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Stress-Testing the Legal Regime for Single-Member Private Companies

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Abstract

This article stress-tests the legal regime for single-member private companies in Nigeria. The Companies and Allied Matters Act 2020 (CAMA) is the most important reform of Nigerian company and business law in three decades. It introduced, for the first time, a legal regime for single-member private companies (SMPCs). CAMA aims to extend the benefits of formal incorporation to medium, small and micro enterprises with limited incorporation and compliance formalities. However, the stress tests conducted in this article reveal that the legal regime for SMPCs has two design flaws that may compel SMPCs to take on the costs of complying with certain formalities that have no practical legal or economic value for SMPCs. The findings from the stress tests also suggest an inchoate legal transplant, which may be microcosmic of conceptual, transplantation, and drafting problems in the CAMA.

Keywords: single-member private company, company law, law reform, CAMA, Nigeria.

JEL Classification: K0, K2.

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A. Introduction

The enactment of the Nigerian Companies and Allied Matters Act 2020 ('CAMA') was celebrated for three major reasons. First, it was a significant milestone in the efforts by the present government to improve Nigeria's ranking on the defunct World Bank's Ease of Doing Business Index.[2] Second, it is the most significant reform of the legal framework for companies and functionally similar entities in Nigeria in three decades, and this reform was achieved through a public-private partnership. Before the CAMA, the Companies and Allied Matters Act 1990 was the corpus of Nigerian company law and provided the primary regulatory framework for doing business in Nigeria. This framework persisted for three decades without significant reform despite the monumental political, legal, and economic changes in Nigeria over that period – particularly Nigeria's transition from a military-led autarkic economy to a relatively open federal democratic republic in the first decade and increasing levels of trade openness over the next two decades. Reforming the regulatory space for doing business in Nigeria was therefore high on the policy agenda of the Buhari administration.

To achieve this policy goal, the government established the Presidential Enabling Business Environment Council (PEBEC) at the Presidency, and the leadership of the National Assembly supported the establishment of the National Assembly Business Environment Roundtable (NASSBER)[3] at Parliament. These bodies comprised representatives from the public and private sectors, and were primarily responsible for the implementation of the government's policy on the reform of Nigerian company law. Thus, the CAMA and a few other laws aimed at enabling access to credit[4] are products of a public-private partnership between the Nigerian government and the organised private sector.

Third, the CAMA introduced a number of reforms aimed at extending the benefits of formal incorporation to small and micro enterprises (SMEs), with limited incorporation and

[2] In September 2021, the World Bank discontinued the Ease of Doing Business Reports following allegations of data manipulation. The World Bank is working on replacing it with a new project provisionally titled the 'Business Enabling Environment' Project.
[3] This is an economic law reform roundtable comprising the National Assembly (public sector), the Nigerian Economic Summit Group (private sector), and the Section on Business Law of the Nigerian Bar Association (private sector).
[4] Secured Transactions in Movable Assets Act 2017, Credit Reporting Act 2017, and the Finance Act 2020.

compliance formalities. From the perspective of SMEs, which are predominantly sole proprietorships, the most significant and beneficial reforms include the new legal regimes for single-member private companies ('SMPCs'), partnerships, and the modified legal regime for small companies. This article is on the legal regime for SMPCs. The authors have chosen to focus on this small aspect of the CAMA because the issues involved suggest an inchoate legal transplant which may be microcosmic of deeper conceptual, transplantation, and drafting problems in the CAMA.

B. Purpose and Methodology

This article is practical and policy-orientated. The analysis is technical and focuses on the provisions of the CAMA, with limited reliance on secondary sources. It stress-tests the legal regime for SMPCs using hypothetical scenarios, and doctrinal and comparative analytical methods. A stress-test is a simulated test conducted to assess a system's response to pressure and to reveal its weaknesses. This article hypothesises that on the balance, the legal regime for SMPCs is suboptimal and may create practical problems for some businesses. The article starts by tracing the legal origins of SMPCs, then it tests the hypothesis within the framework of two design flaws in the CAMA. The legal origin is important because it will facilitate an understanding of SMPCs at a conceptual level and provide a theoretical segue into the stress-tests. The analysis of the design flaws will enable a diagnosis of the nature and scope of each flaw, and the specific stress-tests will reveal the practical implications of each flaw. Whilst this article concedes that a market-wide adoption of SMPCs would take some time given that it is a recent addition to Nigerian law; it posits that as the formation of SMPCs increases, the practical problems identified in this article would become market-wide concerns. This article advances company law scholarship in Nigeria and represents the first attempt to critically appraise SMPCs under Nigerian law in theoretical, practical, policy, and comparative terms. This underscores the importance of the analysis provided here and the methodology adopted.

In conducting these stress tests, reliance will be placed on Nigerian case law where relevant and available. However, given that the legal regime for SMPCs is a new addition to Nigerian law and Nigerian courts have not had the opportunity to expound the law on

the subject, heavy reliance will be placed on English case law. Nigeria's legal tradition is founded on the English common law and Nigeria's successive company laws have historically been based, to a substantial extent, on English company laws. A natural consequence of this close relationship between English and Nigerian law is that Nigerian courts frequently rely on English case law for persuasive guidance on matters – including questions of company law – for which domestic precedents do not exist. This recourse to English case law for gap-filling and general persuasive guidance is accepted in academic circles[5] and has also been certified by the Nigerian Supreme Court.[6]

C. Concept and Legal Origins

A conceptual analysis is necessary because the CAMA's legal framework for SMPCs highlights – to adopt the language of the Supreme Court in *Savannah Bank v. Ajilo*[7] – the difficulties created by the lack of precision and the inelegant drafting of statutes. The CAMA does not provide a definition for the term SMPC and it uses the terms 'shareholder' and 'member' interchangeably in relation to SMPCs. For instance, the provisions designed to exempt SMPCs from the obligation to hold annual general meetings apply to 'single *shareholder* companies'[8] while the provisions designed to exempt SMPCs from the obligation to file annual returns after annual general meetings apply to 'single *member* companies.'[9]

Further, the CAMA defines the term 'member' to include personal representatives[10] but this expressly conflicts with other provisions of the CAMA which state and demonstrate clearly that the personal representative of a member is not *ipso facto* a member of a company.[11] These may create practical problems for the courts and the Corporate Affairs Commission whenever they are called upon to determine the compliance obligations that are applicable to SMPCs or to determine whether a company qualifies as an SMPC. This is

[5] J. Olakunle Orojo, *Company Law and Practice*, 5th ed. (Durban: LexisNexis, 2008), p. 19.
[6] Kalu v. Odili [1992] 6 SCNJ 76; Tandy v. Harmony House Furniture Company Ltd [1964] 3 NSCC 21 at 24.
[7] [1989] 1 NWLR (Pt. 97) 305.
[8] Ss. 237 & 240 CAMA. Other provisions relating to quorum at annual general meetings, adjournments, and meetings apply to 'single/one-*member* companies.' See sections 256, 264(5) 266(1), and 266(4) CAMA.
[9] S. 421(2) CAMA.
[10] S. 868(1) CAMA.
[11] S. 178, 179 (1), (2), (3), & (5) CAMA.

because, as will be demonstrated below, the terms 'shareholder' and 'member' in relation to companies limited by shares are distinct, but related, legal terminologies.

A person becomes a shareholder of a company simply by acquiring a share of that company.[12] On the other hand, a person becomes a member[13] of a company by holding at least one share[14] of the company and either: (i) by subscribing to the memorandum of association of the company and having her name entered into the register of members[15] – note that for subscribers, the non-entry of their names into the register of members will not affect their status as members;[16] or (ii) by agreeing in writing to become a member of the company and having her name entered into the register of members.[17] In relation to SMPCs, however, the sole member must hold sufficient shares to meet the minimum issued share capital requirement.[18] This is because the CAMA provides that in a company having a share capital, each member is a shareholder and must hold at least one share, '*except in relation to a company that has only one shareholder*.'[19] This exception is a new addition to the CAMA[20] but it serves no practical purpose given that an SMPC could have a share capital of ₦100, 000 divided into one (1) share of ₦100, 000, effectively allowing the sole member to meet the CAMA's capital requirements while holding just one share.

Ownership of shares in a company does not *ipso facto* make a person a member of that company. That is, whilst shareholding is a mandatory precondition for membership in a company limited by shares,[21] shareholding does not automatically make a person a member of a company. For example, and as was held by the Supreme Court in *Tika Tore Press Ltd v. Abina & Ors*,[22] the personal representative of a deceased shareholder becomes the legal owner of the deceased's shares in the company (that is, a shareholder).[23] But,

[12] Para. 49(1) Companies Regulations 2021.
[13] The term 'holder' as defined in para. 49(1) Companies Regulation 2021 is synonymous with the term 'member' given that they are both tied to the register of members.
[14] S. 105(3) CAMA. See also A. A. Adeogun, 'Some Supreme Court Decisions on Company Law' (1975) 9 Nigerian Law Journal 159 at p. 160.
[15] S. 105(1) CAMA.
[16] Ezeonwu v. Onyechi & Ors [1996] 2 SCNJ 50. Subscribers are automatically deemed to be members of the company. See also Adeogun (n 13), p. 160.
[17] S. 105(2) CAMA. See also Starcola (Nigeria) Ltd & Anor v. Adeniji & Ors [1972] 1 SC 202.
[18] S. 27(2)(a) CAMA.
[19] S.105(3) CAMA.
[20] Compare with the analogous provisions of s. 79(3) of the Repealed Companies and Allied Matters Act, 1990.
[21] S. 105(3) CAMA.
[22] [1973] 4 SC 63. See also Adeogun (n 13), p. 163.
[23] S. 179(1) & (5) CAMA.

that personal representative will not become a member of the company or exercise the rights conferred on members in relation to company meetings[24] until her name is entered into the register of members after compliance with the formalities including an election to become a member, notice requirements, and the updating of the register of members.[25]

As the name implies therefore, SMPCs (also termed 'one-person companies')[26] are private companies with only one member. That is, only one name on the register of members of the company. This is the consistent conceptual definition underlying the frameworks for SMPCs in the European Union,[27] the United Kingdom,[28] and India.[29] A private company with only one subscriber on its memorandum of association may or may not be an SMPC. If it has the names of two or more members on its register of members, it will not qualify as an SMPC notwithstanding the fact that there is only one subscriber to its memorandum of association. An SMPC is not a company with only one shareholder and a company with many shareholders may still be an SMPC at law, the best example being joint shareholding.[30] This is because the operative determinant of the SMPC status is not the legal or beneficial ownership of shares. The operative determinant is the register of members: where it contains the name of a single member only, the company is an SMPC irrespective of the number of shareholders or the number of legal persons beneficially entitled to shares of the company.

And, as will be demonstrated below, where the register of members contains the names of more than one member, it will not qualify as an SMPC even if all other members but one have died (if natural persons) or have been dissolved (if artificial persons). In *Randhawa & Anor v. Turpin & Anor*,[31] the company's register of members had the names of two members. The second member and minority shareholder, Belvedere Estates Limited, was dissolved in 1996 but its name remained on the company's register of members. The

[24] S. 179(5) CAMA.
[25] S. 179(2 – 4) CAMA.
[26] S. 2(62) Indian Companies Act of 2013.
[27] Article 2(1) Twelfth Council Company Law Directive (as amended) 89/667/EEC, [1989] OJ L395/32, p. 40.
[28] S. 123 Companies Act 2006.
[29] S. 2(62) Indian Companies Act, 2013. Note however that the Act expands the definition of member to include shareholders whose names, though not in the register of members, are recorded as beneficial owners in a depositary. See s. 2(55)(iii) Indian Companies Act, 2013.
[30] S. 22(4) CAMA. Joint shareholders, irrespective of their number, are deemed to be a single member.
[31] [2017] EWCA Civ. 1201.

English Court of Appeal held that a non-existent person, whose name is still on the register of members, must be treated as a member of the company for various statutory purposes. Its membership, as evidenced by the register of members, could not be ignored under the applicable law simply because it was dissolved.[32]

The legal origins of the term 'SMPC' is directly traceable to the House of Lords' decision in the seminal case of *Salomon v. Salomon & Co Ltd*.[33] A brief statement of the facts of this case will enable an understanding of the context within which this term emerged. Mr Aron Salomon carried on business as a leather merchant and boot manufacturer. His business was very successful. In 1892, he incorporated a private limited liability company – Salomon & Co Ltd – under the English Companies Act of 1862. The object of the company was to take-over and continue, as a going concern, the leather and boot-making business previously carried on by Aron Salomon as a sole proprietor. The subscribers to the memorandum of association were Aron Salomon, his wife, his daughter, and his four sons, all of whom had one share each. This was to ensure compliance with the Companies Act 1862, which required at least seven (7) shareholders for the formation a private company. The purchase price for the leather and boot-making business was £39000, even though the business was worth less than that sum. The company paid the purchase price to Aron Salomon by giving him £1000 in cash, £20,000 in the form of new shares in the company (that is, 20,000 shares of £1 each), and £10,000 in debentures secured by a floating charge on the company's assets.

Within a year after the consummation of this transaction, the company became insolvent and a liquidator was appointed. The unsecured creditors sued for the remaining assets of the company on the grounds of fraud. They claimed that the 'company' was a one-man business, an alias or agent of Aron Salomon, and a sham which did not qualify as a company under the Companies Act 1862 because the other shareholders were merely 'dummies' for Aron Salomon. The trial court and the Court of Appeal agreed with the unsecured creditors. However, the House of Lords rejected the reasoning of the lower courts and held, particularly per Lord Herschell and Lord MacNaghten, that a company incorporated

[32] Ibid., paras 83 & 84.
[33] [1897] AC 22.

under the Companies Act 1862, after full compliance with the requirements of the Act, would be deemed validly incorporated even if it is in effect a one-man company. Although the House of Lords used the term 'one-man company' in the context of a company having a dominant shareholder and director with other subservient shareholders and/or directors,[34] it is settled that this decision laid the foundations for the legality of 'one-person' or single-member private companies,[35] notwithstanding the oxymoronic nature of the term.

From the foregoing, the idea of SMPCs is not novel and has been around for over a century. Their inclusion within the corpus of Nigerian company law is therefore quite late. They have been in use within the European Union since 1989,[36] in the United Kingdom since 1992,[37] in India since 2013,[38] and in the USA.[39] Thus, in conducting the stress tests, there is sufficient comparative material to draw from. CAMA's lack of precision notwithstanding, it is reasonable to conclude that the CAMA intended to create a framework for single 'member' private companies and not single 'shareholder' private companies. Some provisions of the CAMA support this conclusion. For instance, the CAMA requires every company, including SMPCs, to keep a register of members;[40] and ties shareholding to membership by requiring each member to hold at least one share.[41] Consequently, and for analytical clarity in the stress-tests, this article will treat CAMA's references to single/one *shareholder* and single/one *member* as references to SMPCs.

D. Design Flaw 1: Ownership and Control

The basic design flaw in the legal regime for SMPCs, as prescribed by the CAMA, is that the regime is predicated on the traditional statutory model for companies. This model assumes the structural separation of ownership and control.[42] This traditional model is the

[34] Moore Stephens (a firm) v Stone Rolls Ltd [2009] UKHL 39 at para. 161.
[35] Paul Davies and Sarah Worthington, *Gower: Principles of Modern Company Law*, 10th ed., (Sweet & Maxwell, 2016), pp. 30-31.
[36] Twelfth Council Company Law Directive (as amended) 89/667/EEC, [1989] OJ L395/32, p. 40 (as repealed and replaced by Directive 2009/102/EC).
[37] The Companies (Single Member Private Limited Companies) Regulations 1992, Statutory Instrument No 1699 of 1992.
[38] S. 3(1)(c) Indian Companies Act, 2013.
[39] See, for instance, the Delaware General Corporation Law 1899, as amended.
[40] S. 109(1) CAMA.
[41] S. 105(3) CAMA.
[42] Alan Dignam & John Lowry, *Company Law*, 10th ed. (Oxford: OUP, 2018), p. 10.

reason why companies, whether public or private, are legally structured with two principal organs: the general meeting and the board of directors.[43] Under this traditional model, the general meeting represents ownership – the body of shareholders, who own the company but are not necessarily involved in the daily management and control of the business of the company. On the other hand, the board of directors represent managerial control – they are appointed by the general meeting and given the latitude both by the relevant company-related laws and the company's Articles of Association to superintend the daily operations of the company and to manage its business.

Whilst this traditional model holds true and works well for public companies and large private companies with dispersed ownership; it holds false for most private companies since they are closely-held, with the same persons comprising the general meeting and the board of directors. For most of these closely-held private companies, there is no factual separation between ownership and control. The majority shareholders are either members of the board of directors or wield sufficient shareholding to directly influence the decisions of the board of directors. The vast majority of limited liability companies in Nigeria fall within this category.

The 2017 National Survey of Micro, Small and Medium Enterprises[44] reports that from inception to December 2017, the Corporate Affairs Commission had incorporated 1,597,958 limited liability companies (both public and private). Of that number; only 7% are large enterprises (including all public companies), 60% are small and medium enterprises, and the remaining 33% are micro enterprises.[45] Small, medium, and micro enterprises are typically closely-held. There are news reports indicating that the number of registered companies had increased to 3.1 million as at March 2019.[46] In the absence of more recent and definite data; this article surmises that the ratio of large, small/medium, and micro enterprises in 2017 remains substantially unchanged today. Thus, approximately 93% of the companies in Nigeria today are closely-held companies with substantially the same

[43] S. 87 CAMA.
[44] From the information available on the website of the National Bureau of Statistics, this is the most recent report from the Bureau on the subject.
[45] National Survey of Micro, Small and Medium Enterprises 2017, p. 62.
[46] See https://dailytrust.com/nigeria-has-3-1m-registered-companies-cac accessed on 04 March 2021.

persons as shareholders and directors. The structural separation implemented within such companies is done for statutory compliance purposes, for posturing, and for the perceived reputational benefits that come with titles like managing director or director.

In relation to SMPCs, the traditional statutory model for companies is wholly inapplicable for the simple reason that there is only one member. This sole member is the general meeting and is typically the only director. If there is another director, that director holds office at the pleasure of the sole member who wields the unfettered power to remove and/or replace that director. Thus, any attempt to enforce the traditional statutory model on SMPCs, as the CAMA now prescribes, would only yield farcical results.[47] The stress-tests below will put this in context and demonstrate the practical problems that flow from this design flaw.

- ***Hypothetical Scenarios***

Two hypothetical scenarios – scenarios A and B – have been generated for the purposes of the stress tests.

Scenario A: X is a Nigerian chef and manages a food truck in Lagos. X hopes to expand the business into a chain of restaurants in Nigeria. For this purpose, X intends to incorporate an SMPC to take-over and continue her food-truck business.

Scenario B: It is identical to scenario A save that the chef, Y, is Lebanese, recently migrated to Nigeria, and has satisfied all the residence and business permit requirements in Nigeria. Thus, the only significant distinction between both scenarios is the nationality of the sole member.

The CAMA provides that one person may form and incorporate a private company limited by shares[48] if she is solvent, mentally sound, at least 18years old, and is not disqualified under the CAMA from being a director of a company.[49] This provision applies to both Nigerians and aliens, and any such person must comply with all the formal requirements

[47] Dignam & Lowry (n 42), p. 11.
[48] S. 18(2) CAMA.
[49] S. 20(1) CAMA.

of the CAMA relating to private companies.[50] However, in relation to aliens (whether foreign individuals or foreign companies), their ability to join in the formation of a company is also governed by any other laws (particularly immigration laws and investment promotion laws) governing their ability to enter, reside and carry on business in Nigeria.[51] Thus, the entrepreneurs in scenarios A and B can incorporate their businesses as SMPCs in Nigeria by complying with the requirements of the CAMA relating to private companies. Post incorporation, all the formalities and compliance provisions of the CAMA relating to private companies limited by shares formed by two or more people are also applicable to SMPCs unless specifically excluded. Some of these formalities and compliance obligations are the target of the stress tests below.

- ***Test 1: The Board and the Secretary***

The CAMA requires every company, excluding 'small companies,' to have at least two directors[52] and a secretary.[53] This means that all SMPCs must have at least two directors and a secretary unless they qualify as 'small companies.' For SMPCs that do not qualify as small companies, these requirements would not only be unnecessarily burdensome, they would also be farcical in operation. This is because it would be absurd and costly for a company with only one member to appoint and pay two directors and a secretary.

The definition of the term 'small company' provided by the CAMA[54] is somewhat technical, especially in relation to the second and subsequent financial years of a company.[55] This article does not intend to unpack the nuances of that definition. For the purposes of the stress test here, the companies in scenarios A and B would be deemed to be in their first financial years. In this regard, the CAMA provides that a company qualifies as a small company in relation to its first financial year[56] if, in that year:[57]

(a) it is a private company;

[50] S. 18(2) CAMA.
[51] S. 20(4) CAMA.
[52] S. 271(1) CAMA.
[53] S. 330(1) CAMA.
[54] S. 394 CAMA.
[55] S. 394(2) CAMA.
[56] S. 394(1) CAMA.
[57] S. 394(3) CAMA.

(b) its turnover is not more than ₦25 million;[58]

(c) its net asset value is not more than ₦12.5 million;[59]

(d) none of its members is an alien;

(e) none of its members is government or government-affiliated; and

(f) the directors hold at least 51% of the equity share capital.

The SMPC incorporated in pursuance of scenario A would certainly qualify as small company in its first financial year. Consequently, it would not be required to have two directors and a secretary. The sole member can serve as general meeting, board of directors and secretary for all intents and purposes of the CAMA. The company will avoid the costs of maintaining those officers. In relation to scenario A, therefore, CAMA's provisions on the composition of the board and the appointment of a secretary will pass the stress test. X and other sole proprietors are incentivised to incorporate their businesses without any need to seek out additional persons for compliance purposes and without incurring unnecessary costs. The practical value in this aspect of the legal regime for SMPCs is potentially infinite given that approximately 93% of the companies in Nigeria are closely-held micro, small and medium entities. The pool of potential beneficiaries of this simplified regime is very wide.

The result is different when scenario B is applied. The SMPC incorporated in pursuance of scenario B will not qualify as small company in its first financial year. This is because one of its members – indeed, its sole member – is an alien. Applying CAMA's definition of 'small company' above, a company with an alien in its membership is not a small company. The practical implication of this is that the scenario-B SMPC, and similar small-scale companies incorporated by foreign investors in Nigeria, must have at least two directors and a secretary. This is neither the law or the practice in India,[60] Delaware,[61] or the United Kingdom,[62] all of which only require a minimum of one director. Foreigners seeking to incorporate SMPCs in Nigeria must therefore seek out additional persons for compliance

[58] Para. 19(2) Companies Regulations 2021.
[59] Para. 19(3) Companies Regulations 2021.
[60] S. 149(1)(a) Indian Companies Act 2013.
[61] S. 141(b) Delaware General Corporation Law.
[62] S. 155(1) UK Companies Act 2006.

purposes, and must take-on the consequential costs. The term 'foreign investors' is a broad term that includes not only multilateral development banks and global financial institutions, but also includes the individual labour and business migrants from other parts of the world, especially China, Lebanon, India and other parts of Africa.

These labour and business migrants are more likely to be affected by this additional cost and compliance requirement. However, empirical data would be needed to properly measure the materiality of this problem and its impact on the willingness of such persons to organise their business endeavours in Nigeria as limited liability companies. In any case, it is difficult to articulate the rationale undergirding this seeming unequal treatment of Nigerians and non-Nigerians in relation SMPCs. It is also inconsistent with the government's policy goal of making Nigeria an attractive place for foreigners to come in and do business. This preferential treatment does not guarantee employment for Nigerians as the alien-owned SMPC can still have aliens as the directors and the secretary. There are no nationality requirements for persons seeking to hold office as directors or secretaries of companies under the CAMA.[63] Also, the second director in such alien-owned SMPCs would hold office at the absolute pleasure of the sole member. The second director serves no useful purpose since the sole member – as half of the board and its chairman – can always use her second or casting vote[64] to resolve all disagreements in her favour. If the second director puts up any resistance, the sole member can remove her at will since the sole member is the general meeting. Thus, it appears that there is no sound legal justification for requiring two directors in an alien-owned SMPC.

The foregoing analysis of scenario B has focused solely on disqualification from small company status on account of the presence of an alien in the membership of the company. Note that other factors, like turnover and net asset value, can also operate to disqualify a company from claiming the small company status. From this test, it may be concluded that the aspects of the legal regime relating to the composition of the board of directors will work very well for most indigenous SMPCs. But, they are likely to impose additional and

[63] Ss. 283 and 332 CAMA.
[64] S. 289(2) CAMA.

unnecessary formalities and compliance costs on SMPCs that do not qualify as small companies either on account of turnover, net asset value, or the membership of an alien.

- ***Test 2: Proceedings of the Board***

The tests here produce pretty preposterous results, all flowing directly from a design flaw that attempts to apply the traditional statutory model of companies to SMPCs. The CAMA requires that the board of directors may meet together to manage the business of the company, the first of such meetings to be held within the first six months of incorporation.[65] At such meetings, a chairman may be appointed[66] and decisions are to made by simple majority of the board.[67] Unless the company's Articles of Association provide otherwise, two directors are required to form quorum at these meetings.[68] These provisions apply to all companies, including SMPCs. However, for clarity, note that the requirements for general meetings and quorum do not apply to SMPCs under the CAMA.[69]

Recall that the SMPC incorporated in pursuance of scenario A has only one member and one director because it qualifies as a small company. If the aspects of the legal regime relating to proceedings of the board are applied to that scenario-A SMPC; the CAMA would require this sole director to meet with herself, consider the appointment of a chairman, and take decisions by voting all by herself. Importantly, X (as the sole director) will never be able to hold a quorate board meeting unless the company's Articles of Association modifies the minimum quorum threshold prescribed by CAMA. This prescription of a minimum of two directors for a quorate board meeting is also restated in paragraph 11 of the model Articles of Association for private companies limited by shares available on the company registration portal of the Corporate Affairs Commission and in the 20th Schedule to the Companies Regulations 2021. Further, the sole director would be required to retire and reappointment herself every year in compliance with section 285 CAMA unless this obligation is excluded by the company's Articles of Association. The likely beneficiaries of the SMPC regime are micro, small and medium enterprises who generally have no need

[65] S. 289(1) CAMA.
[66] S. 289(4) CAMA.
[67] S. 289(2) CAMA.
[68] S. 290 CAMA.
[69] Ss. 237, 256, 264(5) CAMA.

for elaborate Articles of Association and would likely adopt the model Articles provided by the Corporate Affairs Commission.[70] Consequently, any such SMPCs would be unable to have quorate board meetings and their sole directors would be subject to the retirement and rotation rule. This also affects all small companies under the CAMA that have only one director, irrespective of whether they are SMPCs or not. Again, this is neither the law nor the practice in other jurisdictions like India, which expressly exclude SMPCs with a single director from every requirement relating to board meetings and quorum.[71]

The absurdity of these requirements is perhaps mitigated by the possibility of using written resolutions or falling back to the general meeting where the board is inquorate. In this regard, the CAMA provides that the board of directors may make decisions through unanimous written resolutions in lieu of actual meetings.[72] The unanimous written resolution dispenses with the need for convening and holding an actual quorate meeting. This will present no problems in the case of the scenario-A SMPC given that all decisions by the sole member and director are effectively unanimous. The CAMA also provides that where the board is unable to achieve quorum, which is likely to be the case for most SMPCs unless the model Articles are amended, the general meeting can act in place of the board of directors.[73] These mitigating provisions are not deliberate additions to the legal regime for SMPCs under the CAMA because they were lifted verbatim from the repealed Companies and Allied Matters Act 1990,[74] under which SMPCs were unlawful.[75]

Recall that X, the single member, is the board of directors and is also the general meeting. So, when she sits to take a board-level decision and finds that there is no quorum[76] (as absurd as that sounds), she will transfigure herself into the general meeting to take the same decision.[77] In either case, all of this is unnecessary if she puts that decision into writing and signs it as a written resolution.[78] The question then arises: what is the practical

[70] Ss. 32-34 CAMA.
[71] See the proviso to S. 173(5) Indian Companies Act, 2013.
[72] S. 289(8) CAMA.
[73] S. 291 CAMA.
[74] Ss. 263(8) & 265 repealed Companies and Allied Matters Act, 1990.
[75] Ibid., ss. 18 & 408(c).
[76] S. 290(1) CAMA.
[77] S. 291 CAMA.
[78] S. 259 and 289(8) CAMA.

value in determining the capacity in which the sole member and director of an SMPC sits to take decisions for the company? The simple answer is that there is none. No practical value whatsoever. This is because decisions in either capacity are binding on the company.[79] The capacity in which X sits to make decisions is absolutely irrelevant and this strikes at the roots of the separation of ownership and control in SMPCs, which underlies the language of the CAMA. Where the Articles or the CAMA confer a specific power on the board or the general meeting,[80] that power may freely be exercised by X in whatever capacity since she also has the power to ratify *ultra vires* actions of the board of directors.[81]

The arguments above take their roots from the Duomatic Principle,[82] the legal origins of which is again directly traceable to *Salomon v Salomon*[83] where Lord Davey held that:

> '…it must be observed that, as the appellant held the bulk of the shares, or (as the respondents say) was the only shareholder, the money required for the payment of it came from himself… Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members.'

The decision of Warrington LJ in *Re Express Engineering Works Limited*[84] puts the application of this Duomatic Principle in the proper context of a closely-held private company. He held that:[85]

> 'It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not but as shareholders acting together,

[79] S. 89 CAMA.
[80] Ss. 87(2), (3), & (4) CAMA.
[81] S. 87(5)(c) CAMA.
[82] In Re Duomatic Limited [1969] 2 Ch 365.
[83] Supra n 32.
[84] [1920] 1 Ch 466.
[85] Ibid., at pages 470-471 said (in agreement with Lord Sterndale MR).

> they could... *Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as businessmen they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out*.'[86]

Even if the directors in *Re Express Engineering Works Ltd* had acted in their capacity as directors to unanimously approve the transaction; the transaction would still be valid under the UK Companies Act and the CAMA because as the only shareholders of the company, they could ratify or confirm any action taken by them as the board.[87] In demonstrating the irrelevance of formalities and capacities in relation to unanimous company decisions or actions, the English Court of Appeal held in *Monecor (London) Ltd. v Euro Brokers Holdings Ltd*,[88] per Lord Justice Mummery that:

> 'It is a sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not comply with them. *What matters is the unanimous assent of those who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting. It does not matter whether the formal procedures in question are stipulated for in the Articles of Association, in the Companies Acts or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement*.'[89]

Having established that formalities and capacities are irrelevant in relation to SMPCs, this article can now test other aspects of the legal framework for SMPCs under the CAMA, beginning with section 266(4). Testing that provision using the scenario-A SMPC produces an interesting result: in effect, the CAMA requires that where the sole member and director of the scenario-A SMPC takes a decision in her capacity as the general meeting,

[86] Emphasis supplied.
[87] S. 87(5)(c) CAMA.
[88] [2003] EWCA Civ. 105.
[89] Ibid., at para. 62. Emphasis supplied.

she must provide a detailed notice of that decision to herself in her capacity as the board of directors. If she fails to do this, she will be guilty of an offence under the CAMA. This result is clearly absurd. A very similar provision exists in the UK, but the detailed notice there is provided to the company (as a separate legal person) and not to the board of directors.[90]

Section 303 CAMA governs the disclosure, by directors, of their personal interests in contracts with the company and it applies to all companies, including SMPCs. Where a director is directly or indirectly interested in any contract or transaction involving the company, the director is under a duty to promptly notify the board of directors of that interest.[91] If the director fails to do this, he or she will be guilty of an offence under the CAMA.[92] Applying this provision to scenario A, X (as a director and the board of directors) would be required to send herself detailed notices of any interest she has in a contract or transaction involving the company. This means that X would have to send herself detailed notices of every contract or transaction involving the company since, as sole member, she has an indirect and beneficial interest in all contracts or transactions involving the company.

In a similar vein, the CAMA requires the board of directors to prepare the financial statements (modified or otherwise) of the company for each financial year,[93] and obligates them to lay those financial statements before the general meeting.[94] These provisions apply to all companies, including SMPCs. Applying these provisions to scenario A, X as the board of directors will prepare the company's financial statements (modified, since it is a small company)[95] and lay those financial statements before herself as the general meeting. The same test can be applied to sections 310 and 311 CAMA,[96] which govern substantial property transactions with directors.

[90] S. 357 CAMA.
[91] S. 303(1) CAMA.
[92] S. 303(3) CAMA.
[93] S. 377 CAMA.
[94] S. 388 CAMA.
[95] Ss. 393 & 396 CAMA.
[96] Compare with s. 193 Indian Companies Act, 2013; s. 231 UK Companies Act, 2006.

These tests demonstrate the absurdity of formalities, capacities, and the application of the traditional statutory model for companies to SMPCs. If these tests are conducted using scenario B, all the results would be slightly different and less absurd given the presence of a second director.

- ***Test 3: Audit***

The audit requirement is another formality that is unnecessary in SMPCs. The audit process exists to provide comfort to the shareholders that the financial statements, prepared by the board of directors, are credible and represent a true and fair statement of the financial position of the company. The audit process is founded on the separation of ownership and control, and is one of the mechanisms employed by company law to mitigate the agency problem that exists between shareholders (as principals) and the board of directors (as agents). Thus, in SMPCs where there is no agency relationship and no separation of ownership and control, the audit process is a costly and irrelevant formality.

The CAMA requires every company, except dormant companies and small companies,[97] to appoint auditors to audit the financial statements of the company.[98] Scenario-A SMPC is exempted from this audit requirement because it is a small company. But, as demonstrated above under Test 2, not all SMPCs will qualify as small companies. The SMPC incorporated in pursuance of scenario B will not qualify as a small company because it has an alien in its membership,[99] even if the sum of its turnover and net asset value is less than one million. This SMPC would, however, be required to appoint an auditor to audit the financial statements prepared by the board of directors (comprising Y, the sole member, and the second director, appointed by Y). The auditor will be required to prepare and present an audit report to Y (as the general meeting).[100] Given Y's status as sole member and her absolute control over the board, there appears to be no practical value in asking the SMPC to take on the costs and formalities of appointing an auditor to assure Y of the credibility of financial statements prepared by Y.

[97] S. 402(1) CAMA.
[98] S. 401(1) CAMA.
[99] S. 394(3)(d) CAMA.
[100] S. 404 CAMA.

E. Design Flaw 2: SMPC by Operation of Law

It appears that the only way a private company can attain SMPC status in Nigeria is by formal incorporation at the Corporate Affairs Commission. Beyond the requirements for updating the register of members, the CAMA is silent on what would or should happen if the membership of an SMPC subsequently increases to two or more members. And, if the membership subsequently falls back to a single member, the CAMA prescribes winding-up.[101] The UK permits the attainment of SMPC status by operation of law where the number of members falls below two for any reason.[102] India provides a legal framework that enables companies to convert their status to and from SMPC[103] and does not prescribe winding-up where the number of members falls below two.[104] The CAMA, however, provides no framework for converting or changing status from an SMPC to a private company with two or more members, or vice versa.[105] In all, it appears that the CAMA does not permit the attainment of SMPC status by operation of law.

This may create a practical problem given that most closely-held private companies in Nigeria are 'one-man companies' similar to Salomon & Co Ltd. The second or additional members in such companies are usually nominal shareholders included solely for statutory compliance under the repealed Companies and Allied Matters Act, 1990. If these companies decide to reorganise themselves as SMPCs under the CAMA, they would be taking on the risk of a potential winding-up action. This risk is not remote because the nominal member, who would be eased-out under the reorganisation, would qualify as a contributory and can file a petition for the winding-up of the company.[106]

- ***Hypothetical Scenario***

To enable a determination on the question whether an SMPC can emerge by operation of law under the CAMA, a layer of complexity will be added to the stress-test scenarios above. Assume that the proposed company in scenario A was incorporated as a conventional

[101] S. 5671(c) CAMA.
[102] S. 123 UK Companies Act 2006.
[103] S. 18(1) Indian Companies Act, 2013.
[104] Ibid., s. 271.
[105] S. 55 CAMA.
[106] Ss. 565, 566, & 117(4) CAMA.

private company with two members. X as principal shareholder with 99% of the shares and her husband as a nominal shareholder with 1% of the shares. A few years after the incorporation of the company, the husband transfers his 1% shares to X,[107] leaving X as the sole member and sole shareholder of the company.

Or; to adopt a different legal structure for variety, assume that a few years post-incorporation, X and her husband executed a scheme under which they became joint owners of 100% of the shares. Upon execution of the scheme, CAMA will deem them to be a single member. This is because the CAMA provides that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of determining the total number of members of the company, be treated as a single member.[108] For practical legal purposes and the technical purposes of the CAMA, the number of members would effectively be below two in such a case. At law, X and her husband would be the single member of the company on account of this *ex post* restructuring of their shareholding.

- ***Test 4: Number of Members Below Two***

If any of the foregoing happens in a private company, the CAMA prescribes a strange course of action. It empowers[109] the company, a director, a creditor, a receiver, a contributory, the Corporate Affairs Commission or any of their authorised representatives to file a petition asking the Federal High Court to wind-up the company on the grounds that the number of its members has fallen below two.[110] The result would be the same if this layer of complexity was added to scenario B. The practical legal question flowing from this is whether a potential winding-up proceeding should be the proper prescription in the event of *ex post* arrangements that effectively convert a hitherto dual- or multi-member private company into a *de facto* SMPC?

[107] Note that the company may also buy back the 1% shares from the husband. If this happens, the company's register of members will still have two members, the second member being the company itself. Where a company acquires its own shares, those shares become treasury shares and the company's name is entered in the register of members as the member holding those treasury shares. See ss. 184(5) and 868(1) CAMA.
[108] S. 22(4) CAMA.
[109] S. 573(1) & (2) CAMA.
[110] S. 571(c) CAMA.

Without implicating jurisprudential arguments over what the law is and what it ought to be, this article answers this question in the negative. It argues, instead, that the occurrence of any of the foregoing should result in the creation of an SMPC by operation of law, subject to minor formalities like updating the register of members and notifying the Corporate Affairs Commission. There are several reasons why a dual- or multi-member private company may want to reorganise and convert itself into an SMPC, including the desire to run a small business independently without having to deal with an additional person. A private company desirous of converting to SMPC status should not suffer the risk of a potential winding-up action.

The question of whether an SMPC can arise by operation of law has been answered by the English courts. In *Randhawa & Anor v. Turpin & Anor*,[111] the court was called upon to determine, *inter alia*, whether a company could automatically become an SMPC on the death, dissolution or exit of all other members such that only one member was left. The facts were that BW Estates Ltd had two members, one of which was a company that had been dissolved for about 19years. The shareholding history was much more nuanced but at the time of the appeal, the names on the register of members were David Williams with 75% of the shares and Belvedere Estates Limited with 25% of the shares. The company was insolvent. Given that Belvedere had been dissolved for about two decades, David, purportedly acting as sole member and sole director, appointed the respondents as joint administrators of the company. The appellants were creditors of the company who sued to annul the appointment of the joint administrators on the grounds that they were appointed at an inquorate board meeting. The lower court disagreed with the appellants, reasoning that the appointment of the joint administrators was validated by the Duomatic Principle. The lower court was also of the view that the appellants' failure to raise the issue in the earlier proceedings they had maintained amounted to an abuse of court processes and they were consequently estopped from raising the issue in this proceeding. Hence, the present appeal. At the Court of Appeal, the respondents argued that the company was an SMPC at all material times given that Belvedere had been dissolved since 1996.

[111] [2017] EWCA Civ. 1201.

Consequently, the appointment of the administrators by David alone was valid and, in any event, protected by the Duomatic Principle.

The Court of Appeal agreed with the respondents that SMPCs were part of English company law and that a company may move in and out of the SMPC category over the course of its life. The court, however, disagreed with the respondents' argument that the death or dissolution, without more, of member of a company with two members would automatically convert the company to an SMPC. The court relied on the Companies Act 2006 and copiously cited section 123 thereof which requires that where the members of company falls to one for any reason, the register of members must be updated to contain a statement that the company now has only one member, the date on which the company became an SMPC, and the name and address of the sole member.[112] Also, if the membership subsequently increases to two or more, the register of members must be updated to contain a statement that the company has ceased to be an SMPC, the date on which the company ceased to be an SMPC, and the names and addresses of all the shareholders.[113]

By this decision and the provisions of the Companies Act 2006, it is clear that an SMPC can emerge by operation of law. All that is required is the *de facto* existence of a single member, and a clear statement to that effect in the register of members. Once these requirements are met, the *de facto* SMPC would become a *de jure* SMPC at law and by operation of law. There is no threat of a potential winding-up action solely because the number of members in a private company fell below two. In a similar vein, an SMPC can also cease to exist by operation of law if it subsequently gets two or more members. The SMPC category is fluid and a private company can flow in and out of it at will. In *Gaultier v. Registrar of Companies & Ors*,[114] the Irish Supreme Court, restating European Union Directives, held that a private limited liability company may be an SMPC from the time of its incorporation, or may become one because its shares have come to be held by a single shareholder.[115]

[112] S. 123(2) UK Companies Act 2006.
[113] S. 123(3) UK Companies Act 2006.
[114] [2019] IESC 89.
[115] Ibid., para. 36.

From the foregoing, if we stress-test the Companies Act 2006 using the amended scenarios above, the Companies Act 2006 will pass the stress test and is clearly more amenable to the needs of medium, small, and micro enterprises. If, however, we stress-test the CAMA using the amended scenarios above, the result will be the threat of a potential winding-up proceeding. As noted above, it appears that the only way a private company can attain SMPC status in Nigeria is by formal incorporation at the Corporate Affairs Commission. The CAMA is silent on what would or should happen if the membership subsequently increases to two or more shareholders. The CAMA only has a general provision that the names and addresses of all shareholders be entered into the register of members within 28 days after they become members or cease to be members.[116] If the membership of the company subsequently falls back to a single shareholder, the CAMA, as enacted, threatens potential winding-up. The legal regime for SMPCs under the CAMA is therefore suboptimal.

Conclusion

The tests above demonstrate that the CAMA's attempt to protect SMEs and closely-held companies from unnecessary formalities and compliance obligations is limited in its application to the most extreme form of a closely-held company – the SMPC. Even in relation to SMPCs, the results are mixed given that some of those protective provisions apply to 'small companies' as defined by the CAMA. Some SMPCs will not qualify as small companies and will not benefit from those protective provisions. The tests also demonstrate that at a taxonomic level, the CAMA's framework for SMPCs is deficient. At law, a single shareholder company is different from a single member company.

It may be argued that this suboptimal legal regime was not intended by the legislature. After all: (i) there is clearly a deliberate, but inchoate, effort to eliminate unnecessary formalities in SMPCs; and (ii) the penal provisions against a company carrying on business with only one member is expressly applicable to public companies and companies limited

[116] S. 109 CAMA.

by guarantee only.[117] It no longer applies to private companies limited by shares as was the case under the repealed Companies and Allied Matters Act 1990.[118] These suggest that the drafts-people of the CAMA contemplated and intended a reasonably complete legal regime. However, the term the '*intention of the legislature*' is a very common but slippery phrase which may mean anything from a clear intention embodied in a positive enactment to a speculative opinion on what the legislature may have meant, but failed to enact. In any case, the intention of the legislature can always be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.[119]

The CAMA's provisions on SMPCs are very clear: SMPCs are required to comply with certain formalities that have no practical legal or economic value, but increase the compliance costs of these companies. In addition to this, where the number of members of a private company limited by shares falls below two, winding-up becomes a real risk even though the law recognises SMPCs. For public companies and companies limited by guarantee, penal sanctions accompany that risk of winding-up. In the absence of an elaborate or bespoke legal regime for SMPCs, these design flaws would have been avoided if the drafts-people of the CAMA had employed the omnibus modification clause: 'this Act and any enactment or rule of law which applies in relation to a private company limited by shares shall, in the absence of any express provision to the contrary, apply with necessary modifications to such a company which has been formed by one person or which has only one member.'[120]

The enactment of the CAMA represents one of the most significant efforts at law reform in Nigeria in decades. The suboptimality of the legal framework for SMPCs may negatively impact on the intended economic and efficiency gains of SMPCs. It suggests an inchoate legal transplant which may be microcosmic of other conceptual, transplantation, and drafting problems in the CAMA. Law reform efforts should not be limited to merely

[117] S. 118 CAMA.
[118] S. 93 repealed Companies and Allied Matters Act, 1990.
[119] Supra (n 33) per Lord Watson.
[120] Adapted from s. 38 UK Companies Act 2006 and s. 2(1)(a) UK Companies (Single Member Private Limited Companies) Regulations 1992.

transplanting legal provisions from other jurisdictions. Such efforts must encompass a complete understanding and adaptation of the entire framework to ensure seamless application in Nigeria.