

**UPDATE ON CURRENT LIABILITIES OF OFFICERS, DIRECTORS AND  
STAKEHOLDERS OF PRIVATELY AND PUBLICLY HELD COMPANIES**  
**BEING A PAPER PRESENTED BY YUSUF ALI SAN<sup>1</sup> AT THE  
INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE,  
WASHINGTON DC ON 20TH OCTOBER, 2016**

**INTRODUCTION**

- The concept of investment in companies, either private or public is one hinged upon trust.
- 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.
- 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).
- 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.
- For the benefit of those who did not witness the earlier presentation, the content of the earlier paper will be recaptured before the update is given.
- this paper looks briefly at:

---

<sup>1</sup> LLM, FCIArb (UK); FCIArb(Nig); FSPSP, F.DRI, Principal, Yusuf o. Ali & Co., Ghalib Chambers, Ilorin and Abuja, Nigeria; [www.yusufali.net](http://www.yusufali.net)

- 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?’
- 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.
- 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”.
- 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.
- 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 member of the Institute of Chartered Secretaries and Administrators; or
- a legal practitioner within the meaning of the Legal Practitioners Act; or
- 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
- 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
- a body corporate or firm consisting of members each of whom is qualified under paragraphs (a), (b), (c), or (d) of this section.

## **DUTIES OF OFFICERS AND DIRECTORS**

- Some of the specific duties of a director under Nigerian company law are extensively covered by section 279-283 of the CAMA.
- Section 279 covers the duties of directors.
- Section 280 has provisions regarding conflicts of duties and interests.

- Section 281 provides for non-derogation from a Director's fiduciary duty even in instances of multiple directorships.
- Section 282 covers the duty of care and skill expected of directors.
- Section 283 legal position of directors as trustees and agents of the company.
- 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.

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.

- 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 company, responsible along with the directors, for certain tasks under the Act.
- 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.

- 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 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.**

- 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 therefore, to the same extent as if it was a natural person.
- Some provisions of CAMA also impose liabilities on directors and officers of a company.

Sections 128, 246, 250 and 290 also impose liabilities on directors and officers of a company.

## **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:
  1. **INJUNCTION(S) OR DECLARATION(S)**
  2. **DAMAGES OR COMPENSATION**
  3. **REVISION OF CONTRACT IN WHICH THE DIRECTOR IS INTERESTED**
  4. **ACCOUNTING FOR PROFIT**

## **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.
- 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.
- However, the following conducts appear not to be ratifiable.
  - Insurance claim in respect of a criminal or fraudulent conduct cannot be ratified, as this will be contrary to public policy.
  - 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.

## **WHAT IS NEW**

- 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 put together a Draft Bill for the repeal of the Act and enactment of the CAMA 2016.

- 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.
- 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 new 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. But the liability hereunder is not criminalised.
- 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.
- 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 above provisions 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.

## **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.