a wrong done to the company or ratify an irregular conduct. This is known as the rule in FOSS v. HARBOTTLE, which has found statutory enshrinement in Section 299 of CAMA .

Some exceptions to this rule, which entitles Shareholders to commence an action in a Court of Law, are provided for in Section 300 of CAMA. They include:

Entering into illegal or ultra vires transactions.

Purporting to do by ordinary resolution any act, which by its Articles/Charter or CAMA is required to be done by special resolution.

Any act or omission affecting the Shareholder's individual rights as a member of the company.

Committing fraud on either the company or its minority Shareholders.

Where a company meeting cannot be called on time to be of practical use in redressing a wrong done to the company or to its minority Shareholders.

Where the Directors are likely to derive a profit or benefit, or have profited or benefited from the negligence or from their breach of duty.

Company Secretary; qualifications, appointment, powers and duties

Company Secretary

The next category of persons in the management of a company is the Company Secretary. Section 293 of CAMA provides that every company shall have a Secretary. The cases of *Okeowo & Ors v. Migiliore & Ors* (1979) 12 NSSC 210 and *Panorama Dev. Ltd v. Fidelis Furnishing Fabrics Ltd.* (1971) WLR 440 p443 are instructive in this regard. No company can correctly and efficiently exist and function without having a Secretary; this is because they hold a key place in the overall workings of the company. Section 295 provides for the qualification for being appointed as Secretary thus:

Private company – the Secretary must be someone who appears to the directors to have the requisite knowledge and experience to discharge the functions of a Secretary of a company.

Public company – here the Secretary must belong to any of the following; chartered secretary and administrator, legal practitioner, chartered accountant or any person who has held office as secretary of a public company for at least 3 years.

The appointment and removal of a Company Secretary is provided for under section 296 of CAMA. The Act provides that a Secretary shall be appointed by the directors and they may also remove him. In carrying out the task of removing a Company Secretary, the Act further provides for the various steps to be followed for his removal; this is seen under section 296 (2) of CAMA.

Administration of the company; the directors, the secretary, the annual return, accounts and audit, mergers, arrangements, reconstructions and takeovers.

- In today's corporate world, the administration and daily management of companies has become crucial in the face of the many ills that have bedeviled the corporate sector of so many economies. The issue of weak or inefficient corporate governance has also brought to the fore the inherent problems of this sector in most economies; thus the need to look at the various institutions in a company responsible for its management. These institutions are the Company Directors, Secretaries, Registrars and Auditors. We would look at how these institutions function and how their work reflects on the overall image and efficiency of a company as regards its management.

Directors

The first category of persons to be considered in the management of a company are the directors; section 244 of Nigeria's Companies and Allied Matters Act (CAMA) Cap C20 LFN 2004 describes 'directors' as persons duly appointed by the company to direct and manage the business of the company.

Liability of a company cont'd

Auditors

Corporate entities cannot be seen to be healthy and doing well without these categories of persons called auditors who to help in the management of such companies. Section 357 of CAMA provides that every company shall at each annual general meeting appoint an auditor or auditors to edit the financial statement of the company and to hold office from the conclusion of that, until the conclusion of the next Annual General Meeting.

Section 358 (1) of CAMA further states who qualifies to be designated as an auditor. It states that only individuals who satisfy the professional requirements of the Institute of Chartered Accountants of Nigeria Act can be appointed as company auditors

Review Questions

1. Write brief story of how a company may be formed.
2. Highlight the roles of corporate affairs commission
3. Differentiate between memorandum and article of association
4. What do you ultra vires rule.

Reference

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- <http://bankruptcylawyerpa.com>
- <http://www.study.com>
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