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LEGAL PROTECTION OF MINORITY SHAREHOLDERS IN NIGERIA: A MYTH OR A REALITY

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Abstract

The chequered legal position is that once a company is incorporated, it becomes an artificial person in law, capable of suing and being sued in its corporate name. The corollary of this is that if a company is wronged, it is only the company, and the company alone, that can challenge or remedy the wrong. However, this position is not without exceptions, one of which is that an individual minority shareholder may challenge the wrong done to the company, especially in matters of fraud committed by the majority shareholders or the company''s directors. This paper is therefore out to examine the issue whether minority shareholders are really protected under the law. The methodology employed in arriving at a logical conclusion in this paper is doctrinal, with the use of both primary and secondary sources of law such as the provisions of the Companies and Allied Matters Act, the relevant case law and text books.

It has been found that the protection accorded the minority shareholder is inadequate. It has been suggested that in order to protect the minority shareholder, appointment of directors of companies should be based on proportional representation method with each class of shareholders represented on the board. This is capable of guaranteeing some equity into corporate managements. There must also be educational or enlightenment programmes for shareholders for increased awareness and the urge to seek improvement on the various provisions affecting shareholder''s rights generally and the minority in particular.

Keywords: Legal Protection, Minority, Shareholder, Directors

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Introduction

A company is an association of persons in business for profit duly registered under the law. Since the case of *Salomon v. Salomon*[1] —once a company has gone through the rituals of incorporation as stipulated under the law, it becomes an entity distinct from the co-operators or what we may choose to call the shareholders.‖[2] It is thus obvious that there are many parties (stakeholders) involved with the issue of corporate management, the shareholders being in the forefront. Others include creditors, directors, managers, employees, government and the general public. Therefore, for a company's legislation to be effective, it must strike a balance between the various often conflicting interests. This paper looks into the provisions of the major Statute relating to corporate management in Nigeria, that is Companies and Allied Matters Act, (CAMA) 1990[3], and how far there is this balance of conflicting interest particularly between the minority shareholders and the company as an entity? Have all problems been frozen out? If not, how can they be frozen out?

The general rule is that the majority of the members of a company must not commit a fraud on the minority. They must thus act *bonafide* for the benefit of the company as a whole.[4]

When one talks of protecting minority shareholders in company matters, one wonders whether the interest of the majority shareholders has been adequately protected. This calls for concern, moreso when the tussle between shareholders and Board for the control of the corporate entity is anything laid to rest. Although this is beyond the scope of this paper, the position of the minority shareholder cannot be discussed without reference to the majority *shareholder*s.

The Rule in Foss v, Harbottle or The Majority Rule

The elementary principle of the law relating to incorporated companies is that the court will not interfere with the internal management of companies acting within their power and in fact has no jurisdiction to do so. It is also clear that the proper person to bring an action to redress a wrong done to the company is the company itself. These

[1] (1897) AC, 22.

[2] Asomugha E. M., *Company Law in Nigeria under the Companies and Allied Matters Act* (Toma Macro Publisher, Lagos, 1994) Page 119.

[3] Now embodied in *Cap C20 Laws of the Federation of Nigeria 2004*.

[4] C. S. Ola, *Company Law in Nigeria* (Heinemann Law Studies in Nigerian Law, 2002) 337.

cardinal principles are laid down in the well known cases of *Foss v Harbottle*[5] and *Mozley v Alston.*[6]

Asomugha E. M. in his book, Company Law in Nigeria under the Companies and Allied Matters Act[7] expressed the above principles more vividly as follows:

It means that where a wrong is done to the company or where there is an irregularity in its internal management which is capable of confirmation by a simple majority of members, an action will not lie at the suit of a minority of members.[8]

It is imperative at this juncture to look at the facts of the case of *Foss v Harbottle* which is the *locus classicus* of the majority rule and the minority protection. Foss and another person brought an action on behalf of themselves and other shareholders against the defendants who consisted of five directors, a solicitor and an Architect of the Company alleging *inter alia* a fraudulent sale by the directors of their own property at an inflated value to the company. The plaintiffs also claimed damages from the defendants to be paid to the company and asked for the appointment of a receiver. The court refused to permit the action on the argument that there was nothing preventing the company itself from bringing the action. The court stated further that upon becoming a member of a company, the shareholder agrees to submit to the will of the majority of the members expressed in general meeting and in accordance with the law, memorandum and articles. The basis of the rule therefore is that the will of the majority should prevail. However, the rule will apply only where the majority can cure the irregularity or illegality complained of, by the ordinary resolution where this cannot be done; the court will interfere at the instance of the minority.[9]

The rule in *Foss v Harbottle* and the exceptions thereto have since been adopted or applied in Nigeria.[10] The justification for making the exceptions is that those who have appropriated company's property may by their control prevent the company

[5] (1843) 67 Eng Rep 189; (1843) 2 Hare 461.

[6] (1847) I ph 786, 790 odj 16 Ljch, 217.

[7] Asomugha E.M. *Company Law in Nigeria under the Companies and Allied Matters Act* pg 125.

[8] Ibid.

[9] *Burlard v Earle* (1982) AC 83; *Balis v Oriental Telephone* (1915) 1 Ch. 603.

[10] *Abubakri and Others v Smith & Others* (1973) 65; *Trade Links International Nig. Ltd. v Banks of America P.* 355 (Zaire). See also *Yalaju-Amayev. Associated Registered Engineering Contractors Ltd & Ors* (1990) 4 NWLR (Pt. 145) 422.

from calling them to account.[11] The exceptions to the rule have also been developed in several authorities to include:

a) an act which is ultra vires the company or illegal;
b) an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company;
c) a resolution which requires a qualified majority but has been passed by a simple majority;
d) where the rights of the shareholders are infringed or about to be infringed.

The Supreme Court has even recognised the need to protect the minority in the interest of justice. This is the fifth exception in Nigeria. These exceptions, according to a learned author, Akanki E.O., should be treated as *obiter dicta* because –It is clear that the minority was allowed to sue under the exception now contained in Section 300 (c).‖[12] Granted that the fact of the case of *Edokpolo & Co Ltd v. Sem-Edo Wire Industries Ltd & Ors*[13] showed that the applicant's individual rights as a member was affected, it can also be said that all the listed exceptions (i.e. Section 300 (a)-(f) of CAMA) will fall under interest of injustice because the provisions are to meet the end of Justice.

Statutory Protection of Minority Shareholder In Nigeria

Section 201 of the 1968 Companies Act preserved the rules in *Foss v Harbottle* as well as the exceptions thereto as follows: that any member of the company who complains that the affairs of the company are being conducted in an oppressive manner may bring a petition to court for an order regulating the conduct of the affairs of the company as it is fair and just. This operates as an alternative remedy of winding up.

Under the current company legislation, that is Companies and Allied Matters Act, 1990, the whole of Part X with 32 sections is devoted to the protection of minority against illegal and oppressive conduct. The sections are further divided into four major parts. The rule in *Foss v Harbottle* is preserved in section 299. Section 299 provides that —Subject to the provision of this Act, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the

[11] Susan Barber, *Company Law* (4th ed, Old Bailey Press, London, 2003) 274.

[12] E. O. Akanki, „Protection of the Minority in Companies' in E.O. Akanki (ed), *Essays on Company Law* (University of Lagos Press, Akoka, Lagos, 1992) P. 278.

[13] (1984) 7 SC. 119.

company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.‖`

This provision has been criticized as having negative effect[14] because what the provision appears to suggest is that only the majority can decide whether or not to sue or ratify the irregular conduct of directors. However, the fear expressed has been subdued, though not totally removed, by the provision for exceptions which are enshrined in Section 300 of the same Act, the effect of which is that a member can sue to prevent the Company from the following:

a) entering into any transaction which is illegal or ultra-vires;
b) purporting to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution;
c) any act or omission affecting the applicant's individual rights as a member;
d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;
e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and
f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their breach of duty.

Section 300 (e) above has been said to be simply the codification of the decision in *Hodgson v NALGO*[15] which applied the rule that where the –interest of Justice demands, the rule in *FOSS v. Harbottle* should not apply‖. But the vision of section 300 (e) is much narrower than can be said to mean the same thing as –in the interest of Justice.‖

Improvements Made By the Cama, 1990

Although the new CAMA does not provide new methods for protecting the minority, it certainly introduced new ideas into the legislation towards making the minority protection provision more potent. For example, there is no change in the discretion given the court under section 209 of 1968 Act to wind up the Company to end oppression. However, the concept of oppression under S. 201 of 1968 Act has been enlarged under the 1990 CAMA as well as the power of the court. This is achieved by adding to the word –oppression‖ to elucidate a wider meaning.

[14] E. O. Akanki, ‗Protection of the Minority in Companies' pg. 276.

[15] (1972) I W.L.R. 130.

Accordingly, by section 311(2)(a) of the CAMA 1990, a member is allowed to complain to the court:

that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member or of the members as a whole;that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution or, a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or could be in manner which is in disregard of the interests of a member or the members as a whole.

Significant differences can be identified between section 201 of Companies Act 1968 and the new sections (S.311)[16] as follows:

a) the substitution of unfairly prejudicial conduct for oppression.
b) the relief for conduct that is unfairly discriminatory
c) the expansion of the category of persons who may petition
d) the removal of the link with winding up
e) the coverage of isolated transactions and omissions to act
f) the possibility of relief for threatened acts

A major obstacle in the way of a minority shareholder was the *locus standi,* that is whether a minority shareholder has any standing in law to bring an action in court in respect of wrongs done to a company. Of particular significance is breach of duty by directors which is a major source of injury to the company and consequently the minority.

Although from the provisions contained in section 300 CAMA, it is almost clear that a minority shareholder has *locus standi* to sue either personally or in a representative capacity.[17] It will however appear that any ground that does not come under the provisions will not entitle the minority shareholder to sue. This does not totally remove the judicial obstacle of *locus standi* against the minority shareholder. The enlargement of the class of those who can seek remedy under section 310 of the new Act is however commendable. Those who can seek remedy now include the personal representative of a deceased member and any person to whom shares have been transferred by operation of law.

[16] K.D. Barnes, *Cases and Materials on Company Laws* (O. A. U. Press Ltd, Ile-Ife, 1992).

[17] Sections 301-303 CAMA.

Also, a minority shareholder wishing to ventilate his grievance in a derivative action before the court under Section 303 of CAMA must comply with the requisite procedural steps as a condition precedent to the hearing of his case, otherwise the proceedings will be declared a nullity on the authority of *Agip (Nigeria) Limited v. Agip Petroli International & Ors.*[18]

What will remove the judicial obstacle totally is by including in the provisions of section 300 an omnibus provision of ground to sue in the interest of justice.

Foss V Harbottle: A Critique

In the case of *Edwards v Halliwell and others*[19], the Court of Appeal decided that the rule in *Foss v Harbottle* applied where a corporate right is infringed and has no application where an individual right of membership is denied to a member. The question that comes to mind is even if corporate right is exercised in any given situation, will that preclude an exercise of an individual right by a minority shareholder?

This question has to be answered in the negative, that is corporate right should not preclude individual right. A share is a property to which an individual holding it has a right. Proprietary right affects him as the holder. In the words of Sir George Jessel M. R.:[20]

> He is a member of the company and whether he votes with the majority or minority he is entitled to have his vote recorded – an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in Foss v Harbottle and that line of cases. He has a right to say ‗whether I vote in the majority or not, you shall record my vote, as that is a right of property belonging to my interest in this company and if you refuse to record my vote I will institute legal proceedings against you to compel you…'.

In the same vein, it has been observed by Jerkins L. J.[21] that:

[18] (2010) 1 SC (Pt. II) 98.

[19] (1950) 2 ALLER 1064.

[20] Asomugha E. M., Opcit P. 135

[21] Ibid.

The personal and individual rights of membership of each of them have been invaded by a purported, but invalid alteration. In those circumstances, it seems to me the rule in Foss v Harbottle has no application at all, for the individual members who are suing sue in their own right to protect from invasion their own individual rights as members‖.

From the foregoing, it is doubtful whether the very fabric of the rule established by *Foss v Harbottle* has not been torn on a close examination of the various interpretations which have emerged. A breach of director's duty was concerned in that case and it was thought that it concerned corporate right of the company rather than the individual right of a shareholder. With due respect, this rule can no longer stand, because it will be illogical to divorce anything affecting the corporate life/right of a company from the individual right of the shareholders. That will amount to cloaking a reality with fantasy which will work great injustice against the shareholder. Granted that the two, that is the company and shareholder are distinct personalities, the corporate right has reflections of the individual right of shareholders and the two are therefore intertwined or at best the latter attached to the former. The need to fully recognize the individual right of members of company becomes even stronger when the principle of the Anglo-Nigerian Law is that the majority owes no fiduciary duty towards the minority[22].

To a large extent Section 300(f) has greatly whittled down the effect of the rule laid down in *Foss v Harbottle*.

It appears that section 300 read with Section 310(1) and 311(2) has recognized and widened the scope of the individual right of members, as members of a company. This is a better guarantee to minority shareholders to protect themselves based on the aforementioned argument.

Even though that might look like opening the flood gate to litigations, it is surely a better democratic approach to intra-corporate disputes with an independent arbiter, that is the court left to determine/decide the justice of each case.

Have The Provisions Of Cama 1990 Laid The Minority Protection Issue To Rest?

The above question cannot be answered in the affirmative. Although, the combined effect of Sections 300, 310(1)(a), 310 and S. 311 guaranteed the individual member's right, there is the need for the entrenchment of the decision in *Edokpolor"s* case

[22] Akanki E.O. Supra, 278.

which could be termed a omnibus „minority protection clause' in the new company legislation. What will qualify as being in the interest of justice will depend however on the peculiar circumstances of each case? There are no closed criteria for what is in the interest of justice'. This was evident in *Edopkloro"s* case where liberal interpretation of the words dismantled the *locus standi* barrier in its entirety when read in conjunction with section 408(a) of the Companies Act, 1968.

In the case of *Edokpolor and Co. Ltd. v Sam Edo Wire Industries Ltd & Ors*[23], the plaintiff applied to the court to have the allotment of shares made by the company's directors set aside on the ground that there was a collusion between the company and the allottees to his own detriment. The defendants contended that plaintiff had no right to bring the action because he was barred by the rule in *Foss v Harbottle*. Moreover, the defendants contended further that the cause of action did not accrue because he was barred by the rule in *Foss v Harbottle*. Moreover, the defendant contended further that the cause of action arose before the company was incorporated. The Federal High Court overruled the defence and granted he plaintiff's claim. The judgment of the Supreme Court led by Nnamani, JSC was most elucidating. He said, listing the four exceptions, —A fifth exception appears to have developed from the cases. An individual minority shareholder can also sue where the interest of justice demands that he be so allowed to sue‖ [24]

It should be noted that investigation into the companies' affairs is also provided for in Section 314 of CAMA. The investigation which could be initiated by a company or that of its members appears not to favour a minority shareholder as there is no reference to minority or membership in the singular sense, hence access to court by minority shareholder is not so freed, open under this section. Although Section 314(2)(a) provides that in the case of a company having a share capital, members applying for investigation should hold not less than one-quarter of the class of share issued. This may be impracticable in view of the high level of ingenuity and corporate politics usually played by most Nigerian businessmen who might have designed the shareholding structure of their companies to sabotage the possible implementation of this provision.

Recent events of arresting company executives especially in banks who hold majority shares for financial frauds is also a step in the right direction. The Economic and Financial Crimes Commission has arrested a number of them in recent times and

[23] (1984) 15 NSC 553; (1984) 7 S.C. 119.

[24] At P 142 of the report.

some are already being prosecuted – featured in the News both electronic and the print media.

In a typical Nigerian company, shares are concentrated from hands of a few powerful individuals while the rest holding is allotted in such a way that renders the members ineffective in the decision making process of the company. Twelve years after shareholding pattern largely remains lopsided even with the drive of privatization. As at 2010, UBN Plc had its share structure is follows:

Shareholding analysis

The shareholding pattern of the Bank as at 31 December 2010 is as stated below:

	Range	Number of Shareholders	Shares Held	Percentage of Shareholding %
1	1,000	76,751	34,868,611	0.26
1,001	5,000	242,960	553,225,994	4.09
5,001	10,000	65,066	466,279,219	3.45
10,001	50,000	85,118	1,790,638,150	13.24
50,001	100,000	11,573	807,211,626	5.97
100,001	1,000,000	9,686	2,308,710,402	17.07
1,000,001	5,000,000	690	1,370,831,219	10.14
5,000,001	10,000,000	77	530,375,174	3.92
10,000,001	nd above	114	5,662,615,578	41.86
		492,035		100.00

(Headlines in Vanguard Newspaper, Dec. 1, 1990, AGM's turn battle grounds as minority shareholders protest).[25]

The analysis shows that 881 Shareholders hold 54.92% of the total shares of the bank, while 491,354 shareholders hold 45.08% of the shares. The annual meeting is the only popular forum of shareholders which is usually in metropolitan centres such as Abuja, Port Harcourt, Lagos etc. Most members do not attend this meeting for social-economic reasons. One wonders how 25% members of a company such as UBN Plc can get themselves together for the purpose of taking a decision on investigation of their company. It has equally been observed that general meetings of public liability companies with substantial government shares had fallen prey to politics. During the same period the president of the Nigerian Shares Solidarity Association, Mr. Akintunde Asalu expressed concern that companies were being ruined and hard-earned investments of minority shareholders were being endangered. The then Deputy Director of the Ministry of Finance Incorporated, J.E. Odiri dismissed the

[25]Headlines in Vanguard Newspaper, Dec. 1, 1990, AGM's Turn Battle Grounds as Minority Shareholders Protest.

allegation and challenged any shareholder irked by his inability to gain a foothold on the board to increase his shares or keep quiet[26]. That was most unfortunate a response, which was not augur well for a healthy corporate management regime. Odiri believed that all what minority shareholders could do is to attend the Annual General Meeting, raise issues if there need be, collect gifts and be grateful that their dividends had climbed several notches. It is doubtful whether this oppressive stance of the like of Odiri has changed even at this moment.

Conclusion and Recommendation

It should be noted that majority of companies incorporated in Nigeria are glorified partnerships and often disputes are resolved without recourse to formality or the company abandoned where there is deadlock. The attitude reflects our educational level and also the traditional attitude to business association as the existing provisions have not been fully utilized. However, since a large number of companies also exist with good spread of their membership; the minority shareholder issue deserves the great attention which it is receiving.

However, one thing that deserves to be looked into is the socio-economic condition in Nigeria. It serves as the premise for effective application or implementation of any statutory law. It has been suggested in some quarters that appointment of directors of companies should be based on proportional representation method with each class of shareholders represented on the board. This is a welcome suggestion capable of guaranteeing some equity into corporate managements. It will not be an exaggeration to say that the majority of the Nigerian populations are largely illiterates or poorly educated in general and in investment laws in particular. The question is if the bulk of Nigerian shareholders should be enlightened or educated as to their rights at whose expense? This may not be of much interest to the Board of Management, since the more informed, the more the demands by shareholders.

Perhaps this is an area where the shareholders' Association has a role to play. If there are educational or enlightenment programmes for shareholders there will be increased awareness and the urge to seek improvement on the various provisions affecting shareholder's rights generally and the minority in particular, in accordance with the dictates of the time. Since the world is dynamic and law is organic by this, the legal needs of the minority shareholder *vis-a-vis* their protection will be met or nearly met always. This is imperative since the number of shareholders in the country is bound to swell as the privatization policy is still waxing strong in the psyche of policy make.

[26] C.S. Ola, *Company Law in Nigeria*, P 352.