



UNIVERSITY OF BENIN

JOURNAL OF BUSINESS LAW (UBJBL)

VOLUME 1 NUMBER: 1
JUNE 2021

ISSN: PRINT: 2782-795. ONLINE: 2782-7647

ARTICLES:

- The Roles of Directors in Corporate Governance in the 21st Century Nigeria*
Olusegun O. Onakoya 1-15
- Bridging the "Valley of Death" Through Intellectual Property Protection in Nigeria*
Umoru L. Godwin 16-34
- An Analysis of the Exclusive Jurisdiction of the Investments and Securities Tribunal (IST) and the Federal High Court over Investment Disputes: are they Factually Exclusive or Integrative?* Omengale A. Kingsley, Olong A. Matthew & Idubor Richard 35-48
- Employees" and Government Responses to Business Practices in the face of Coronavirus Pandemic in Nigeria: How Effective?* Andrew Uponi O.A 49-58
- Enhancing Human Rights and Protection of IDPS due to Climate Change in an Emerging Developing Economics.* Opara Leonard 59-70
- Legal Regime of Air Cargo Insurance* Bemini P. Nimibofa 71-83
- Preventing and combating Corruption in Nigeria: the Pivotal role of the Bureau of Public Procurement (BPP).* Aigbe I. Airen 84-100
- Appraising the Role of Tax Incentives in the Promotion of Socio- Economic Development in Nigeria* Ujah Marian 101-112
- Non-special Criminal Jurisdiction Forum for Securities Case: Remediating Investors" Confidence in the Market.* Bolarinwa L. Pius 113-125
- Time Charter under the Contract of Affreightment: Examination of the Constituent Elements.* Ojumu Cletus & Aruwa Emeje 126-137
- International Protection for Domestic Workers: Narrowing the Legislative Gap Between South Africa and Nigeria.* Omuwa Andrew Uponi A 138-146
- Towards Enhancing Effective Legal Control of Cashless Policy in Nigeria.* Odnagbon T. Otasowie 147-154
- Latent and Silent Crime Against Men: Gender-based Violence* Nwagwu Dandy 155-166
- International Criminal Court: Prosecuting Underdeveloped Nation-states: Africa in Perspective.* Owuzonoyen F. Ebeigbe 167-183

UNIVERSITY OF BENIN

JOURNAL OF BUSINESS LAW (UBJBL)

VOL. 1 No. 1. JUNE, 2021.

A Publication of the Department of Business Law, Faculty of Law,
University of Benin, Nigeria.

ISSN: PRINT: 2782-795. ONLINE: 2782-7647

TABLE OF CONTENTS

GUILDLINE FOR AUTHORS	-	-	-	-	-	-	-	-ii
EDITORIAL	-	-	-	-	-	-	-	-iii
EDITORIAL ADVISORY BOARD	-	-	-	-	-	-	-	-iii
LIST OF CONTRIBUTORS	-	-	-	-	-	-	-	-iv

ARTICLES:

- The Role of Directors in Corporate Governance in the 21st Century Nigeria.
Olusegun O, Onakoya - - - - - **-1- 15**
- Bridging the "Valley of Death" through Intellectual Property Protection in Nigeria-
Umoru L. Godwin - - - - - **-16-34**
- An Analysis of the Exclusive Jurisdiction of the Investments & Securities Tribunal & the Federal High Court over Investment Disputes: Wither Factually Exclusive or Integrative?
Omengale A. Kingsley, Olong A. Matthew & Idubor Richard - - - - - **-35-48**
- Employees' & Government Responses to Business Practices in the Face of Coronavirus Pandemic in Nigeria: How Effective? *Andrew Uponi O.A-* **-49-58**
- Enhancing Human Rights & Protection of IDPS Due to Climate Change in Emerging Developing Economics. *Opara Leonard* - - - - - **-59-70**
- Legal Regime of Air Cargo Insurance *Bemini P. Nimibofa* - - - - - **-71-83**
- Preventing & Combating Corruption in Nigeria: The Pivotal Role of the Bureau of Public Procurement. *Aigbe I. Airen* - - - - - **84-100**
- Appraisal of the Role of Tax Incentives in Economic Development in Nigeria.
Ujah Marian- - - - - - **101-112**
- Non – Special Jurisdiction Forum for Securities Case: Remediating investors' Confidence in the Market. *Bolarinwa L. Pius* - - - - - **113-125**
- Time Charter Party Under the Contract of Affreightment: Examining the Constituent Elements. *Ojumu Cletus & Aruwa Emeje* - - - - - **126-137**
- International Protection for Domestic Workers: Narrowing the Legislative Gap Between South Africa & Nigeria. *Omuwa Andrew Uponi A,-* - - - - - **138-146**
- Towards Enhancing Effective Legal Control of Cashless Policy in Nigeria.
Odnagbon T. Otasowie - - - - - **147-154**
- Latent Silent Crime Against Men: Gender Based Violence.
Nwagwu Dandy - - - - - **155-166**
- International Criminal Court prosecuting underdeveloped Nation -States: Africa in Perspective. *Owuzonoyen F. Ebeigbe* - - - - - **167-183**

THE ROLES OF DIRECTORS IN CORPORATE GOVERNANCE IN THE 21ST CENTURY NIGERIA.

ABSTRACT

The company is referred to as a legal person distinct from the shareholders. Company have the attributes/qualities of human beings, however it has been rightly described as a legal abstraction, an artificial person who enjoys such status as a consequence of its incorporation. A company, though a „legal personality“ has no mind or will of its own. Its action, of a necessity must be found in some persons who are the directing mind and will of the company. They give directives as to the day to day running of the activities of the company. They are not in themselves the company but they are appointed to direct the affairs of the company. These set of people are called the company’s directors and as a body, is usually referred to as „Board of Directors“. The success or failure of a company largely depends on its board of directors. The roles of the directors have over the years been amplified in the 21st century, such that directors now shoulders higher responsibility, a departure from its core traditional duties and liabilities. This paper therefore examines the roles of directors in the modern day company’s management and administration and suggested ways of enhancing their impact on the sustainability of company’s development.

1. INTRODUCTION

The aftermath of the celebrated case of *Salomon v. Salomon*¹ gave rise to the emergence of the modern day company law and practice. Company, upon its incorporation with the appropriate body set up for the purpose, and upon the issuance of the certificate of incorporation becomes a corporate legal personality. This simply means that such company is seen in law as a ‘legal person’. It does not by virtue of incorporation become a natural person, but an ‘artificial person’, ‘legal abstraction’ or ‘legal fiction’.

By operation of law, a duly registered company has some of the attributes of a natural person, but not more than that. It does not have the mind of its own, the brain and or hands of its own.

It therefore becomes necessary for the company to look-up to some human or natural beings that will be entrusted with the –thinking for the company and giving directives for the day-to-day running of the company on its behalf. In legal parlance, such appointees are referred to as the directors. They are neither the company nor its owners; they merely act on behalf of the company and in its interests.

¹ Olusegun O. Onakoya, PhD, Senior Lecturer and Head of Dept. Commercial and Industrial Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria. (1897) A.C. 22

The insightful decision of Lord Macnaghten in *Salomon v. Salomon*² is worthy of being reproduced here in this regards that:

The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.

This is the plank upon which the principle of legal personality rests. Similarly, the provision of section 42 of the Companies and Allied Matters Act (CAMA)³ gives a useful insight into the membership of the company and its powers, thus that:

As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such, other persons as may, from time to time, become members of the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold, land and having perpetual succession but with such liability on the part of the members to contribute to the assets of the company in the event of being wound-up as is mentioned in this Act.

For ease of understanding, it is imperative that some of the keywords employed in this work be defined:

1. **Company**

A company is a body or association of persons with distinct legal personality.⁴ Chianu⁵ defines companies as separate legal entities, which requires identification by name. The name must be stated in the memorandum of association, and appear both in the register of the company saddled with registration, and on a company's certificate of incorporation. Gower,⁶ in his work described company as a corporate personality which is distinct from its members. It is an artificial person, in contrast with a human being, a natural person.

2. **Board of Director**

The mental capacity of a company is found in humans or natural persons who act as its directing mind and will. In law, the company is distinct from its directors and employees. Board of Directors is a group of persons validly appointed to act for and on behalf of the company, which actions are binding on the said company.⁷

Jessel, M.R. in *Re Forest of Dean Coal Mining Company*⁸ gave detailed description of Directors thus that directors have sometimes been called trustees, or commercial trustees,

² *supra*

³ Companies and Allied Matters Act, 2020

⁴ Akomolede, I. (2008), *Fundamental of Nigerian Company Law*. Lagos, Niyak Print and Publications; 1.

⁵ Chianu, E. (2012), *Company Law*. Abuja, LawLords Publications; 189.

⁶ Davies, P. L., (1997) *Gower's Principles of Modern Company Law*. Sixth ed. London, Sweet and Maxwell; 77

⁷ *Ibid.* at P. 182

⁸ (1879) 10 Ch. D. 450.

and sometimes they have been called managing partners. It does not matter what you called them so long as you understand what their true position is, which is that they are really commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it.

Keenan,⁹ reinforcing the above explained that the management is usually entrusted to a small group of persons called directors, he stated further that a company must have a board of directors numbering at least two in the case of a public company, and as for a private company, one director will suffice. Directors are officers of the company, irrespective of the name they are called within the corporate structure. According to Black's Law Dictionary,¹⁰ board of directors is defined as the governing body of a corporation, elected by the shareholders to establish corporate policy, appoints executive officers, and make major business and financial decisions.

Similarly, a director is defined as a person appointed or elected to sit on a board that manages the affairs of a corporation or other organisation by electing and exercising control over its officers.

3. Management

Management is the organization and coordination of the activities of a business in order to achieve defined objectives. Sometimes, the concept depending on the context of its usage refers to the directors and managers who have the power and responsibility to make decisions and oversee an enterprise.¹¹

In the same vein, management could also be defined as the skill or practice of controlling, directing or planning something, especially a commercial enterprise or activity.¹²

4. Corporate Governance

The concept of corporate governance has been used in different perspectives. It started as maximizing shareholders' wealth and then expanded to maximizing all stakeholders' wealth. Corporate governance has been defined in many different ways by scholars and agencies. Corporate governance simply means, to facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of a company.¹³

Similarly, corporate governance is considered to be the framework of rules and practices by which a board of directors ensures accountability fairness and transparency in company's relationship with all its stakeholders.¹⁴

According to Harvard Law School Forum on corporate governance, the concept requires a clear understanding of the board of directors, management and shareholders; their relationship with each other, and their relationships with other corporate stakeholders.¹⁵

The scope of corporate governance covers ethics, values and morals of a company and its directors.¹⁶

⁹ Keenan, D. (1987) *Smith and Keenan's Company Law*, Seventh edition, London, Pitman Publishing; 223.

¹⁰ Black's Law Dictionary, Eighth ed. St. Paul Minn. West Publishing Co.; 184.

¹¹ Business Dictionary. Retrieved Jan. 15, 2020 from <http://www.businessdictionary.com>

¹² Chambers 21st Century Dictionary (1999). Retrieved ed. Edinburgh, Harrap Publishers Ltd.; 833.

¹³ Retrieved Jan. 15, 2020 from <https://www.icaew.com>

¹⁴ Business Dictionary. Retrieved Jan. 16, 2020 from <http://www.businessdictionary.com>

¹⁵ Harvard Law School Forum on Corporate Governance (2016) *Principles of Corporate Governance*.

Retrieved Jan. 16, 2020 from corpgov.law.harvard.edu

¹⁶ Badi, N.V. (2012), *Corporate Governance*. Delhi, Urinda Publications (P.)Ltd.; 9.

The roles of directors in company's management cannot be overemphasised. It therefore becomes important to examine their mode of appointments, qualification and tenure of office. As earlier noted company is an artificial legal person and can only act through its human representatives, hence the need to appoint directors.

The status of directors as not being employees of the company, nor servants or members of staff of the company has been sufficiently settled by the court.¹⁷ In the celebrated Nigerian case of *Yaleju Amaye v. AREC Ltd.*¹⁸ Nnameka-Agu, JSC (as he then was) addressing the issue of directors' status stated *inter-alia* – "to my mind, it would be wrong to hold that because the relationship of a managing director and the company was based on contract it was ipso facto, a matter of master and servant for which the Federal High Court has no jurisdiction. A managing director does not cease to be a director he is managing the company. And the better view is, perhaps, that directors of a company are trustees, agents and fiduciaries of the company".

Section 271 (1) of the Companies and Allied Matters Act (CAMA)¹⁹ states *inter-alia* that every company upon its incorporation shall have a minimum of two directors. CAMA also provides for the appointment of the first directors, usually they are the named-directors in the naming the directors in the article of association.²⁰

Directors may also be appointed by subscribing to the memorandum of association of the concerned company.²¹ Similarly, when the need arises, the company by an ordinary resolution of the members at a general meeting could appoint directors.

After the appointment of first directors, the said persons constitute what is generally referred to as the Board of Directors of the company. The Board in the event of a casual vacancy may appoint a director or number of directors to fill such vacant position.

Although, there is no elaborate provisions in the CAMA as to the qualifications of a director, however section 277 (2) provides *inter alia* that for anyone to qualify for appointment as a director of a public company limited by shares, such a person must, personally or through an authorised agent have signed and delivered to the Registrar an undertaking to take his share qualification, which must be obtained within two months of his appointment.

Given the importance of directors in the management of companies and the fact that the success or otherwise of any company depends largely on the board of directors, the Act²² provides for six categories of persons that shall not be qualified to be appointed as directors, they are:

- (a) A person who has attained the age of seventy, unless such appointment is made with the approval of the general meeting after special notice has been given to the company and its members.²³
- (b) A person who has failed to sign a written consent to act and who has failed to sign the memorandum for qualifications of shares.

¹⁷ See the cases of *Normandy v. Ind Coope and Co.* (1908) Ch. 84; *Kerr v. Walker* (1933) SC 458; *Hutton v. West Cork Railway* (1883) 23 ChD. 654; *Moriarty v. Regents Garage* (1921) 1 KB 423.

¹⁸ (2020).

¹⁹ CAMA 2020

²⁰ Section 39 CAMA 2020

²¹ See section 247 CAMA

²² In this context the words 'CAMA' and 'Act' are used interchangeably, except otherwise specified.

²³ Section 282 CAMA 2020.

- (c) An undischarged bankrupt cannot act as a director.²⁴
- (d) Persons convicted of fraud or connection with the promotion, running or winding up of a company.²⁵
- (e) A court may disqualify a person from being a director if he has been a director of two insolvent companies, which has been wound up within five years of each other.
- (f) For obvious reason of incapacity, the Act provides that an infant person below the age of 18 years and a lunatic or person of unsound mind shall be disqualified from being appointed a director.²⁶

Similarly, a corporation other than its representative appointed to the board for a given term is also disqualified from being appointed as a director.

Apparently, the strict qualification for a person to be appointed as a director is largely due to the enormous responsibilities of the directors in terms of competence, skill, rational thinking and forthrightness. It is therefore not surprising that a director can be relieved of the position by the company.

The private sector, comprising largely registered companies, no doubt drives the economic growth of a nation. It increasingly plays an important role as an engine of economic growth, job creation, among other roles. It follows therefore that, for private sector to thrive, issue of management should be taken very seriously and not left for incompetent personnel to oversee. However, where appointed directors are found incapable of guiding the company to financial growth, the Act provides for the removal of such directors.

2. REMOVAL OF DIRECTORS

The position of a director may become vacant as a result of any of the following events –

- (i) Death of such director;
- (ii) Where liquidator is appointed for the company;
- (iii) Where such director is disqualified from further holding the office;
- (iv) Where the director resigns his appointment;²⁷
- (v) Upon retirement; or
- (vi) Removal from office.

Section 288 (1) of the Act provides 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 consequence of this law is simply that even where a person appointed a director for life or a director that enjoys a permanent status by operation of the articles of association or by agreement, such a director may be removed by the general meeting, however his right of compensation is preserved, where deserved.²⁸

²⁴ Section 283(d) CAMA 2020

²⁵ Section 283 (c) CAMA 2020

²⁶ See generally section 283 CAMA 2020

²⁷ Section 284 (1) (e) CAMA. See generally section 284 for some of the reasons for vacation of the office of director.

²⁸ Orojo, J. O. (2006) *Company Law and Practice in Nigeria Vol. 1*, Durban, LexisNexis Butterworths; 295

It is trite that the members of a company at the general meeting, and or the Board of Directors cannot remove any director before the expiration of his tenure except the articles of association of such company provides for such power.²⁹

However, the court in *Iwuchukwu v. Nwizu*³⁰ held that if the articles do not specify the duration of a director's appointment, he holds office at will and may be removed by an ordinary resolution of the company without any further liability.

Section 288 (2) and (3) of the Act spelt out extensively the procedures for removal of a director as follows:

A special notice shall be required of any resolution to remove a director under this section, or to appoint some other person instead of a director so removed, at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section, the company shall forthwith send a copy of it to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

Sub-section (3) thereof provides *inter-alia* thus:

Where notice is given of an intended resolution to remove a director under this section and the director makes with respect to it representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so –

- (a) In any notice of the resolution given to members of the company state the fact of the representations having been made and
- (b) Send a copy of the representations to every member of the company to whom notice of meeting is sent (whether before or after receipt of the representations by the company).

3. DUTIES OF DIRECTORS

The company being a legal abstraction and not a natural person has put enormous obligations on its directors, being the 'mind' and 'directing will' of the company through which it acts. Directors therefore have wide-range of responsibilities. Since company literally thinks through its directors, and also set agenda, activate and execute same through the company's employees, its directors therefore owes it fiduciary duties.

Directors' obligations will necessarily differ with the nature and structure of a particular company as are usually clearly spelt out in its article of association.³¹

Section 305 CAMA provides *inter-alia* that directors shall have fiduciary relationship towards the company and also under obligation to observe the principle of *uberrimafidei* (utmost good faith)

²⁹ *Ibid.* see also Palmer's *Company Law* (17th ed.) P. 898

³⁰ (1994) 7 NWLR 379, per Ogwuegbu, JSC (as he then was); 410

³¹ Chianu, E. *ibid.* at 504

in their dealings with and on behalf of the company.³² The issue of integrity and honesty on the part of the directors cannot be over emphasised. It is important to stress that the duty of utmost good faith is owed jointly and severally by the directors.

Interestingly, this duty does not necessarily end with the termination, removal, resignation or retirement of a director. For instance, Lord Greene M.R. in *Re Smith and Fawcett Ltd*³³ reiterated this principle when he held that a director may be restrained from taking advantage of vital and classified information he possessed as a director to the prejudice of the company upon his disengagement from such a company.

According to Gower, there are four different ways by which the principle of *uberrimafidei* could be interpreted and applied. They are namely:

- (i) The directors must act in good faith in what they are convinced to be the best interest of the company;
- (ii) That powers so conferred upon the directors by virtue of the constitution of the company and other extant laws be applied for the purpose(s) for which such powers are conferred only;
- (iii) The directors must not be fettered in the use of their discretionary powers in the way they act;
- (iv) The directors must avoid conflict of interests, that is situation where their personal interests will conflict or run contrary to what will be beneficial to the company, except where the company approves of such dealings/transactions.³⁴

Akin to the duties highlighted above, is the duty of care and skill. In examining this duty, the celebrated case of *Re City Equitable Fire Insurance Co. Ltd.*³⁵ Readily comes to mind, where Romer J. (as he then was) held as follows that:

In order... to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association.

In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not... give any very clear answer. It has been laid down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense... if, therefore, a director is only liable for gross or culpable

³² Section 305 (1) & (2) CAMA 2020

³³ [1942] Ch. 304 at 306

³⁴ *Ibid.* at 601. See generally section 305 CAMA

³⁵ [1925] Ch. 407 at 427-429.

negligence, this means that he does not owe a duty to his company, to take all possible care. It is some degree of care less than that.

The court in a very explicit and comprehensive *ratio* further posited as follows:

The care that he is bound to take has described... as 'reasonable care' to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf... There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1) a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience... It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment. (2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.³⁶

The Supreme Court in *Julius Berger Plc. v. Toki Rainbow Community Bank Plc.*³⁷ re-emphasized the fact that company is an abstraction and they of necessity need to act through human agents, hence the totality of the company's existence and operation depends largely on the persons appointed as directors to oversee the affairs of such company. Directors, therefore shoulder huge responsibilities. There are a number of -do's and -don'ts for the directors, which keep evolving with time.

Section 306 CAMA provides for the obligations restraining directors from doing certain acts in the course of, or in furtherance of the management of the company's affairs. Some of such duties are enumerated below that:

- (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 utilization of the company's property or achieve other unnecessary benefits.

³⁶ See generally *Re City Equitable Fire Insurance Co. Ltd* [1925] Ch. 407-429.
³⁷ [2020] All FWLR pt. 1027, 238 at 292-293; paras. D-A

It is important to note that except for the Managing and or Executive directors who are entitled to salaries and wage as employees of the company other directors who constitute the Board of directors are merely entitled to periodic allowances.

Orojo in his work ³⁸ gave a clear-cut distinction between directors and Managing/ Executive directors of a company as follows that:

Sometimes the articles give the directors or the company power to appoint executive, special or alternate directors. In practice, the –executive or –special director is an employee of the company whose status has been raised to that of a director but who continues essentially as such employee, for example, a sales director. His status is usually limited by the articles, but he may eventually be elevated to full directorial status.

In the view of the fact that the success or otherwise of the company depends largely on the performance level of the directors, particularly in the 21st century where the private sector which comprises principally ninety per cent companies play pivotal role in economic development and sustenance.

4. THE ROLES OF DIRECTORS IN CORPORATE GOVERNANCE IN 21ST CENTURY

There have been increases in directors' responsibilities and relevance since the beginning of the 21st century. In Nigeria, the Code of Corporate Governance states that the board is accountable for the affairs of the company. Among other things, the board of directors oversees the effective performance of management in order to enhance shareholders' value and meet the company's obligation to its employees and other stakeholders³⁹. Three major tasks are identifiable here, namely; (i) overseeing and ensuring the effectiveness of company's management, (ii) enhance shareholders' value (by way of protecting the investments and increase in dividends) (iii) Meeting the company's obligations to its employees and other stakeholders with a view of promoting the company's integrity as a body corporate.

In a bid to conform to the international best practices in corporate management, the Nigerian Code of corporate Governance (the –Codell) was issued in 2018 by the Financial Reporting Council of Nigeria (the –FRCN) pursuant to Sections 11(c) and 41(c) of the Financial Reporting Council of Nigeria Act, 2011.⁴⁰

The whole essence of corporate governance in Nigeria and some parts of the world is predicated principally on how to make the board of directors more responsive, accountable and concerned with the well-being of the company, employees, shareholders, creditors and other stakeholders.⁴¹ To ensure the implementation of all the aforesaid, the following legislations are made in addition to the extant laws:⁴²

³⁸ *Ibid. Orojo, at 288. See also Longe v. FBN Plc. (2006) 3 NWLR 228 at 261.*

³⁹ The Board of Directors. Retrieved May 12, 2020 from <https://portal.abuad.edu.ng>
Chapter F 42 Laws of the Federation of Nigeria, 2004.

⁴¹ Principle of Corporate Governance in Nigeria. Retrieved May 12, 2020 from resolutionlawng.com

⁴² Companies and Allied Matters Act, 2020, Banks and Other Financial Institutions Act (BOFIA) Cap. B3 LFN 2004, Investments and securities Act No. 29, 2007

- i. Code of Corporate governance for public companies (2011).
- ii. Code of Corporate governance for banks and discount houses in Nigeria 2013 and for guidelines of whistle blowing in the Nigerian banking industry.
- iii. Code of Corporate governance for other financial institutions in Nigeria (applicable to microfinance banks, finance companies and bureau the change).
- iv. Securities and Exchange Commission Rules 2013 (listing rules of the Stock Exchange).
- v. Code of business ethics and principles on corporate governance for the insurance industry.
- vi. Financial Reporting Council (FRC) code (21) of corporate governance.

The new Nigerian Code of Corporate Governance 2018 was released on January 15th, 2019 by the Financial Reporting Council (FRC).

One striking feature of this Code is the recommendation of an annual board evaluation to assess the performance of the board of directors, board committees and individual directors in executing their role and responsibilities in the company, while annual evaluation of the board's compliance with Corporate Governance Code is facilitated. The two assessments and evaluation are expected to be undertaken by independent external consultants.

The provision under reference is a welcome development and will in no small measure allow for practices that encourage healthy, viable and sustainable company. Similarly, the innovation of regulatory framework on whistle blowing to the effect that, among other things, illegal and unethical behaviours could be reported without any retaliation or subtly meeting punitive measures on the whistleblower.

The obligations and liabilities of directors, today, more than ever before; have been amplified and enhanced.

5. VACATION OF OFFICE OF A DIRECTOR

A person may cease to be a director of a company, whether private or public for many reasons. This may be a result of any of the following: (i) death of a director (ii) appointment of liquidator (iii) disqualification from further occupation of the position (iv) resignation by the concerned director (v) retirement from the office of a director; and (vi) removal from the office of a director.

It goes without saying that upon the death of a director, his position becomes vacant and the company may appoint another person in his stead.

Similarly, a director's tenure automatically comes to an end upon the commencement of winding-up process of a company particularly when a winding-up order is made by the court. Where the winding-up process is voluntary, an appointed liquidator may dismiss the directors, in which case⁴³ they cease to further participate in the company's management.

Section 284 CAMA provides extensively for reasons why a director may be disqualified from further continuing in the office as follows:

- (a) Where such a director cease to occupy the office by virtue of section 277 of CAMA.⁴⁴

⁴³ Akomolede, I. *Ibid.*, at 85

⁴⁴ Section 284 provides *inter-alia* that the office of director of a company shall be vacated if the director does not within two months from the date of his appointment, obtain his qualification or after the expiration of the said period, he ceases at any time to hold his shareholding qualification.

- (b) Becomes bankrupt or makes any arrangement or composition with his creditors generally;
or
- (c) Becomes prohibited from being a director by reason of any order made under sections 280-281 of this Act.
- (d) Becomes of unsound mind; or
- (e) Resigns his office by notice in writing to the company.

6. DIRECTORS' PROCEEDINGS AND REMUNERATION

The directors may meet for the purpose of deliberating and taking decisions with respect to the business of the company when the need arises.

However, the first meeting of the directors shall be held not later than six months after the incorporation of the company.⁴⁵

It is imperative to note that unless the company's article of association so provides, any matter or issue that comes up for deliberation at any meeting; is to be decided by a simple majority of votes, the chairman has a second vote, otherwise referred to as the -casting vote.⁴⁶

It should also be noted that a director may, together with the secretary shall on the requisition of a director at any time summon a meeting of the board of directors.⁴⁷

As earlier noted, section 292 (1) of the Act provides that every director is entitled to receive notice of the directors' meeting, unless he is so disqualified by any reason under the Act from continuing with the office of director.⁴⁸

However, although a meeting of the board of directors is generally required for a decision, a resolution in writing signed by all the directors for the time being entitled to receive notice of a meeting of the directors is as valid as if it has been passed at a board meeting duly convened and held.⁴⁹ If the resolution in writing is not signed by all the directors, such resolution shall be invalid.

6.1 Remuneration

Section 293(1) – (7) CAMA, 2020 provides for the remuneration of the directors as follows:

- (1) The remuneration of the directors is determined by the company in general meeting and such remuneration is deemed to accrue from day to day.
- (2) The directors may also be paid travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the company or in connection with the business of the company.
- (3) Where remuneration has been fixed by the articles, it is alterable only by a special resolution.
- (4) A company is not bound to pay remuneration to directors, but where the company agrees to pay, the directors shall be paid such remuneration out of the fund of the company.

⁴⁵ Section 289 (1) CAMA, 2020

⁴⁶ Section 289 (2) CAMA, 2020

⁴⁷ Section 289(3) CAMA, 2020

⁴⁸ See *Longe v. FBN Plc.* (supra)

⁴⁹ The case of *AG Enugu State v. Avop plc.* (1995) 6 NWLR 90 affirmed the above position.

- (5) The amount of remuneration is a debt from the company so that if directors take office on the basis of the articles, they shall be able to sue the company on account of the debtor and prove it in liquidation.
- (6) A director who receives more money than he is entitled to is guilty of misfeasance and is accountable to the company for such money.
- (7) The remunerations of directors are apportionable.

7. LIABILITIES OF DIRECTORS

Liabilities of a director could be categorized under three major headings, namely:

- (i) Liability in Contract
 - (ii) Liability in Tort
 - (iii) Personal liability of directors
- (i) Under contract, where a director entered into a contract on behalf of company and in the name of the company, such company takes benefit and also assumes liability for the contract. This is the elementary rule of agency.⁵⁰ It is instructive that this age- long principle is still applicable in the 21st century. However, where a director contracts in his own name, without the third party knowing of the existence of the company as its principal, such director will be personally liable on the transaction.⁵¹ Similarly, even where a director without employing words that suggests that the company is bound, though he contracts as a director, he will be personally liable.⁵²
 - (ii) In tort, where a director personally defrauds, or commits any other third party, he would be liable personally to the aggrieved party. The company will therefore not be vicariously liable for his action. On the strength of the decision in *Cargil v. Bower*⁵³ and *Dovey v. Cory*,⁵⁴ a director will not be liable or answerable for the fraud of his co-directors which he did not personally authorised. It is important to note that, not only are these principles still relevant today, but applicable in Nigerian Courts. The court held in the popular English case of *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*⁵⁵ that where directors make a negligent misstatement on which a member, or even non-member relies and suffered loss or injury, such member can recover damages from the directors.
 - (iii) Personal liability of Directors. Section 316 CAMA 2020 provides for directors' personal liability where such director(s) obtains loan or advances on behalf of the company for specific projects and diverts them to his personal use, such instances include cases –
 - (a) where a company receives money by way of a loan for specific purposes, or
 - (b) where it receives money or other property by way of advance payment for the execution of a contract or project; or

⁵⁰ See Palmer's *Company Law*, para.62 -02; 922

⁵¹ *Elkington and Co. v. Hunter* (1892) 2 Ch. 452

⁵² *Ibid.* Palmer's *Company Law*; para. 62-02; 922

⁵³ (1878) 10 Ch.D 502

⁵⁴ (1901) AC 477.

⁵⁵ (1964) AC 465.

- (c) with intent to defraud, fails to apply the money or other property for the purpose for which it was received, fails to apply the money or other property for the purpose for which it was received, every director or other officer of the company who is in default is personally liable to the party from whom the money or property was received and not applied for the purpose for which it was received and nothing in this section affects the liability of the company itself.

In *PFS Ltd. v. Jefia*,⁵⁶ where the appellant company received large sums of deposit from the respondent on the undertaking to repay on maturity with interest but failed to do so, the court held that every director or officer of the company was personally liable to the party defrauded.

The Act further provides that a creditor can proceed against any person (particularly directors) during the winding-up of a company if it is found that such a person conducted transactions/business of the company in a reckless manner or with an intent to defraud the creditors of the company or the creditors of other person.

In *Akinwunmi O. Alade v. Allie Nig. Ltd. & Anor.*⁵⁷ the director of the company knew that the company was in debt, the company however proceeded to enter into a partnership with the Appellant and as a result of non – disclosure of the state of affairs of the company by the director, it resulted to a breach of the partnership. The court in its judgment found the director liable with that company. The court stated that even through the director was not a party to the agreement, he did not only fail in his responsibility as a director to manage the affairs of the company but also masterminded the committing of the fraud by the company and as such the veil of incorporation of the company had to be lifted to hold the director responsible for the fraud committed.

However, it is instructive to note that in a bid to allow directors from exercising their discretion and apply their skills and expertise without the fear of running fowl of the law, Section 738 of the Act provides for certain reliefs for the directors as officers of the company as follows:

- 1) If in any proceeding for negligence, default or beach of duty or breach of trust against an officer of a company or a person employed by a company as auditor, it appears to the court hearing the case that the officer or person is or may be liable in respect of the negligence, default, or breach of duty or breach of trust, but that he has acted honestly and reasonably and that having regard to all the circumstances of the case, including those concerned with his appointment, he ought fairly to be excused for the negligence, default or breach of the trust, that court may relieve him, either wholly or partly, from this liability on such terms as the court thinks fit.⁵⁸

Similarly, the Act in subsection 2 to the provision under reference further provides that:

- 2) When any such officer or person has reasonable apprehension that a claim may be made against him in respect of any negligence, default, breach of duty or trust, he may apply to the court for relief, and the court on the application shall have the

⁵⁶ (1988) NWLR 602

⁵⁷ (2010) LPELR - 399

⁵⁸ *Customs and Excise v. Hedon Alpha Ltd.* (1981) 2 All ER 697

same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

An exemption to the above provision is that where a director of a company deals with legal matters without seeking legal advice at all prefers to deal with the matters himself without proper consideration cannot be said to have acted reasonably.⁵⁹

In a bid to ensure probity and accountability, the Act provides that each year, the directors have the statutory responsibility to prepare and present a report that shall contain the following:

- (a) A fair view of the development of the business of the company and its subsidiaries during the year and their position at the end of it; and
- (b) Stating the amount, (if any) which they propose to carry to reserves.

The report shall also state the names of the persons who, at any time during the year, were directors of the company and the financial activities of the company and its subsidiaries in the course of the year and any significant change in those activities in the year.⁶⁰

8. IMPACT OF COVID19 ON DIRECTORS' DUTIES

Coronavirus, otherwise known as *covid19* became a global pandemic and nemesis to global economy since its outbreak in the city of Wuhan, China in the last quarter of year 2019 and extended to the whole of year 2020. Its impact is sweeping and touches on every aspect of human endeavours. *Covid19* has become a notable and prevalent issue in all commercial activities, particularly corporate organisations and their directors. In many instances, it is adding more pressure to the directors in addition to the existing problem of economic recessions, and the consequential response of governments' harsh economic policies. In view of the aforesaid, insolvency in the private sector seems inevitable, as fortunes of companies begin to witness downward trend, resulting from the effects of the pandemic. This is a challenging time for directors, hence the need to improve on their knowledge, skill, expertise and also be technologically savvy as over seventy per cent of the companies' management may have to be undertaken electronically (online).

Also, in view of 'lockdown' in most commercial centres/cities all over the world it becomes imperative for the companies, acting through their directors to diversify their businesses and adopt more of electronic transactions. The burden on the directors to keep the companies afloat at a time like this is enormous.

In a bid to meet the demands of 21st century corporate governance and effective management of the companies, the Companies and Allied Matters Act, 2020⁶¹ incorporates same innovations, some of which are outlined below:

- (i) By virtue of Section 240 (1) & (2) CAMA, 2020, companies can now hold electronic Annual General Meeting (AGM) and Extra – Ordinary General Meeting (EOGM).

⁵⁹ Re Duomatic Ltd, 91969) 2 Ch. 365. Note that Nigerian Courts continue to follow this principle of law till today.

⁶⁰ See generally Section 385 CAMA 2020.

⁶¹ The new CAMA 2020 will take effect as from the 1st January, 2021.

This provision where applied will greatly help to reduce the cost of management and time usually put into organizing AGM and EOGM.

- (ii) Companies' officers can now use electronic signatures by virtue of section 98 CAMA. This will aid quick disposition of matters of urgent importance, as concerned officers can append their signatures without being necessarily present physically.
- (iii) New and elaborate plans to rescue insolvent companies are provided for in sections 434 – 442, 443 – 549 and 718 -721.
- (iv) Ordinary businesses at the AGM (which could now be held electronically) have now been increased by virtue of Sections 238, 242 and 257CAMA.
- (v) For ease of trading in equities, shares can now be transferred electronically in line with Section 176 (1) CAMA

All the mentioned innovations and many others contained in the CAMA, 2020 are specifically designed to aid the ease of doing business in the 21st century.

9. CONCLUSION

Private sector remains pivotal to the growth of the nation's economy, hence the 'managers' or 'trustees', that is the directors under whose watch the companies either grow or become insolvent have onerous responsibilities and duties, much more greater than before.

The challenges of the 21st century business climate are huge and daunting as noted in this work, hence the extra- efforts are required by the directors in corporate governance, though within the ambit of the law.