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MINIMUM NUMBER OF DIRECTORS AND THE REQUIREMENT OF INDEPENDENT DIRECTORS IN A PUBLIC COMPANY IN NIGERIA: AN APPRAISAL

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Abstract

This paper appraises the provisions of Companies and Allied Matters Act (CAMA), 2020 on the minimum number of directors and the requirement for three independent directors in a registered public company. It is trite that a registered company requires natural persons who should be entrusted with the management of its affairs. This is so because a registered company is an artificial person; its management has to be entrusted to human agents. CAMA makes it mandatory that every registered company that is not small shall have minimum of two directors. Any registered company, not being a small company, whose number of directors falls below two (statutory requirement) shall within one month, appoint new director and shall not carry on business after the expiration of the one month unless the directors are appointed. It is an offence for any director or member of a company to know that the company carries on business, sixty days after the number of directors has fallen below two. Such director or member shall be liable for all liabilities and debts incurred by the company during that period when the company so carried on business. In another provision, CAMA makes it a requirement that every registered public company shall have at least three independent directors, though the Act is silent on the penalty for default in complying with the requirement. The paper, using doctrinal method, observes a conflict between the two provisions; to the extent that which of the provisions will determine the minimum number of directors in a registered public company. It is recommended that the provision on the minimum number of directors should be reviewed to limit it to registered private companies; while the provision on minimum of three independent directors should be reviewed to determine the minimum number of directors in a registered public company, and penalty for default in complying should be provided.

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1. Introduction

The focus of this paper is appraisal of the provisions of Companies and Allied Matters Act (CAMA), 2020 on the minimum number of directors and the requirement for three independent directors in a public company. It is trite that a registered company requires natural persons who should be entrusted with the management of its affairs. This is so because a registered company is an artificial person; its management has to be entrusted to human agents. Hence, the need for directors and board of directors in a registered company as they are in charge of the day to day running of the affairs of the company. Lord Denning in Bolton (Engineering) Co. Ltd v. Graham & Sons said:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does.…

In essence, directors of a company by whatever name called, are those managing and directing the affairs of the company; they are in charge of the running of the day to day affairs of the company.

2. Meaning of Director

CAMA defined director of a registered company as "a person duly appointed by the company to direct and manage the affairs of the company".[1] In another provision, it described director to include "any person occupying the position of director by whatever name called; and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act".[2] Therefore, it is immaterial by whatever name he is called; the test is whether it is the company that held the person out as directing its affairs. The Act provides that "there is a rebuttable presumption in favour of a person dealing with a company that those

[1] Section 269, Companies and Allied Matters Act (CAMA), 2020.
[2] ibid, section 868.

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persons described by the company as directors have been duly appointed".[3] It however provides that "where a person not duly appointed as a director acts as such on behalf of the company, his act does not bind the company and he is personally liable for such action, but where it is the company which holds him out as director, the company is bound by his acts".[4]

3. Share Qualification of Director

Shareholding qualification is not a requirement for appointment as a director. However, where article of company stipulates share qualification for appointment as a director, a person must possess the stipulated quantity of shares before he is appointed or allowed to remain in office as a director. Where a director who is by the articles required to hold a specified share qualification is not already so qualified, a period of two months after his appointment is granted to acquire the requisite quantity of shares or vacate office. Having vacated office, he shall not be re-appointed until he meets the requirement. It is an offence to remain in office after the stipulated period of grace without meeting up with the requirement.[5] Share qualification requirement is necessary where board commitment is highly desirable as a company policy. It assures the company that members and directors are both stakeholders which fact would make management avoid wasteful expenses and bad management which usually result in corporate insolvency.

4. Disqualification for Directorship

There are categories of person who are disqualified from being appointed directors of a registered company:[6]

i. Infant under the age of 18 years
ii. Lunatic/person of unsound mind
iii. Fraudulent person prohibited under court order
iv. Insolvent person
v. Bankrupt person
vi. Corporation other than its representative appointed for a given term

Note that though there is no maximum age qualification, there is restriction in respect of registered public company as regards appointment of a person who is 70 years or more as director. Certain conditions must be fulfilled as follows:[7]

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[3] ibid, section 269.
[4] ibid, section 276.
[5] ibid, section 277.
[6] ibid, section 283.

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i. Special notice of the resolution for appointment must be given to the company
ii. The notice must state the exact age of the director
iii. The person who is being proposed must disclose this fact to the members at the general meeting.

5. Appointment of Directors

First directors are directors appointed at the point of incorporation of the company. The appointment is either by stating in writing by the subscribers to the memorandum of association or naming them in the articles.[8] The usual mode of the appointment of first directors is to appoint them in writing. The disadvantage of naming them in the articles is that it forms part of the articles and any change of director would necessitate alteration of the articles.

Subsequent directors are appointed after the company is incorporated and is operating in ordinary course of business. In this respect, the members at the annual general meeting may re-elect or reject directors and appoint new ones. In the event of all the directors and shareholders dying, any of the representatives of the shareholders may apply to court for an order to convene a meeting of all the personal representatives of the shareholders to appoint new directors. If they fail, any creditor may initiate the meeting. The articles may give power to some particular persons to nominate a director. Subsequent directors are usually appointed by an ordinary resolution. Two or more directors cannot be appointed by a single resolution except for private company or where a resolution had earlier been unanimously passed by the general meeting to that effect.[9]

6. Type of Directors

In practice, there are several types of directors in the management of the activities of company such as executive director, non-executive director, managing director, chairman of the board of directors, alternate director, shadow director, assignee director, representative/nominee director, life director and independent director.

6.1 Executive Director

Executive director occupies dual status as employee and officer of the company. As an officer, he sits at board meetings formulating policy directions for the company; and as an employee, he is in charge of implementation of the policy drive of the company. An office is usually created

[7] ibid, section 282.
[8] ibid, section 272.
[9] ibid, section 273.

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for the executive director in the company office structure. In addition to his appointment as director, he must also have service contract that specifies his schedule of duties and responsibilities.

6.2 Non-Executive Director

Non-executive director is not an employee of the company as he does not have contract of employment and does not draw salary. He is however paid remuneration in form of allowances for attending meetings and carrying out any specific duty assigned to him. He may be regarded as part time director.

6.3 Managing Director

Managing director is a director who is the chief executive officer and takes full responsibility for the activities of the company. The board of directors appoints one of the directors (whether from executive or non-executive directors) to the position of managing director.[10] Thus, the managing director exercises powers delegated to him by board of directors. Some companies appoint managing director as chairman, thereby making him chairman and chief executive officer, taking the position of both non-executive and executive director. This is usually in private companies with small spread of shareholders.

6.4 Chairman of the Board of Directors

Chairman of the board of directors is also the chairman of the company. He presides over both the board meeting and the general meeting of the shareholders. He is appointed by the board of directors from amongst the board constituting both the executive and non-executive directors. However, the position is usually from non-executive directors unless the chairman is an executive chairman.

6.5 Alternate Director

Alternate director is appointed to take the position of a director in the event of absence. It is the director that appoints his alternate but is approved by the resolution of the general meeting. Here, two persons 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 directors are usually created for administrative convenience especially where an alien is involved with other local/resident directors. It is not available for executive director position since executive director is expected to

[10] ibid, section 88.

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be actively involved in day to day running of the company. Alternate director is not proxy but is a substantive position.

6.6 Shadow Director

Shadow director is not formally appointed. He is the only type of director without an official record of appointment. Usually, the board of directors of the company is accustomed to the instruction and direction of the person who operates from outside the company.[11] Shadow director is common where the person is actively involved in other official activity such as public/civil service or employment with restraints to private business activities.

6.7 Assignee Director

Assignee director is a person who is assigned to exercise the powers and roles of the substantive director. Assignee director is distinguished from alternate director in the sense that alternate director is a temporary delegation of functions by the substantive director; whereas appointment of assignee director amounts to permanent delegation of powers and duties.

6.8 Representative/Nominee Director

Representative/nominee director is appointed by a company which is a director of another company. Because the law requires a human being to represent the company in the board of that other company, the company appoints a nominee to represent it in the board for a fixed period.

6.9 Life Director

It may be necessary to appoint a director for life in a company, especially private company. This is a way of retaining control of the company for a long time. A major benefit of appointment as life director is that such a director is not subject to retirement and rotation rule. However, a life director is subject to vacation of office under section 284 and removal under section 288.[12]

6.10 Independent Directors (Public Company)

A registered public company shall have at least three independent directors. An independent director is a director of a public company who, or whose relatives either separately or together with him or each other, during the last two preceding years, was not an employee of the company; or did not make to or receive from the company, payments of more than ₦20 million, or own more than a 30% share or other ownership interest directly or indirectly or act as a partner, director or officer in an entity that made to or received from the company, payment of

[11] ibid, section 270.
[12] ibid, section 281.

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more than ₦20 million; or did not own directly or indirectly more than 30% of the shares of any class of the company; or was not engaged directly or indirectly as an auditor for the company.[13]

7. Number of Directors

The minimum number of directors of a registered company (not being a small company) is two qualified persons. The maximum is however a matter of articles of association. A registered company, not being a small company, whose number of directors falls below two (statutory requirement) shall within one month, appoint new director and shall not carry on business after the expiration of the one month unless the directors are appointed. It is an offence for any director or member of a company to know that the company carries on business, sixty days after the number of directors has fallen below two. Such director or member shall be liable for all liabilities and debts incurred by the company during that period when the company so carried on business.[14]

8. Minimum Number of Directors and the Requirement of three Independent Directors in a Public Company

It is noteworthy that the Act specifically states that the minimum requirement of directors in a registered company is two as seen in the discussion on number of directors above, without making any distinction on the type of the registered company. In essence, any registered company, whether small, private or public, can legally operate with minimum of two directors without going against the provisions of the Act.

Meanwhile, the Act specifies, in another provision, that a registered public company shall have minimum three independent directors. The three independent directors in a registered public company is a requirement and every registered public company must satisfy the requirement in order to operate in Nigeria. Although, the Act is silent on the penalty applicable to a registered public company that is in default of the requirement, the provision used the word ‘shall’ which signifies that it is mandatory for a registered public company to have at least three independent directors. The vexed question here is what happens to a registered public company in Nigeria that does business for a period of time with only two directors, or with more than two directors, but with no independent directors or with less than three independent directors?

[13] ibid, section 275.
[14] ibid, section 271.

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9. Observations

Flowing from the above discussions, it is observed that there seems to be conflict between the two provisions as to which of the provisions will determine the applicable rule on minimum number of directors in a registered public company. It is also observed that the provision on the minimum three independent directors in a registered public company only makes it mandatory for every registered public company to have at least three independent directors, it does not provide penalty for default in complying with the provision.

10. Recommendations

In line with the observations above, the paper recommends that:

i. The provision on minimum of two directors should be reviewed to limit it to registered private companies

ii. The provision on minimum three independent directors should determine the applicable rule on minimum number of directors in a registered public company. Therefore, the minimum number of directors in a registered public company should be three.

iii. The provision on minimum three independent directors should be reviewed to provide penalty for default in complying with the rule.

11. Conclusion

The paper appraised the provisions of CAMA on the minimum number of directors in any registered company in Nigeria, other than a small company and the requirement of three independent directors in a registered public company. It found that conflict exists on the applicable rule on minimum number of directors of a registered public company to the extent that should the applicable rule be the provision on minimum two directors or the provision on minimum three independent directors. It recommended the review of the provisions to limit the application of the minimum two directors to registered private companies; make the requirement of minimum three independent directors as the applicable rule on minimum number of directors of a registered public company; and provide penalty for default in complying the requirement of minimum three independent directors by a registered public company.

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