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SHAREHOLDERS' PARTICIPATION IN THE AFFAIRS OF PUBLIC COMPANIES: AN INSIGHT

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ABSTRACT

The aim of this study was to have an insight into the participation of shareholders in the affairs of public companies. The information gathered in relation to this study revealed that the only way shareholders can actively participate in the affairs of public companies was by attending the Annual General Meeting (AGM) and exercise the powers reserved for them. However, as a matter of law, there is no enforceable obligation on the shareholders to attend the AGM of their companies for that matter, or indeed, actively participate in the affairs of the company, but such shareholders remain bound by any decision the meeting may take, their nonparticipation notwithstanding. Conclusively, the study submitted that active participation of shareholders in the AGM is capable of saving their companies from possible lapses that may be as a result of mismanagement. Therefore shareholders should attend meetings of their companies, mostly the AGM.

Keywords: *Shareholders, participation, affairs, public companies*

INTRODUCTION

One outstanding feature of modern company law is the concept of incorporation whereby the law confers corporate personality on a company. A major consequence of this concept and which is fundamental attribute of corporate personality is that an incorporated company is a legal entity distinct from its members[1]. In other words, a corporation is an artificial person distinct from the shareholders who are natural persons and this being the case, it is capable of enjoying certain rights and, subject to duties different from those of the shareholders.

However, its policies are formulated and executed through the agency of human beings. Viscount Heldane L C in Lennards Carrying Co. V. Asiatic Petroleum Ltd noted that "…a corporation is an abstraction, it has no mind of its own any more 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 as agent but who is really the directing mind and will of the corporation, the ego and centre of the personality of the corporation[2]. Although every registered company is an entity distinct from its constituent members, it is composed of members. With regards to a company limited by shares, a member is a person holding shares in the company. There can be no membership i.e. proprietary relationship to a company otherwise than through the medium of shareholding[3]. Section 79 Companies and Allied Matters Act (CAMA) 1990, defines a member of a company as any person who has a constituent proprietary interest in the company and whose name is on the register of members[4]. A shareholder of a company, having share capital is a member when his name is entered in the register. Similarly, a person who undertakes to make contributions in the event of the winding up of a company limited by guarantee becomes a member of a company when his name is entered in the register of members.

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As a general rule, any legal person may become a member of a company. However, infants[5], personal representatives of deceased persons[6], companies, married women[7] and aliens[8] are subject to special rules. In a company having a share capital, membership can be acquired by subscribing to the Memorandum of Association, by signing and delivering to the Corporate Affairs Commission (CAC) an undertaking for directors' qualification shares, by allotment and registration and by transfer of transmission followed by registration[9]. Where the company is limited by guarantee, the membership may be acquired by subscription and by an undertaking as in Section 27 (4) (b) followed by registration by the company.

Consequently, the term "member" is practically synonymous with being a shareholder[10]. The membership of a company creates rights and obligations in the member in relation to the company depending of the quantum of his proprietary interest in the company. These rights include the right to attend any general meeting, speak and vote dividends, seek redress against oppressive and unfair treatment and make various applications to court or the CAC[11].

The memorandum of Association and the Articles of Association, when registered, bind the company and its members as if they had been signed and sealed by each member and contained covenants by each member to observe their provisions[12]. Shareholders are entitled to be treated equally according to their rights and obligations under CAMA. The agreement between each of the members and the company is commonly termed a contract. Certainly, it is a legally binding agreement, but one subject to the provisions of CAMA and also to the general rules of company law. Each member has a right to have the company's affairs conducted in accordance with the articles.

The law in pursuance of this recognizes decision s of a company such as the acts of certain bodies in charge of the company

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such as the General Meeting and the Managing Directors which together constitute the organs of the company. The day to day running of a company is usually, by the Articles of Association of most companies, vested in the Board of Directors who often delegates the power to one of its members referred to as the Managing Director.

This therefore means that the shareholders cannot interfere with the day to day management of the company. Greer, LJ, in Shaw & Sons (Sanford) Ltd .v. Shaw noted that "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, may be exercised by the directors; certain other powers may be reserved for the shareholders in the General Meeting. If powers of management are vested in the directors, they only can exercise the powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove….."[13]. These features apply to both private and public companies. However, the focus of this paper is on public companies whose members are numerous and diverse

SHAREHOLDERS' PARTICIPATION

Although shareholders are usually, by the provisions of the company's articles, not expected to interfere with the management of the company, the ultimate control of a company rests with them in general meeting. In other words, the major means by which a shareholder can participate in the management of a company is at the general meeting[14]. He therefore has to be in attendance in order to exercise this ultimate control reserved for shareholders by the company's articles of association.

The Companies and Allied Matters Act (CAMA) Cap C20

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2004 provides that a public company shall hold the following meetings after it officially commences business: Statutory Meeting[15], Extra-Ordinary General Meeting[16] and Annual General Meeting[17].

Statutory Meeting: Section 211 of the CAMA requires every public company to convene a general meeting of its members within six months of its incorporation. This meeting (usually called Statutory Meeting), among other things avails members the opportunity to discuss issues bordering on the formation of its business. The members in attendance could also raise matters on the contents of the Statutory Report delivered to them prior to the meeting[18].

Annual General Meeting: Every company is required by section 213 of the CAMA to convene a general meeting shall also specify the meeting as such. The meeting transacts a number of ordinary businesses of the company which are considered in detail below.

Extra-ordinary General Meeting: This refers to any meeting of the company other than the Annual General Meeting. It is usually convened by the board of the company. But it can also be requisitioned for by any member of the company with at least one-tenth of the paid up share capital. Section 215 of the CAMA also allows for the meeting of holders of any class of shares in the company[19]. This includes meetings of debenture holders or creditors.

Annual General Meeting: It must be noted here that, of these meetings prescribed by the CAMA 1990, the Annual General Meeting (AGM) is the most common and popular. It affords shareholders the best forum where they can have some measures of participation in the management of their company and the opportunity to meet the directors and ask questions about the general management of the company. It gives the members an

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opportunity of having first hand information about its profit performance which of course affects the return on their investment.

Above all, it also affords members an opportunity to move and pass resolutions on issues that affect the company. The AGM is convened for all members of the company to attend personally or by proxy. It is compulsory for a company to convene it every year to transact, at least, the following businesses[20].

Declaration of Dividends: Companies with share capital are usually formed with a view to carrying out profit- yielding ventures. Consequently, the shareholders who subscribed or purchased the shares of the company do so with the hope of getting some return on their investments, usually in the form of dividends and sometimes, bonus issues. Although companies are not bound to declare dividends every year, they often do depending on how much profit is made in the year in question net of al deductions. Attendance at AGM does not determine the declaration and payment of dividends to members but it does avail the shareholder(s) a first hand information concerning the dividends proposed and perhaps how it was arrived at. Related questions may also be entertained.

Presentation of Account: At an AGM, the state of a company's accounts is disclosed to all shareholders in attendance. This presents members with the opportunity to analyse the Accounts and possibly raise relevant questions. Members will also have the opportunity of knowing the liquidity position of the company and other cash flow problems as well as how the company's funds were applied. The extent of the company's assets and liabilities will also be seen from such report.

Presentation of Directors and Auditors Report[21]: Attendance at AGMs also afford members the opportunity of receiving the Directors' and Auditor's reports. Here, a member has the opportunity of questioning the directors on matters contained in their report

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and where he is not satisfied, could move a resolution rejecting such report. The basis of the Auditor's conclusions on the accounts of the company can also be scrutinized by members at the AGM. Non- attendance at AGMs therefore means that the actions of the Board will go unquestioned whether or not such acts are in the interest of the company.

Appointment of Directors and Auditors: In virtually every AGM of a public company, new directors are appointed to replace retiring ones[22]. The attendance of shareholders is therefore crucial as it affords them the best and easiest opportunity to decide who to appoint to manage the affairs of their company. Similarly, the shareholders could decide on the appointment of the company's Auditors where necessary and accordingly fix the remuneration payable to them[23].

The most effective control shareholders can exercise over their company is the power to decide on what the company does and who constitutes its board. This invariably carries with it the power to remove or dismiss any or all of the board of the company found wanting. This power is usually exercised at the AGM. It is therefore important for shareholders to be present at such meetings in order to be able to exercise those powers reserved for them and exercisable only at the AGM[24].

Attendance of Annual General Meeting by Proxy[25]: Where a shareholder is unable to attend an AGM personally, he has the option of sending another person whether or not a member of that company, to represent him. The person so sent is called a proxy. The proxy is appointed via an instrument (which is also referred to as Proxy) prepared by the company for that purpose and usually sent to members along with the notice of meeting. Where the choice of attendance by proxy is made, the proxy form is completed and returned not less than 48 hours before the time scheduled for the meeting as required by section 230(7) of CAMA.

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One common problem with attendance at AGM by proxy is the late arrival of the notice of meeting together with the form to the shareholders which often denies them adequate time to seek and obtain an appropriate and willing proxy. The consequence of this is the non representation of shareholders at the AGM. In such a situation, many companies' articles empower the Managing Director to act as proxy to absent shareholders. The inherent danger in this lies with jeorpadising shareholders' interest, since no Managing Director acting as proxy will for instance support a resolution which is to his own detriment.

Secondly, even where a proxy is found, he may not be compelled to exercise the authority conferred on him unless there is a fiduciary duty or a binding contract existing between him and the shareholder appointing him such as the payment of remuneration for service, in which case the proxy would be obliged to carry out the instruction to the latter.

A corporate shareholder of a company usually attends the AGM by use of designated representatives. These representatives possess and exercise same powers in the meeting as would the corporate member were in a natural person in attendance. Proxy statements should be reasonably obvious when sent with notices of meetings. Where this is not the case, every officer of the company concerned will be guilty of an offence and liable to a fine of N250[26]. Section 230(3) CAMA renders void, any provision in a company's articles which has the effect of requiring the instrument appointing a proxy or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy or any other person more than 48 hours before a meeting or adjourned meeting in order that the appointment may be effective at the meeting. If proxies are solicited at the company's expense, the invitation must be sent to all members entitled to attend and vote[27]. Every officer in default will be guilty of an offence and liable to a fine of N500.

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SHAREHOLDERS' REMEDY FOR FAILURE BY COMPANY TO CONVENE AN AGM

It is the duty of the Board to convene the AGM of a company. There are instances, however, where the Board fails to carry out this duty. A number of factors may be responsible for the default ranging from a sheer neglect to an intentional refusal on the part of the Board. The reason for this may not be completely devoid of the attitude of the shareholders themselves towards attendance and active participation in such meetings. This often creates the impression that they careless how the affairs of their company are managed. It must be pointed out however, that although shareholders are sometimes to blame for the board's failure to convene an AGM, it is no valid excuse for the Board's default. And in an event of such default, a number of options are opened to the shareholders to enforce the conveyance of the meeting. These include:

(a) Application to the Corporate Affairs Commission (CAC)
A member of a company may apply to the Commission under section 213 CAMA for an order that the meeting be convened. The Commission can, in addition to making such an order, give directive on how the meeting may be conducted. But where a member seeks to have the decision of the meeting binding on all other members, he requires a Court order in that respect.

(b) Application to the Court for an order that the meeting be convened Section 223 CAMA empowers the court to hear and if deemed appropriate, order that a meeting (including the AGM) of a company be held on the application of any member entitled to attend and vote at that meeting[28]. The court may in addition make ancillary orders such as that a member attending a meeting in person or by proxy may take decision which will bind the other members[29].

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It is noteworthy, that a default to convene an AGM by a company constitutes an offence punishable with a fine of N500. In addition, where there is a need to convene an extra-ordinary general meeting of a company and the directors default in so doing, section 215(2) CAMA allows any member with not less than one-tenth of the paid up share capital of the company to requisition for such a meeting.

SHAREHOLDERS' CONSTRAINTS

In exercising the powers reserved for them at the AGM, shareholders are faced with a number of constraints. These constraints lie basically with how such meetings are summoned and conducted. Although the summon and conduct of a meeting depend on the regulations of the individual company, the CAMA has laid down certain rules which must be complied with no matter what the company's regulations say. In summoning an AGM, every member of the company entitled to attend and vote is given 21 days notice prior to the meeting[30]. He is also entitled to receive, together with the notice of meeting, the Annual Report of the company which also includes the Financial Report (i.e. its audited account) for that year. Proxy forms are also included in case he cannot attend personally[31].

In practice, most members do not get the Notice and Annual Report within the time stipulated by law. In some cases, the notice either does not get to the member at all or he receives it well after the meeting would have taken place. With this situation, the Shareholders would have lost an opportunity to have a say in the affairs of the company. Even where the notice gets to him late, he has no sufficient time to study the annual report/account to enable him prepare for the meeting. In other words, shareholders would not be able to muster any opposition to the Board. The fact that these lapses are common to most public companies gives the

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impression that dispatch of notices of AGMs is deliberately delayed by the management of these companies.

Similarly, most companies in Nigeria hold their AGM in Abuja where hotel accommodation is expensive and beyond the reach of numerous shareholders with small holdings. The question then is, "how will the majority of the shareholders attend such AGMs?" It is doubtful; the Board of these companies intends that the bulk of their shareholders should attend since they would not be able to afford to attend. One solution to this problem is for shareholders to be more active in their Shareholders Association. The Association can at zonal level nominate members to represent their common interest at AGMs. In this case, wherever the meeting is scheduled to take place, the shareholders can muster sufficient resources to sponsor members to the meeting.

Another constraint faced by shareholders in participating in the affairs of their company through the AGM and other meetings of the company is the manipulation of the proxy system. Since notices of AGMs are usually dispatched late, most shareholders are unable to comply with the regulation of most companies which require the forms to be returned 48 hours before the meeting. As a result of this, a situation arises where the proxy becomes invalid. The shareholder is then deemed not to have appointed a proxy. In some cases, the shareholder does not fill the forms properly. For example, the proxy may not be named. In such situations, it is common for the Managing Director to exercise the proxy on behalf of the member(s). Such Managing Director will only vote in a manner aimed at protecting his own interest and not according to the wishes of such a member.

MINORITY PROTECTION[32]

As noted earlier, shareholders have powers to act corporately at a general meeting, and in that forum to appoint the directors and make some major decisions affecting the operation of the company's

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business. Be that as it may, the majority actually decide matters at general meetings. Sometimes, their actions discriminate against or are unfair to the minority shareholders. Both statutes and common law provide redress for minority shareholders in this situation. The law ensures that minority shareholders enjoy some measure of protection when the company meets as a body at a general or extra-ordinary meeting. It is trite law that all members must receive notice of meetings[33] and have a right to exercise their voting power. Similarly, with regards to changing objects clause or class rights, 15% of holders of the nominal share capital of the company may apply to the court for relief from the resolution[34].

The courts have recognized situations where shareholders may enforce their own rights and occasionally obligations owed to the company in which they are members. These are referred to as exceptions to the rule in Foss .v. Harbottle[35].

These exceptions are[36]:

- The rule does not apply to ultra vires acts, which by their nature could not be ratified by the majority.
- Minority shareholders can complain of a fraud on the minority
- A bare majority cannot do something needing a larger majority.
- Individual members can always assert their personal rights.

CONCLUSION AND RECOMMENDATIONS

It is unfortunately a common practice to see many shareholders absenting themselves from meetings of their company especially the AGM and thereby withholding what may have been their valuable contribution to the successful running of the company. There is of course, as a matter of law, no enforceable obligation on shareholders to attend the AGM or any meeting of

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their company for that matter, or indeed, actively participate in the affairs of the company. Such shareholders however remain bound by any decision the meeting may take, their non-participation notwithstanding.

Non-participation in the affairs of the company could also mean the loss of golden opportunities to positively affect the running of the company whose success shareholders stand to benefit from. There is no doubt that the progress of a company is largely determined by the efficiency of its management which is placed on the Board. Shareholders whose interests are at stake have the responsibility of determining who constitutes the Board and ensure that any cause of inefficiency is properly eliminated. This can be easily done by attending and participating in the election of persons they consider fit to direct the affairs of their company.

Finally, by not participating in the affairs of the company, the shareholders are simply leaving the fate of their company to the Board who may or may not manage it satisfactorily. Their active participation is capable of saving a company from possible lapses that may be a result of mismanagement. Therefore shareholders should attend meetings of their companies especially the AGM.

NOTES

[1]Salomom .v. Salomon & Co (1897) AC 22 HL
[2] (1915) AC 705 at 713-714
[3]See Palmer's Company Law (vol. 1) (1982). P.681
[4]Tika-Tore Press Ltd and Ors .v. Abina and Ors (1973) 8 NSCC 239; See also Alalade .v. Northline Ind.& Agric.Serv.Ltd (2003) 14 NWLR (pt 839) 172
[5]Section 20 CAMA Cap C20 LFN 2004
[6]Sections 148 & 155(1) CAMA C20 LFN 2004
[7]Married Women's Property Laws of the various States
[8]Section 8 Immigration Act Cap 11 LFN 2004

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[9]Section 79 CAMA Cap C20 LFN 2004
[10]Section 81 CAMA Cap C20 LFN 2004
[11]Sparks Electrics (Nig) Ltd .v. Ponmile (1986) 2 NWLR (pt23) 516
[12]Section 41 (1) CAMA 2004
[13](1935) 2 KB 113 at 134 CA
[14]Isle of Wright Rly .v. Tahourdin (1883) 25 Ch. D. 230
[15]Section 211-213 CAMA 2004
[16]Section 215-216 CAMA 2004
[17]Section 213-214 CAMA 2004
[18]Section 211 (8) CAMA 2004
[19]Section 243 CAMA 2004
[20]Section 214 CAMA 2004
[21]Sections 342 and 359 CAMA 2004
[22]Section 248 (1) CAMA 2004
[23]Section 357 CAMA 2004
[24]Sections 262 and 362 CAMA 2004
[25]Sections 230 CAMA 2004
[26]Section 230 (2) CAMA 2004
[27]Section 230 (4) CAMA 2004
[28]See Okeowo .v. Migliore & Ors (1979) 11 SC 138
[29]Section 223 (2) CAMA 2004
[30]Section 217 CAMA 2004
[31]Section 218 CAMA 2004
[32]See sections 299-309 CAMA 2004
[33]Section 219 (a) CAMA 2004
[34]Section 46(2) CAMA 2004
[35](1843) 2Hare.461
[36]See Edwards .v. Haliwell (1950) 2 All ER 1064

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