AN APPRAISAL OF THE DUTIES AND ABUSE OF POWERS OF DIRECTORS OF A COMPANY IN NIGERIA.

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ABSTRACT

This paper appraises the duties and abuses of powers of directors of a company in Nigeria. In Nigeria, people invest in businesses without any knowledge about those behind the business as directors. The aims of this paper were to examine, the meaning of director, appointment of directors, types of directors, the duties of directors, abuses of powers of directors, liability for abuses of powers of directors of the company, disqualifications and removal of directors, as well as the remedies against a defaulting directors. The paper utilizes relevant statutes, textbooks, judicial precedents/case law. The findings of this paper inter-alia are that directors are indispensable in companies, there is lack of proper legal mechanism on company directors. The company can only function through the instrumentality of the directors. The Court and Companies and Allied Matters Act had given pronouncement on who is a director and what are his duties. The position of the director places him in a position of authority which can be abused except they are checked by the law. The paper will contribute to knowledge viz, as it underscores the directors unique position , and will enhance company directorship practice.it exposes weaknesses in corporate governance and the need for legal reforms.it will help serve as a veritable asset to lawyers and the general public, thereby enhancing the existing body of knowledge. The paper concluded that there enormous duties on company directors , but there should be checks and balances. There is lack of sufficient legal framework on company directors in Nigeria. It was recommended etc: There is need for adequate legal framework and judicial activism The roles or duties of the Directors of a company need to be taken more seriously. Government should address the reasons that propel corporate failures

Introduction

The company is a legal person endowed with all the powers of a natural person with powers to carry out all the objects set out in the constitution of the company. The company being an artificial person, it can only function or operate through the instrumentality of its human organs, officers and agents which mainly are regarded as the directors.[1] Lord Viscount Haldane in *Lennards Carrying Co v. Asiatic Petroleum Ltd*,[2] said:

> a corporation is an abstraction; it has no mind of its own anymore than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who really is really the directing mind and will of the corporation; the very ego and Centre of the personality of the corporation.

Since the powers of the company can only be exercised through the organ of the company, it becomes necessary to know who is the person in charge of the running of the company and its management and what are the duties and responsibility expected from such person(s). At Common law, the distribution or allocation of powers depends in the most part on the memorandum and articles of association of the company. However, the Court and Companies and Allied Matters Act had given pronouncement on who is a director and what are his duties towards the company, the shareholders (when acting as shareholders' agent or in any transaction affecting his interest) and towards any person dealing with the company's securities.

The welfare and upkeep of a company rests on the shoulders of the directors and the directors are also responsible for the interests of the company as well as shareholders. Directors are basically fiduciary agents and they owe duties to the company, directors' are appointed by the company's shareholders to run the company's affairs for the benefits of the shareholders. Moreover, no company can get success without having the good and honest directors, so company success can

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[1] E.O. Akanki, ''Essay in Company Law'' The Division and Exercise of Powers between the Corporate Organs by E.M. Asomugha, p. 110

[2] (1915) AC 705 @713. This view was also held by his lordship **Aniagolu JSC** in *Trenco(Nig) Ltd v. African Real Estate Ltd.* (1973) 1 LRN 146.

only be achieved, if the directors of the company fulfill their duties.[3] Therefore directors play very significant role in any corporate governance system. Director's general duties are based on the certain common law rules and equitable principles. Lord Judge Bowen explains director's duties in these beautiful words that "directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of this expression is to be used not as exhaustive of their powers and responsibilities, but indicating useful points of view from which they may for the moment and for the particular purpose be considered."

This paper will touch on meaning of director, appointment of directors, types of directors, the duties of directors, abuses of powers of directors in the management of the company, liability for acts of abuses of powers of directors of the company, disqualifications and removal of directors, remedies against a defaulting directors as well as the Conclusion.

Meaning of Director

A director is defined under Section 244(1) of the Companies and Allied Matters Act 2004,[4] thus:

> 244. (1) Directors of a company registered under this Decree are persons duly appointed by the company or direct and manage the business of the company.
>
> Directors are persons appointed as the main organ by which the company acts and functions. Directors may be executive or non-executive but they see to the running of the company.
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> Section 245 (1) of CAMA 2004 went further to define persons who may also be regarded as directors. It states:

[3] https://www.brefigroup.co.uk/directors/directors_roles_and_responsibilities.html The Impact of the Legal Duties and Responsibilities of Directors on a Corporation, Enforcement of Director's Duties, Breach of Duties and Remedies

[4] Cap C20 Laws of the Federation. Since coming into force in 1990, more than 20 years ago, CAMA has not witnessed any major amendment. Accordingly, Corporate Affairs Commission (CAC), the body which regulates the formation and management of companies in Nigeria has carried out an in-house review of the provisions of the CAMA, with a view to bringing it up-to-date with current global best practices in company regulation and administration. To this end, the Commission has put together a Draft Bill for the repeal of the Act and enactment of the CAMA 2016.22 However, the draft Bill is more geared towards strengthening the regulatory and enforcement powers of CAC, with very little amendments made to the extant provisions on liabilities of officers and directors of companies. 22 'Draft Bill for the Repeal of CAMA and Enactment of New Act' (Draft Bill) accessed on 09 September, 2016.

> 245. (1)Without prejudice to the provisions of sections 244 and 250, and for the purposes of sections 253, 275 and 281 of this ACT, "director" shall include any person on whose instructions and directions the directors are accustomed to act.

The fact that a person in his professional capacity gives advice and a director acts on it shall not be constructed to make such a person, in accordance with whose directions or instructions the director of a company is accustomed to act, a director.[5] Director includes any person occupying the position of director by whatever name called.[6] Similar view was expressed in *Re forest Dean Coal Mining Co,*[7].where it was observed that:

> It does not matter what you call them, as long as you understand what their true position is, what is that they are commercial men managing a trading concern for the benefit of themselves and other shareholders in it.[8]

Directors are the Alter ego of the company; thus they are said to be the mind and brain behind's company's activities and constitute the policy making as well as the executive organ of the company.

Appointment of Directors

The number and names of the first directors at the incorporation of the company shall be determined in writing by the subscribers of the memorandum of association or a majority of them or the directors may be named in the articles. However, the members of the company at the annual general meeting reserve the power to re-elect or reject the appointed directors by the subscribers and appoint new ones.[9]

Also, the board of directors shall have power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal and where a casual vacancy is filled by

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[5] Section 245(3) of CAMA Cap C LFN 2004

[6] Section 2(13) of Companies Act 2006This definition given by the Companies Act does not give the clear meaning of the word director but it means that a person who performs the duty of a director will be deemed to be a director irrespective of the name he is called.

[7] (1878) 10 Ch. D 450 at 451.

[8] According to Section 2(30), a director is the officer of the company https://www.businessmanagementideas.com

[9] Section **248** (1) CAMA

the directors, the person may be approved by the general meeting at the next annual general meeting, and if not so approved, he shall forthwith cease to be a director.[10]

Thus where a person not duly appointed as director acts as such on behalf of the company, his act shall not bind the company and he shall be personally liable for such action; Provided that it is the company which holds him out as director else the company shall be bound by his acts.[11]

Types of Directors

The following are the types of directors

1. Executive director

   These are the directors who are appointed to take charge of daily activities of the company. They are in fact occupying dual status as alter ego as well as the employee of the company. As an alter ego, he sits at the board meetings formulating policies, directions for the company and as an employee, he is in charge of implementation of the policy trust of the company. An office is usually created for the executive director in the office structure.

2. Non-executive Director

   These are the directors appointed without any additional administrative role assigned to them. They are only entitled to operate as alter ego of the company. Not being employees of the company. They are not given any office in the company and they are not supposed to resume duties at the company. They must attend board meetings and are often appointed as Chairman of the board who presides over board meetings as chief policy maker of the company.

3. Managing Director

   This is the executive director and chief executive officer of the company. He takes full responsibility for the activities of the company. The managing director occupies dual position both as alter ego and employee of the company. The position of Managing direction is created by the statute. The board of directors has responsibility to appoint one

[10] This is premised on the fact that the directors may increase the number of directors so long as it does not exceed the maximum allowed by the articles, but the general meeting shall have power to increase or reduce the number of directors generally and may determine in what rotation the directors shall retire. Section 248 (3)

[11] Ibid

of the directors in the board as the Managing Director. And the Managing Director exercises the powers delegated to him by the board.

4. Alternate Director

This is the director who is appointed to take the position of another director in the event of absence. It is the director that appoints his alternate but is approved by the resolution of the General Meeting. Thus two Directors are appointed to alternate on one position. Either of them can occupy the position and attend board meetings in the absence of the other. Alternate Director is usually created for administrative convenience, especially where an alien is involved with other resident/local directors.

5. Shadow Directors

This type of directors is not formally appointed and is the only type of director without an official record of appointment and removal. The test is that the Board of Directors of the company is accustomed to the instruction and direction of the person who operates from outside the company. The law regards such a person as a shadow director. Shadow directors are usually witnessed where the person is actively involved in other official activity, usually public/civil service or employment with restraints to private business activities.

6. Representative/Nominee directors

Nominee directors usually appointed in a company or in subsidiary companies by the parent company or creditors to protect their interests in the company. The law draws no distinction between these two positions of a nominee director or any other normal company director. A nominee director owes the same duties towards company like a holding company director. Therefore, a nominee director can not blindly follow the judgement of those people who appointed him.

In *Boulting v. ACTAT,*[12] Nominee directors are not bound to act accordance with the wishes of the nominator, they can refuse nominator's directions, where these intrusions have clash with the interests of the company. It comes clearly in breach of director duties, if a director of a subsidiary company acts solely in the interests of the parent company.

[12] (1963) 2 QB 606, 624, 646; *Diary Containers Ltd v. NZI Bank Ltd* (1995) 2 NZLR 30

Where a nominee director commits any wrong done in the company, so his nominator can not be liable for his personal wrong done.

Where companies are working in a group shape, there this independent judgement rule and do not fetter the discretion rules apply also in same way like in any other company. In *Charter Bridge Corporation Ltd v. Lloyds Bank Ltd*,[13] it was held here that 'each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of the company'.

7. Life Director

It may be necessary to appoint a director for life in a company especially in private companies. This is a way to retain control of the company by being a Board member for a long time. A major benefit of appointment as life direrctor is that such a director is not subject to retirement and rotation rule.[14]However, the fact that a person is appointed life director does not mean that he must occupy the position of a director for life in the company and only subject to removal by death. Alife director is however subject to removal under Section 262 of CAMA by an ordinary resolution of which special notice is given and other procedures observed. He is also subject to vacation of office if any of the conditions stipulated in Section 258(1) CAMA happens to him.

Duties of a Director

The general duty of a director of a company is that a director of a company stands in a fiduciary relationship towards the company[15] and shall observe the utmost good faith towards the company in any transaction with it or on its behalf. [16] A director shall also owe fiduciary relationship with the company in the following circumstances where he is acting as agent of a particular shareholder or where even shareholder, dealing with though he is not an agent of any such a shareholder or other person.

[13] (1970) Ch. D 62
[14] Section 258 CAMA
[15] The Section 170 of the Companies Act 2006 states that the general duties of the directors are those which are laid down under Section 171 to 177 of the Companies Act same as Section s 279 and 280 of CAMA. These are the duties which directors of a company owe towards the company.
[16] Section 279 (1) CAMA Cap C LFN 2004

A director shall act at all times in what he believes to be the best interests of the company as a whole[17] so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances.

The matters to which the director of a company is to have regard in the performance of his functions include the interest of the company's employees in general, as well as the interests of its members. A director shall exercise his powers for the purpose for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose does not constitute a breach of duty, if it incidentally affects a member adversely.

1. Duty to act for proper purposes.[18]

According to this rule the directors have to use their powers within the company constitution and only for the reasonable purposes in the best interests of the company. The directors must observe the constitution of the company while they exercising director's powers and they must exercise their powers bona-fide for the best interest of whole company and under this duty; directors are also compelled to act for the best interest of shareholders

A director shall act at all times in what he believes to be the best interest of the company as a whole, so as to preserve its assets, further its business and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and skillful director would act in such circumstance. *In Artra Industries Nig. Ltd. v Nigerian Bank for Commerce and Industry*[19], the Supreme court while interpreting the scope of Section 279 (3) CAMA held that' in exercise of the management power and duties conferred upon them by Section 63 (3) CAMA the directors of a company must adhere strictly to the statutory provisions which enjoins them to consider the interest of the company as paramount.

In the course of performance of their duties, directors are expected to protect the interest of the company's employees and members. Although in respect of employees, it is a mere pious declaration since the right to enforce observance of the provision is not available for employees

[17] Although this tend to be vague as leaving the actions of the director to his discretion makes the company to be opened to danger. His acts may only be subjected to circumstances and whether he acted in good faith in accordance with the statutes.

[18] Section 171 of Company Law 2006.

[19] (1998) 4 NWLR (Pt. 546) p375

under Section 279 (9) CAMA unlike members who can enforce the right of protection under Section 301,303 and 311 0f CAMA.

This rule gives a remedy to the shareholders to prosecute directors. Where directors misuse their powers and their acts are not in accordance with the constitution of the company shareholders can challenge them in the court of law.[20]

This rule is further explained in a case *Hogg v. Cramphorne,*[21] where the directors of targeted company intentionally allotted new shares of the company to those persons who can oppose the fearing take-over bid. The only reason behind this allotment was that they want to save their jobs in the board. It was held that the directors did not use their powers properly and the new allotment of shares was also not based on honesty, so court declared this allotment void. This sentiment was shared in the case of *Salomon v. Salomon.*[22] This makes the absolute powers of directors to be curtailed and restrictive by legal principles and authorities.

In another case *Criterion Properties Plc v. Stratford UK Properties LLC*[23] where the managing director of the company had entered in an agreement with a substantial shareholder that the company must buy out his shareholding at a high price, any change in board of director or removal of the managing director will not effect on the agreement. Subsequently, that managing director was terminated from office and then the company went to the court for cancellation of agreement because, director did not act within his power and then it is liable to declare an improper purpose. It was held that the agreement was not a proper exercise of a director's powers, therefore could not be binding against the company.

In *Howard Smith Ltd v. Ampol Petroleum Ltd,*[24] it was held that the main purpose behind issuance of new shares to reduce the percentage of two shareholders stake in the company, who refused the intending take-over bid. Lord Wilberforce said that the new allotment of shares by director in this kind of circumstance could be set aside although there was no self-interest involved. Because, their intention at that time of allotment of new share was mala-fide. It was further held in this case that any act or decision of directors which is not within the company's constitution is called as void act, if there is merely exceed of director powers, then it is declared as avoidable decision.

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[20]Section 69 CAMA
[21] [1967] Ch. 254
[22] [1897] A.C 22. HL
[23] (2004) UKHL 28
[24] (1974) AC 821

2. Duty to Promote the Success of the Company

Lord Greene explained this duty in *Re Smith & Fawcett Ltd,*[25] in these beautiful words that "directors are bound to exercise their power bonafide in the way that what they consider in the best interest of the company not what a court may consider."[26]

Berle recommends that the entire powers which are given to a company or to the management of the company are inevitably for use every time only for the benefit of the all shareholders of the corporation. In *Hutton v. West Cork Railway Co,*[27] where it was held that there is only one kind when directors can promote interests of other groups which are ultimately in the interests of the company in future. Lord Bowen further held in this case that there is no "cakes and ale" except such as are necessary for the benefit of the company's shareholders. Whereas Dodd observes that where on one hand corporations are institutions to maximize shareholders wealth, on same time on other hand, they have a corporate social responsibility role as well to play in a society.

In *Lonrho Ltd v. Shell Petroleum Ltd,*[28] Lord Diplock, held in this case that company's directors should not only watch shareholders interests, they should consider about company's creditors as well.

In *Liquidator of West Mercia Safetywear Ltd v. Dodd,*[29] it was held in this case that when insolvency approaches towards company, then company's director should start to consider in the interests of the creditors. So where a case of insolvency come the director's fiduciary duties shift towards creditors of the company.

Therefore the interests of a company must remain paramount for a director, whatever happens except company insolvency. Director must take all those entire steps to enhance company success and reputation among community and ensure company members prosperity in his every decision.

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[25] [1942] Ch. 304. CA
[26] This core duty is set out in the Section of 172 of the Companies Act 2006.
[27] (1883) L.R. 23 Ch.D 654. CA
[28] (1982) AC 173
[29] (1988) CA

So, in my humble view the directors should not only focus to make the profits solely for shareholders and then they can get more bonuses and pay rise, directors of companies should discharge their responsibilities towards employees, suppliers, customers, and environment and to the whole community as well. Directors must take special notice on the company's corporate social responsibility (CSR) strategy. Because, better CSR leaves company's brilliant impact on the community, as a result it helps well to any company of its speedy enhancement in the market business, good reputation in the society and thus good profit for shareholders also.

3. Duty to use Independent Judgment:-

Section 173 of the Companies Act 2006 set out the duty upon director of independent judgement and this section require from directors that they must exercise independent judgement rule and must not fetter their discretion under any body influence. They owe the duties towards company not towards any individual. They must only work and watch the company's interests, affairs and always use their independent opinion in the best interest of the company rather than any other person's interests. Furthermore, section 172(2) (a) and (b) provides exception of this duty that "exercise independent judgment is not infringed by his acting in accordance with an agreement duly entered into by the company that restrict the future exercise of discretion by its director, or it is authorized by company constitution".

In *Fulham Football Club Ltd. v. Cabra Estates Plc*,[30] it was held that directors could not enter in any contract, which will restrict them to exercise of their future discretion and how they will vote in future election. However, they can do an agreement, which can be proved very beneficial for the company, where they are acting in a good faith in the best interest of the company.

4. The Duty of Care and Skill

The duty to exercise reasonable care, skill and diligence is considered one of the most important duties of the directors. This duty of reasonable care, skill and diligence has got huge attention in recent years also. This duty has been codified in section 174 of the Companies Act 2006. The duty of care and skill is based on the contract, trust, tort and equality principles. However section 174 states that a director of any company must display the highest level of care, skill and diligence, while performing a director‘s duty. A director's duty of care, skill and diligence

[30] [1992] B.C.C 863.

normally overlaps in daily routine, the meaning of Care can be understood to be carefulness, though not caution, while skill suggests professional/technical ability, whereas diligence might be understood to mean that a director is to use his skills devotedly in the affairs of the company consistently.

Under the Common law[31], what is required from a director of a company is to exercise knowledge, skill and care that would have been exercised by a reasonable and prudent person who have general knowledge, skill and experience which is required from a person performing same kind of duties which directors also have to perform.

In *Re City Equitable fire Insurance*[32] it was stated that for a director it is not required to possess the higher level of skill and performance as comparison with an ordinary person having same knowledge and experience.

In a case *Dorchester Finance Co v. Stebbing*[33] where directors did not act with reasonable care and signed the blank cheques, which allowed the company managing director to embezzlement. So it is declared a negligent act on the part of the directors. In another case *Re D' Jan Of London Ltd,*[34] where company's director was held negligent, because he signed the company's insurance policy without even reading its contents.

On these above stated circumstances, the critical question is that what is the reasonable standard to be expected from a director while a director performing as director in the company. On the other hand, courts have not been able to describe clearly that point, what is the compulsory level of care and skill required from a director of a company, although courts explain a general level. In *Lagunas Nitrate Company v. Lagunas Syndicate*,[35] it was held in this case that if a director discharged his responsibility with particular care, used his powers properly within company constitution and he maximum utilizes his experience and knowledge while acting as director, so it will consider that he has discharged both his duties to company, equitable duty and his legal duty as well. Because the directors of a company acted within his powers, and with reasonable care, and honestly in the best interest of his company, are not personally liable for losses which the company may suffer by their mistakes.

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[31] Section 174 of Companies Act states about standard of care and skill it is also codified in Section 214(4) of the Insolvency Act 1986

[32] [1925] Ch. 407

[33] [1989] B.C.L.C 498

[34] [1993] B.C.C 646

[35] [1899] 2 Ch. 392. CA.

In *Re Brazilian Rubber Plantations and Estates Limited,*[36] it was held in this case that 'such reasonable care must I think be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly I think not responsible for damages occasioned by errors of judgment.'

However, the Nigerian Company law has improved significantly from the common law position on director's duty of care and skill. At common law, the subjective standard is laid down by the court in *Re City Equitable Fire Insurance Company,*[37] to the effect that directors need not exhibit the performance of his duties with a greater degree of skill than may be reasonably be expected from a person of his knowledge and experience; he is not bound to give continuous attention to the affairs of the company and he may also delegate his duties.

The Position under the CAMA now is quite different from that of the common law. Section 282 91) CAMA has introduced professionalism and objective standard of care and skill on the part of the director in a Nigerian company. In *Delta Steel Nigeria Ltd v. American Computer Tech Inc.,*[38] the court held that since the directors and managers control what the company does, the state of the mind of this special class of employees is the state of mind of the company and thus the company is bound by the acts of its directors and managers.[39] Having being imposed with such duty, the shareholders and members ought to have the best of services from the director.[40]

In those circumstances, J Parker observed In *Re Barings Plc*[41] there are no set principals which can layout the duty of directors, the level of the duty of director and there is no question that they performed their duty but is totally dependent on the circumstances of each case involving the role of director in the company's management.

Directors are elected by the shareholders to run the company affairs on their behalf. So directors should work with reasonably care and use their best knowledge and skill whilst working as a director and always work like that they are working for their own work or their on behalf.

5. Duty to Avoid conflicts or No Personal Secret Profit

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[36] [1911] 1 Ch. 425

[37] [1925] Ch. 407; [1924] All E.R. Rep. 485.

[38] (1999) 4 NWLR (Pt 597)

[39] This was why in some sectors, the regulatory body do impose additional special qualifications for executive directors of companies with the sector. Eg The Central Bank of Nigeria imposed a requirement that the Managing Directors in banks must have a degree or higher degree in Business Administration.

[40] N.C.S. Ogbuanya,' Rssentials of Corporate Law Practice in Nigeria' 2nd ed , Novena Publishers Ltd, 2010 p. 346

[41] (2000) 1 BCLC 423

The directors must not enter into any agreement in where company's interest is clashed with their own interests. Furthermore, directors cannot make a secret personal profit by unfair using of their position or authority as a director. In *Aberdeen Rly Ltd. v. Blaikie Brothers,*[42] it was held that it can not be allowed to anyone to enter an agreement for his own interest or he would have get an interest with this agreement or there may be a chance of clashes of others members of company's interests.

In *Industrial Development Consultants v. Cooley,*[43] here the managing director of the plaintiff company was a successful architect also. He could not obtain a huge local gas contract for his company. Later, he contracted in his private capacity with this same local gas firm to ask the contract for his private firm. Further, he asked from his company to release him from company's service due to his so called health problems, while he concealed all his private correspondence with local gas board to his present company. It was held that he was responsible for account to the company for the profit which he made and caused loss to the company. Furthermore, court observed his act as a conflicting act of the company's interests. In another case *Guinness Plc. v. Sanders,*[44] here a director tried to redundant remuneration for himself without the prior consent of board or company, which was a clear conflict between director and the company policy. In *Plus Group Ltd v. Pyke,*[45] it was held that a director of a company cannot be held as breached of his fiduciary duties towards company, which was occurred in the company after he was excluded from the company matters. In my humble view, there should be no conflict of interest and conflict of policies between the companies and their directors. Moreover, directors should always avoid taking all those steps, where is possibility of clash with their own and company interests.

Section 176 of the Companies Act 2006 states directors undisclosed 'secret profits regulations, which they make by the using of the director's powers. According to this section, directors can be accountable for undisclosed profits which they obtained as a director's position. Section 176 (2) of the Companies Act 2006 explains a "third party" definition a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate. Moreover, it is stated in section 176 (3) that 'benefits received by a

[42] (1854) 1 Macq. 461; (1854) 2 Eq. Rep. 1281, HL
[43] [1972] WLR 443
[44] [1990] 1 All E.R 652
[45] (2002) ENCA Civ 370 @ 375

director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.'

In a case *Regal (Hastings) Ltd v. Gulliver*,[46] here the directors of Regal invested their own money to buy the subsidiary company shares and then they sold the whole group in a takeover bid and then got an instant profit from the acquired shares of a subsidiary company. Later, court declared this act a clear breach from their fiduciary director's duties.

This covers those secret profits also, which a director received during the business deal negotiation on the company's behalf as a director. Directors of a company held in breach of their duty towards company, where they were appointed for a negotiation on the company behalf, but they had taken the benefit from this particular company project. Similarly, another important case is *CMS Dolphin Ltd v. Simonet*,[47] where it was held that any profit which a director earned through the mala-fide use of the company's confidential information is accountable under the secret profit rule, which he knows by virtue of his position as a director, and any leakage of the company's confidential information by seeking of hidden profits comes also under secret profit rule. In *General Exchange Bank v. Horner*,[48] if a director receives any benefit in course of a take bid of the company shares also comes in the secret profit definition. If a company's director misused his power and derives a secret profit from any contract and did not disclose it, subsequently the company can recover this secret profit from him.

However, any conflict can be resolved by the due disclosure of in front of company's general meeting and directors only can protect their any acts which can become conflict later by the due authorization and prior consent of the company AGM. But this kind of ratification or authorization should not be permitted where there is a threat that company will become insolvent soon.

6. Duty of Disclosure of Interest in proposed Transaction

Section 177 of the Companies Act 2006 is about disclosure of interest by a director towards proposed transaction or arrangement. According to section of 177(1) that director of any company who has an interest or could be beneficiary in company any ongoing or future transaction or arrangement. Therefore, that director has to disclose his interest with full details,

[46] (1967) 2 AC 134
[47] (2001) 2 BCLC 704 @ 97
[48] (1870) L.R 9 Eq. 480

"nature and extent" of that interest in on ongoing or proposed transaction immediately. Section 177(2) of the Companies Act, provides the different modes of director disclosure, which could be written notice, disclosure at meeting of directors and a general notice as well. Furthermore, in essence of the section 177(4) any kind of the interest, which a director has in transaction or arrangement, must be disclosing prior to the company entered in this matter or transaction. A director, who was a former member, shareholder or any executive post must disclose to his present company, if his present is going to sign a contract to his former company. Otherwise, he will be held interested in this contract.

It is worth mentioning here that Company Act 2006 provides no mechanism for the shareholders to discover whether any disclosure has been made under the section 177 of the Company Act 2006. Conversely, under the Company Act 1985, companies were compelled to include details of director's interests in material transaction with the company in the notes to the company accounts, but this provision was not carried forward by the Company Act 2006. In the absence of this provision it is the responsibility on the big companies now they should consider or work on it, how they can furnish this disclosure information to the company's shareholders.

Abuse of Powers of a Director in the Management of a Company

It is no more an understatement, the words of Montesquieu that, power corrupts and absolute power corrupts absolutely. The position of the director in the running of the affairs and management of the company places him in a place of power and authority which can be abused by the directors except they are checked or restricted by the law and/or the constitution of the company.

Several laws and principles have evolved to ensure that people who have invested in the company either through asset, money or labour are protected against the people in position of power or the majority who can easily enrich themselves at the expense other stakeholders in the company. Several principles to check this abuse of powers include; Minority protection rule[49], Lifting the veil,[50] The doctrine of Ultra-vires, Members' rights, Place of Memorandum and Articles of Associations etc.

[49] *Foss v. Harbottle* (1843) 2 Hare 461.
[50] *Salomon v. Salomon (supra)*

Under the Members' right rule, a company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors.[51] Subject to the provisions of CAMA, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles.

Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by the Act or the articles required to be exercised by the members in general meeting.

Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by law, shall be bound to obey the directions or instructions of the members in general meeting: Provided that the directors acted in good faith and with due diligence. Notwithstanding the provisions of subsection (3) of this section, the members in general meeting may act in any matter if the members of the board of directors are disqualified or are unable to act because of a deadlock on the board or otherwise; institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so; ratify or confirm any action taken by the board of directors; or make recommendations to the board of directors regarding action to be taken by the board. No alteration of the articles shall invalidate any prior act of the board of directors which would have been valid if that alteration had not been made.

By the provision of the Section 63 (3) of the Companies and Allied Matters Act the business of the company is also managed by the board of directors. Whenever necessary, the court intervenes to correct the excesses of the board of directors, when it is proved in an action before it that the board of directors has acted outside the mandated powers or duty conferred upon it by the company's articles. As such, in the case of *Odutola Holdings Ltd v. Ladegjobi*,[52] an action was instituted to nullify the shareholders' meeting and to nullify the removal of the company's directors. In delivering judgement, the court emphasized per **Ejiwunmi JSC**[53] that the board of directors shall take actions necessary to protect the business of the company, unless the contrary is proved. Again, the members in general meeting in order to protect the company's business can

[51] Section **63** (1) CAMA
[52] *Odutola Holdings Ltd v. Ladejobi* (2007) 14 WRN at 9 - 10
[53] Ibid

deprive directors of the power to act. The company directors are appointed, re-elected or rejected by the company members at the general meetings. In the *N.I.B. Investment (West Africa) v. Omisore,*[54] a company was established for insurance business. A restructuring in the company redistributed the shares allotments. Thus, the capacity to appoint directors was also affected. This gave rise to abuse of powers that necessitated this suit. The courts, on resolving where power to appoint directors of company resides, referred to the Section 248 of the Companies and Allied Matters Act[55] that company members at the general meeting shall appoint directors. And by the Section 249 of the companies and Allied Matters Act[56] empowers the board of directors to fill up casual vacancy.

Unless otherwise provided in CAMA or in the articles, the board of directors may exercise their powers through committees consisting of such members of the body as they think fit; or from time to time, appoint one or more of their body to the office of managing director and may delegate all or any of their powers to such managing director.

The director may also abuse powers by making secret profits and exploit company's assets.. The duties and expectation from the directors under the Nigerian corporate jurisprudence is to ensure the directors do not take undue advantage of their office at the expense of the company or its members. They ought to not also abuse powers through corrupt means[57], abuse of confidential information and placing their personal interest above the interest of the company or its shareholders.

Directors are also not allowed, either during or after the termination of their service with the company to use for their own benefit any property, trade secret or confidential information entrusted in them by virtue of their position.[58] The duty also subsists even after resignation /termination of appointment.

Liability for acts of abuse of powers by directors of the company

[54] *NIB Investment (West Africa) v. Omisore* (2006) 4 NWLR (Pt. 969) at 181
[55] Ibid; See also section 248 CAMA
[56] Ibid; see also section 249 CAMA
[57] Section 287(1) CAMA sets up anti-bribery and corruption provision against the director by expressly prohibiting directors from receiving bribes, gifts or commission, either in cash or kind from any person or a share in profit of that person.
[58] Section 280 (5) CAMA

Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and otherwise liable therefore to the same extent as if it were a natural person: provided that the company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing director, as the case may be had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of such power or of the irregularity; if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorised by the company's memorandum

The act of an individual is binding on the company if it holds such an individual out as an officer or in case of a director as one for the company.[59] Consequently, in *M.M. Ali Co. Ltd. v. Goni*,[60] there was a transaction for the use of two petrol filling stations, facilities, and staff to sell petroleum products. The transaction conditions were breached for three years necessitating the suit. Giving explanation on the liabilities of the company's officers, the court quoted the Section 66(1) (a) of the Companies and Allied Matters Act to emphasize that the acts of a company's officer or agents are not those of the company. This is unless the company acts through its members in the general meeting, board of directors, or managing directors. And the company shall expressly or impliedly authorize such officer or agent to act in the matter.

Dis-qualification and Removal of a Director

The following persons shall be disqualified from being a director;[61] an infant, that is, a person under the age of 18 years; a lunatic or person of unsound mind; a person disqualified under sections 253 and 258 of CAMA and a corporation other than its representative appointed the board for a given term.

[59] Section 250 CAMA
[60] *Mohammed Muslapha Ali Co. Ltd v. Alhaji Isa Goni* (2006) 10 NWLR part 987 at 92 - 93
[61] Section **257** (1) a-d CAMA Cap C20 LFN 2004

A director may be removed and his office declared vacant. The office of director shall be vacated if the director ceases to be a director by virtue of section 251 of CAMA; or becomes bankrupt or makes any arrangement or composition with his creditors generally; or becomes prohibited from being a director by reason of any order made under section 254; or becomes of unsound mind; or resigns his office by notice in writing to the company.

Where a director presents himself for a re-election, a record of his attendance at the meetings of the board during the preceding one year shall be made available to members at the general meeting where he is to be re-elected.

Unless the articles otherwise provided, at the first annual general meeting of the company, all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or if their number is not three or a multiple of three, then the number nearest one-third shall retire from office. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

The recent decision by the Supreme Court of Nigeria in the matter of *Bernard Longe v. First Bank of Nigeria Plc*,[62] has brought to the forefront the legal position that a Director, whether also an employee of a company, cannot be removed as a Director of a company at the whim or caprice of his or her company. The central issue in this matter was whether a Managing Director/Chief Executive Officer could be removed without prior notice of such a removal being first served on the Managing Director/Chief Executive Officer in accordance with Section 262 of the Companies and Allied Matters Act?

The Supreme Court held in this matter that the failure of the Respondent Bank to serve notice of removal on the Appellant Managing Director/Chief Executive Officer invalidated all the resolutions, concerning his alleged removal as a Managing Director, reached by the Respondent company. The Appellant was therefore deemed to still be the Managing Director/Chief Executive Officer of the Respondent Bank with all his entitlements and privileges retrospectively restored eight (8) years after his purported removal.

[62] (2010) 2-3 SC (part III) 67 @ 86 and 94

It is the view of the Supreme Court in this matter that the essence of the notice of removal is to allow the Managing Director of the Respondent's company to respond to the grounds under which he is being proposed to be removed. The suspension of the Appellant did not according to the Supreme Court diminish the necessity to serve this notice of removal because once Nigerian law vest a right on a person, a court of law will resolutely resist any attempt, by whatever method employed, to wrestle such a right from such a person.

The Director that is proposed to be removed is in turn entitled to make written representations concerning the circumstances of his proposed removal. Such written representation may however not be read at an Annual General Meeting of the company if the company is able to convince a Federal High Court Judge that the Director's written representation is intended to create unnecessary adverse publicity and or are defamatory in nature, and therefore an abuse of the statutory right to be heard conferred on such a Director by Section 262 of the Companies and Allied Matters Act. Where a notice of removal is not served on all the Directors including the Director or Directors proposed to be removed, such removal will be declared by a properly constituted court of law to be null and void.

Remedies against a Defaulting Director

Any duties placed on a director by the statutes or the company's constitution shall be enforceable by the company. The following remedies may be pressed against a defaulting director: Termination/Removal, Injunction, Damages/Compensation, Rescission and Restoration of the company's asset if traceable and giving account of the profit.[63]

However by Section 279(8) of CAMA, it precludes any exemption from liability that may be inserted in the articles of association or Resolution or contract of the company. It states 'no provision, whether contained in the Articles or resolutions of a company, or in any contract shall relieve any director from the duty to act in accordance with this section or relieve him from any liability incurred as a result of any breach of duties conferred upon him by CAMA[64]

Conclusion

[63] Section 279(9) CAMA
[64] Section 67 CAMA.

CONCLUSION.

The words of Montesquieu that, power corrupts and absolute power corrupts absolutely. The position of the director in the running of the affairs and management of the company places him in a place of power and authority which can be abused by the directors except they are checked or restricted by the law and/or the constitution of the company.

The roles or duties of the Directors of a company need to be taken more seriously. Some Directors should be encouraged to obtain more education on the significance of their roles as Directors, to both their companies and to national, global development.

Several laws and principles have evolved to ensure that people who have invested in the company either through asset, money or labour are protected against the people in position of power or the majority who can easily enrich themselves at the expense other stakeholders in the company. Several principles to check this abuse of powers include; Minority protection rule, lifting the veil, the doctrine of Ultra-vires, Members' rights, Place of Memorandum and Articles of Associations etc. It is very helpful that various statutes in many jurisdictions have spelt out the duties expected of directors of various companies to avoid abuse or over-use of powers by the directors who are supposed to hold or use such powers in trust or advantage of the shareholders.

It is instructive to mention in this paper that the Nigerian senate on Tuesday 10th march 2020 passed the Companies and Allied Matters Bill 2020 (known as the CAMA Bill). The CAMA Bill is intended to create an efficient of regulating businesses, minimize the compliance burden of small and medium enterprises, enhance transparency and shareholders engagement and promote a friendly business climate in Nigeria. The bill shall be presented to the President for his assent after the version of the said bill passed by the House of Representatives has been harmonized with the Senate's version. Since the CAMA Bill is yet to be passed into law in Nigeria, it will be better and wiser not to discuss it extensively in this paper. After all, the law does not deal with speculations, lawyers don't fish for what will be the law but only the correct /actual applicable laws in force prevalent, applicable and enforceable at all material times. It will not be appropriate to be discussing a bill that may or may not be assented to by Mr President. The correct position of the law is as stated in this paper.