UNDERSTANDING THE NIGERIAN COMPANIES AND ALLIED MATTERS ACT 2020: Your Questions Answered

The discovery of oil in Nigeria in 1956 set the stage for the development of the country as one of Africa's major commercial hubs. Sixty-four years later, the country has become a beehive of commercial activities, housing myriads of multinational and indigenous businesses across diverse sectors transcending the oil and gas sector. A look at the most successful commercial hubs worldwide reveals that their respective company legislations play pivotal roles in these success stories; and if the full potential of businesses in Nigeria is to be effectively harnessed, in a rapidly advancing digital environment, a robust and business-friendly company law framework is necessary.

Until recently, the formation and administration of the various vehicles through which formally registered businesses in Nigeria operate was governed by the Companies and Allied Matter Act 1990[1], (the "**CAMA 1990**"). However, over time the provisions of the CAMA 1990 progressively became obsolete, predominantly due to

[1] Cap C.20 Laws of the Federation of Nigeria 2004.

global economic realities and technological advancement. Consequently, the company law framework of the Nigerian business environment quickly garnered a reputation of "difficulty" and "inconvenience", in comparison to that of other commercial hubs in Africa and other continents which consistently amend their company laws to keep abreast with current realities per time.

In a bid to change this narrative and generally ease doing business in Nigeria, the Muhammadu Buhari and Yemi Osinbajo-led administration passed and signed the Companies and Allied Matters Act 2020 (the "**Act**") into law on 7 August, 2020. The Act repeals the CAMA 1990, albeit retaining a significant part of its provisions, with notable amendments to some of these provisions. It also introduces several new provisions and concepts, with the summative aim of keeping abreast with current realities, as well as aligning with international standards and best practices.

Following the signing of the Act, existing businesses in Nigeria and potential investors are eager to understand the effect of the Act on their businesses; particularly if it indeed creates an easier business environment. In order to aid this understanding, we have set out below what we envisage will be recurring questions and provided responses based on our understanding of the Act.

1. SCOPE AND APPLICATION OF THE ACT

What types of entities are subject to the purview of the Act?

The Act applies to public and private companies, business names, registered associations, limited liability partnerships ("**LLP**") and limited partnerships ("**LP**")[2].

[2] Limited liability partnerships and limited partnerships are new business vehicles recognized by the Act.

What is a Limited Liability Partnership?

This is a corporate body formed as a partnership with a minimum of 2 (two) persons[3] (either corporate entities or individuals[4]). The LLP has a separate legal personality from its partners and the partners are generally not personally liable for obligations of the LLP.[5] In addition, foreign LLPs are required to incorporate a separate entity in Nigeria prior to carrying on business in Nigeria[6].

What is a Limited Partnership?

A LP is a partnership which does not have a separate legal personality. It should comprise of a minimum of one general partner who will be liable for the obligations of the partnership and a minimum of one limited partner whose liability will be limited to the amount which he contributed or agreed to contribute at the time of joining the partnership[7]. The membership is limited to 20 (twenty) persons[8] (either corporate entities or individuals[9]).

2. COMPANY FORMATION

How many shareholders are required to form a company?

1 (one) shareholder is permitted to form a private company, while a minimum of 2 (two) shareholders are required in the case of a public company.[10]

What is the minimum number of directors for a company?

The Act provides that all companies, except small companies, are required to have a minimum of 2 (two) directors[11]. However, upon closer scrutiny, it is observed that the

[3] Section 746(1) and 748(1) of the Act.
[4] Section 747 of the Act.
[5] Section 767(1) of the Act.
[6] Section 788 of the Act.
[7] Section 795 of the Act.
[8] Section 795 (4) of the Act.
[9] Section 795 (2) of the Act.
[10] Section 18 of the Act.
[11] Section 271 of the Act.

"minimum" requirement is determined by the type of company in question. A small private company is permitted to have 1 (one) director whilst private companies other than small companies are required to have 2 (two) directors.[12]

Although the Act prescribes a general minimum, this prescription is contrary to the expectations of the Act in relation to public companies, as it expressly stipulates that public companies are required to have at least 3 (three) independent directors.[13]

What is a small company?

A small company is a private company which fulfils certain requirements prescribed under the Act in the current and preceding financial years.[14] A small company is not required to appoint auditors[15], file audited statements along with its annual returns[16] and appoint a company secretary. Exemption of companies with foreign shareholding from qualification as a small company suggests that the Act seeks to encourage registration of indigenous small and medium scale enterprises.

3. COMPANY OBJECTS, ARTICLES, SHARE CAPITAL AND SHAREHOLDING

Are there any limitations to the objects of a company?

There are no limitations to the objects a company can undertake, except where the articles restrict the objects[17]. Thus, a company is at liberty to act beyond its stated objects.

Is a company bound to adopt statutorily prescribed articles of association?

Although the Act empowers the Minister of Trade (the "**Minister**") to prescribe model Articles of Association ("**Articles**") for different types of companies, a company is not bound by any model Articles, as a company is at liberty to develop its Articles. However, where it does not register its Articles or expressly exclude or alter the applicable model Articles, such model Articles will constitute part of the Articles of the company[18].

The Act does not address resolution of a conflict between a company's Articles and the model Articles in cases where the model Articles is deemed to constitute part of a company's Articles as highlighted above.

What are the share capital requirements for a company?

Companies are no longer required to have an authorized share capital; as the requirement under the Act is to have a minimum issued share capital. The minimum issued share capital prescribed for a private and public company is ₦100,000.00 (approx. $263.00 USD) and ₦2,000,000.00 (approx. $5,263 USD) respectively. Impliedly, companies can no longer have unissued shares.

Is there a change to the minimum share capital requirements for companies with foreign participation and companies in specific sectors?

The Act does not exempt foreign companies from compliance with minimum share capital requirements prescribed by the Citizenship & Business Department of the Nigerian Immigration Service ("**NIS**")[19], or from other sector specific/mandated minimum share capital requirements.[20] The NIS and other

[12] Section 271 of the Act.
[13] Section 275 of the Act.
[14] Section 394 of the Act; a small company is a private company, at least 51% of the shares of which are held by its Directors, and which has a turnover of not more than N120,000,000 and net assets of not more than N60,000,000 and which does not have any foreigner, government or government corporation as a shareholder.
[15] Section 401 (1) of the Act.
[16] Section 424 (2) of the Act.
[17] Section 35 of the Act.
[18] Sections 33 and 34 of the Act.
[19] Where any of the subscribers to a company's memorandum and Articles is a foreign entity or individual, the company is required to have a minimum share capital of N10,000,000.00 (approx. $26,316 USD).
[20] For instance, banking, maritime and insurance sectors.

regulators typically insist on a minimum authorized share capital prior to registration or issuing relevant operating permits/licences. Thus, there is a need for synergy between the Act and these sectoral requirements.

Is the share capital required to be paid up?

The Act is silent on immediate payment for the initial issued share capital of a company. However, in the case of an increase in the issued share capital (by allotment of new shares), a minimum of 25% of the total issued share capital following the increase is required to be paid up in order for the increase to take effect.[21] The implication is that shareholders will no longer benefit from the option of not being required to pay for shares upon allotment afforded by the CAMA 1990.

Are trust arrangements in relation to shares permissible?

It is permissible for a shareholder who subscribes to the memorandum and Articles of a company to hold shares in trust for another person. However, the trust relationship and the beneficiary's name are required to be disclosed in the memorandum of association.[22] The Act is however silent on disclosure of trust arrangements established post incorporation of a company (that is, after subscription to the memorandum and Articles). Thus, it is unclear whether the intention is that all trust arrangements in relation to shares in a company should be disclosed or this requirement only applies to such arrangements created at incorporation (by subscription to the memorandum and Articles). Where the former is the case, companies in sectors where trust arrangements are often adopted in order to comply with local content requirements[23] will come under increased scrutiny by the respective sectoral regulators and there could potentially be a change in parameters for measuring local content.

4. EXECUTION AND AUTHENTICATION OF DOCUMENTS

Can electronic signatures be used in executing documents?

Wet ink signatures are no longer mandatory, as the Act permits the use of electronic signatures, as satisfying the requirement for signing of documents[24].

Is a common seal required for authentication of documents?

This is not mandatory for authentication of documents, as a company is at liberty to elect whether or not to have a common seal[25]. Furthermore, a deed may be executed by a company without affixing the common seal on the document, once it is signed on behalf of the company either by[26]:

- A Director and the secretary;
- At least two (2) Directors;
- A Director in the presence of a minimum of one (1) witness who attests the signature.

5. CORPORATE GOVERNANCE PROTOCOLS

Are Corporate Governance rules more relaxed under the Act?

No. On the contrary, the Act incorporates certain corporate governance principles under existing corporate governance codes and also introduces others, including:

a. ***Annual General Meetings*** ("AGMs"): Small Companies and private companies with a single shareholder are exempt

[21] Section 128 (1) of the Act.
[22] Section 27 of the Act.
[23] For example, the oil and gas and maritime sectors.
[24] Section 101 of the Act.
[25] Section 98 of the Act.
[26] Section 102 of the Act.

from mandatory AGMs. AGMs are mandatory for public companies and private companies with more than one shareholder only.[27]

b. ***Virtual Meetings:*** Private companies are permitted to hold their general meetings via electronic means, in so far as such meetings conform with the provisions in the Articles of the company. The Act does not address whether public companies can hold electronic meetings, even though recent global developments have triggered a necessity for this. It is hoped that the Corporate Affairs Commission (the **"Commission")** and other relevant organisations will continue to provide guidance on this issue.

c. ***Holding AGMs in Nigeria***: Small companies and single shareholder companies are required to hold AGMs in Nigeria even if virtually. It is unclear how compliance with the requirement to hold the meetings in Nigeria would be addressed when such meetings are held virtually and as such, we expect that the Commission will issue further guidance in this regard.

d. ***Separation of Powers and Duties of the Chairman:*** The Act proscribes the commingling of the roles of the Chairman and CEO in public companies.[28] This is in line with international best practices and the Nigerian Code of Corporate Governance, 2018 (**"NCCG"**).

e. ***Prohibition of multiple directorship:*** The Act prohibits individuals from serving as directors in more than 5 public companies at a time.[29]

f. ***Secretaries:*** Small Companies are no longer required to appoint secretaries. This requirement is limited to private companies (except the Small Company) and public companies.[30]

6. FINANCIAL MATTERS AND REPORTING OBLIGATIONS

What are the requirements regarding execution of financial reports?

The Chief Executive Officer and Chief Financial Officer (**"CFO"**) of a company (except a Small Company) are required to certify the Audited Financial Statement (**"AFS"**) to the effect that there are no untrue statements or omission of material facts which would make the AFS misleading, and that the information contained in the AFS fairly represents the financial condition and results of the operation of the company for the period under review. [31]

What are the consequences of not filing annual returns?

Failure of a company to file annual returns for a consecutive period of 10 (ten) years may result in deregistration of the company[32].

What are the obligations of a company where dividends are unclaimed?

A company is required to publish a list of the unclaimed dividends and the names of the persons entitled to the dividends in two national newspapers, and attach the list to the notice sent to the members of the company for each subsequent annual general meeting of the company[33]. The company is permitted to invest the unclaimed dividend for its benefit in investments outside the company three months after the publication has been made and the notices sent.[34]

[27] Section 237(1) of the Act.
[28] Section 265(6) of the Act.
[29] Section 307 (3) of the Act.
[30] Section 330 of the Act.
[31] Section 405 of the Act. This is consistent with extant provisions of the Financial Reporting Council of Nigeria Act (2011).
[32] Section 425(3) of the Act.
[33] Section 429(1) of the Act.
[34] Section 429(2) of the Act.

What are the consequences of omission to pay dividends to some members?

In the event of omission to send dividend to some members, due to the fault of the company, interest will accrue on the dividends at the current bank rate from three months after the date on which they ought to have been posted.[35]

7. PRIVATE ACQUISITIONS AND BUSINESS COMBINATIONS

Has the law made any changes in this regard?

A private company is no longer mandated to restrict the transfer of its shares. In addition, it may by its Articles, provide that:

- there shall be no sale or disposal of assets valued at 50% of the total value of its assets without the consent of all the members;
- any member seeking to transfer its shares shall first offer them to existing shareholders prior to offering same to non-members;
- a member, or a group of members acting together, cannot sell or agree to sell more than 50% of the shares in the company to a person who is not a member, unless that non-member has offered to buy all the existing members' interests on the same terms[36].

8. IMPACT ON CERTAIN COMMERCIAL TRANSACTIONS

Financial Assistance
Can I obtain a credit facility from a Company for the purchase of its shares?

This would amount to financial assistance. In simple terms, providing financial assistance by way of credit, loan, guarantee, indemnity or other means by a company for the purchase of its shares or its subsidiary's shares where it results in a 50% reduction of the net assets of the security provider or where the company providing the security has no net assets is prohibited under the Act.

Unlike the CAMA 1990 where financial assistance is permitted in very limited instances, the Act allows for financial assistance to be provided by a company in broader instances.

For example, financial assistance given by a company where the principal purpose of the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company, or the reduction or discharge of any such liability, but an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company is permissible[37].

Also, a private company may offer financial assistance for the purchase of its shares or its subsidiary's shares, provided, *inter alia*, that: (a) the net assets of the company are not reduced thereby or if the net assets are reduced, the assistance is provided out of distributable profits; (b) at least three-fourths of the members of the company must approve this financial assistance; and (c) the directors proposing the assistance make statutory declaration in such form as to be prescribed by the Commission.[38]

Share buy back
Are share buy backs by companies still permissible?

Yes, however, the Act introduced a more flexible provision on share buyback.
Unlike the old regime where share buybacks were restricted to purchases for the purpose of (i) settling a company's debt and claims, (ii)eliminating fractional shares, (iii)satisfying the claim of a dissenting shareholder, (iv) exercising option rights, or obligations in respect of shares held by an officer or

[35] Section 429(3) of the Act. For the purpose of liability, the date of posting the dividend warrant is deemed to be the date of payment.
[36] Section 22(2) of the Act
[37] Section 183(3) of the Act.
[38] Section 183 (4) of the Act.

employee under a non-assignable contract, the Act does not appear to restrict the circumstances in which a company may repurchase its shares. Thus, a company may purchase its shares provided certain criteria are met, including where its Articles provide for same, the approval of a minimum of three-fourths of the members is sought and obtained etc.[39] Payments for such buy back can only be made from distributable profits.[40]

Registration of Charges
Has the Act made any changes to the registration of security?

The Act preserves the priority ranking of a fixed charge over a floating charge.[41] In addition, the Act stipulates the fees payable to the Commission for the registration or release of a security document evidencing a charge and limits this to 0.35% of the loan amount or such amount as may be determined by the Minister and published in the Federal Gazette[42]. This is a substantial reduction from currently applicable rate.

9. INSOLVENCY

Does the Act cure the perceived defects in the insolvency regime of the 1990 Act?

Part of the criticism of the CAMA 1990 was its pro-liquidation provisions which left financially distressed companies with no robust rescue regime/option. Now, the Act broadens the options available to potentially insolvent companies i.e., companies unable to pay debts of up to ₦200,000.00 (approx. $530) or more. It introduces business rescue process which may be by way of a company voluntary arrangement with its creditors, or commencement of administration proceedings. These options would facilitate the rescue of companies as going concerns in whole or in part in deserving circumstances.[43]

[39] Section 184 of the Act.
[40] Section 185 of the Act.
[41] Section 204 of the Act.
[42] Section 222(12) of the Act.
[43] Sections 434 and 444 of the Act.

This is a welcome development and it is hoped that many companies will benefit tremendously from this.

10. SAVINGS PROVISIONS

I have a transaction that I have just concluded under the CAMA 1990. Will the Act invalidate or negatively impact my transaction?

The Act preserves and validates any order, rule, regulation, appointment, conveyance, mortgage, deed or agreement, resolution, direction, proceeding, instrument or thing done or in force under the CAMA 1990.[44] In addition, the Commission is to issue guidelines sequel to the corresponding provisions of the Act to ease transition.

Is the Act applicable to my ongoing transactions?

Strictly speaking, the Act came into effect on the date of enactment unless it otherwise provides for a later date as the commencement date (from publicly available information, we understand this is not case). However, the Act has not yet been published in the Federal Gazette and therefore no conclusive evidence of its provisions is publicly available. In view of this, the Commission, being the primary regulator responsible for the implementation of the Act, has continued to operate based on the 1990 CAMA pending the gazetting of the Act.

Conclusion

In general, the Act is a more practical legislation than the CAMA 1990 and will certainly foster the ease of doing business in Nigeria. Its provisions with respect to the use of technology for execution of documents and virtual meetings are an excellent addition in the light of recent global events. That said, as can be gleaned from the foregoing, there are a number of loopholes and ambiguities in the Act, therefore it is expected that the Commission will issue regulations and

[44] Section 869 of the Act.

guidelines (the "**Subsidiary Legislation**") which will address these shortcomings and further clarify the implementation of the Act. Furthermore, it is expected that the power of the Commission under the Act to prescribe penalties for certain offences will be exercised through Subsidiary Legislation from time to time.

The aforementioned power of the Commission is not entirely arbitrary, as the Act establishes an Administrative Proceedings Committee (the "**Committee**") to amongst others, provide fair hearing opportunity for persons alleged to have contravened the provisions of the Act[45] and resolve disputes or grievances arising from its operations. The decisions of the Committee are subject to confirmation by the Commission's Governing Board, and parties dissatisfied with decisions of the Committee are entitled to appeal to the Federal High Court.

Lastly, some provisions of the Act appear to be in conflict with certain extant thresholds set under existing legislation. Joint consultation between the Commission and various regulators is therefore imperative for alignment of the law to prevent inadvertent breach of other provisions of the law and confusion on the part of companies regarding applicable compliance obligations.

[45] Including Subsidiary Legislation.

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