

COLLECTIVE RESPONSIBILITY OF BOARD OF DIRECTORS AND POWER OF DIRECTORS TO DELEGATE THEIR DUTIES: WHERE DOES LIABILITY LIE?

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Introduction:

In a world of stringent and enormous competition among corporate entities in vertical line, and especially with the rapid development in technologies and their services, the success of every company is largely dependent on its management and more on the caliber of individuals forming the heart and mind of the company than on the availability of raw materials and its auxiliary services. In the 21st century alone, the corporate world has suffered considerable losses due to the personality and mismanagement by the individuals that chose, either art or nature, to observe contemptible absurdities and negligence in piloting the affairs of the companies¹. The losses and failures are caused either of act of commission or omission by the officers of the company or that of those to whom the officers have delegated their duties.

This article takes a cursory look at the legal framework for collective responsibility of the company's board of directors in Nigeria and the place of liability where the Board delegates its powers and duties, and makes recommendations on ways to mitigate the effects of the liability.

1. THE BOARD OF DIRECTORS:

A company is an artificial person in law, and has a juristic personality so that it can sue and be sued in its on corporate name. A company does not have flesh and blood like an individual or a natural person, but it can perform all the acts that can be performed by a natural person². Consequently, a company can enter into a

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¹ The writer has been forced to sue and obtain judgment against a real estate company that collected huge sum from clients but failed to allocate any property to the clients. The company and similar ones do not even have any money to pay back the clients or the judgment sum. This is an example of failure on the part of the company's management.

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² S.42 of Companies and Allied Matters Act 2020

contract in its own name, be entitled to the benefits of the contract and be contractually responsible or in case of breach, liable under the same contract³. Also, a company may in some cases be criminally liable for offences created by statutes⁴. The legal personality principle under the corporate law emphasizes that the company is a legal entity and different from its members, officers and staff. In appropriate cases therefore, a company may derive benefit and be responsible for acts that are traceable to the company even though the acts were carried out by the officers of the company, and for the ultimate benefit of the company's shareholders.

However, a company operates through the instrumentality of human beings who may be the company's members, directors or staff⁵. The first statutory reference to the human instrument of a company under the Nigerian corporate law is section 87(1) of the Companies and Allied Matters Act which provides succinctly as follow:

A company shall act through its members in general meeting and its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or board of directors.⁶

The implication of above provision is that whereas a company is different from its members, board of directors or duly appointed agents, it can only perform its functions as an entity through that category of persons. In the ordinary course of its operation, a company can only act through above stated persons.

The law also envisages the possible unavailability of every member of a company to unanimously take part in the day to day management of the company, and provides for the directors to fill the gap in appropriate cases. The Act provides further as follows:

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 this Act or the articles requires to be exercised by the members in general meeting.⁷

The literal interpretation of the above provision simply put is that the business of a company in Nigeria shall be managed by the Board of Directors of the company except where the articles of the company provides otherwise or where the CAMA reserves some powers for the members to exercise in general meeting.

³ Emco & Partners Ltd & Ors v. Dorbeen (Nig.) Ltd & Anor. (2017) LPELR-43453(CA)

⁴ S.15 (5) of the Bank and Other Financial Institutions Act

⁵ Trengo (Nig.) Ltd v. African Real Estate and Investment Co. Ltd & Ors. (1978) LPELR-3264(SC)

⁶ S.87(1) Companies and Allied Matters Act (CAMA)

⁷ S.87(3) CAMA

The very pivotal and sensitive position of the directors in the management and operation of the company has been statutorily and judicially recognized. They have been metaphorically referred to as the trustees and agents of the company thereby making them answerable and responsible to the company and its shareholders. Section 309 of CAMA provides as follows:

Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interest.

A director may when acting within his authority and the powers of the company be regarded as agent of the company under Part III of this Act.⁸

The legal implication of S.309(2) of CAMA above may be that, for a director to be regarded as an agent of a company, he must be acting within his authority and powers of the company. But this threshold might be extended to where a director has been held out by the company as one of its officers, staff or agent⁹. It is the writer's view that the authority of the company to the director under this subsection does not necessarily have to be express. Also, in the latter case, a third party should not be made to suffer the wrong of a director solely on the ground that there is no express power of the director to act as the company's agent in a particular transaction where there is an unimpeachable evidence that the company held the director out as an agent. A perfect example is where a company has used a particular director to transact business with a third party over a period of time. Such a company should not be allowed to deny the agency relationship. This view may place reliance on the provisions of S.89 of CAMA which provides as follows:

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 civilly liable therefore to the same extent as if it were a natural person:

Provided that-

(a) 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

⁸ S.309 (1)(2) of CAMA

⁹ Guarantey Trust Bank Plc v. Yunanna Solomon (2016) LPELR-40342(CA)

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;

(b) 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.¹⁰

While prior knowledge in the first ambit of the proviso above may exempt the liability of a company, where the members or directors of a company are more than one, it is difficult, in the writer's view, to exonerate a company with one shareholder and a single director as allowed in the present Act,¹¹ where such a sole director acts in a manner that would ordinarily make the company to be liable.

2. Powers of the Board of Directors:

In view of the enormous functions being performed by the Board of Directors in the management of companies, the law tends to give them corresponding enormous powers to enable the Board to effectively run the company. The only limitations to the powers of the Board of Directors are the articles and the express provisions of Law¹². However, in most private companies, the limitation may be said to be only the express provisions of the Law since the directors are mostly the owners and majority shareholders of the private companies and to a great extent, dictate the provisions of the Articles. Section 87(3) of CAMA refers to it as “**all such power of the company...**” One of the wild provisions of the CAMA in this regard is the protection from interference by the members while performing the functions of the Board. Section 87(4) provides thus:

Unless the articles shall otherwise provide, the board of directors when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in several meeting provided that the directors acted in good faith and with diligence.¹³

The greater danger in the above provision is that only few companies are willing and ready to challenge the illicit acts of the Board of Directors and fewer will succeed when they do so. The reason for this is not farfetched and it ranges from complicity of

¹⁰ S.89(a)(b) CAMA

¹¹ S.18(2) CAMA

¹² S.87(3) CAMA

¹³ S.87(4) CAMA

the other officers to refusal of those who are in the knowing to volunteer to testify in court. Litigation lawyers do face the challenge of ensuring that the witnesses are in court. Even when they come, it takes a strong witness to prove bad faith in the circumstance, as he who asserts must prove, and the burden of proof lies on that person who would fail if no evidence at all were given on either side.¹⁴ Proceeding challenging illicit act of director(s) will definitely find success before a judge if there is no complicity among the company officers, there is a willing and competent witness and the evidence is well presented before a diligent judge.

3. Directors' Duties:

This shall be fully examined in a subsequent paper, but it is worthy of note that directors of a company owe two major duties to the company. The duties are as follows:

- a. Fiduciary Duties
- b. Duties of Care and Skill

The fiduciary duty of a director includes:

- i) The duty to act in good faith and in the best interest of the company and the members as a whole¹⁵
- ii) The duty to exercise power for proper purpose and not for collateral purpose¹⁶
- iii) The duty not to fetter discretion in any way instead of exercising it for the benefit of the company¹⁷
- iv) The duty to avoid conflict of duty and interest¹⁸
- v) The duty not to make any secret profit¹⁹

Duties of Care and Skill:

Unlike the position at common law²⁰, the Nigerian law applies objective standard to the duty of care and skill of a company director. The position of the law is to the

¹⁴ S.132 of the Evidence Act 2011

¹⁵ S.305(3) CAMA

¹⁶ S.305(5) CAMA

¹⁷ S.305(6) CAMA

¹⁸ S.306(1) CAMA

¹⁹ S.313(1) CAMA

²⁰ See *Re City Equitable Fire Insurance Co.* [1925] Ch 407

effect that, a director should exercise the degree of care, diligence and skill which a reasonably prudent director would exercise in similar situation or circumstance. Thus CAMA provides as follows:

Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company, and shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.²¹

It is important to note that any failure by a director of a company to take reasonable care in exercise of his powers and discharge of the duties of his office is a sufficient ground for an action for negligence and breach of duty against the director.²²

Every director like any other prudent man of business is advised to see his position as a call to duty. The competition in businesses today is enormous, and directors are encouraged to take the bull by the horn, and apply all necessary care and skill in carrying out their official duties. Directors are therefore advised to know something about everything. They should also try to improve their knowledge especially in information, communication technology as that will improve their skills.

4. Doctrine Of Collective Responsibility(S.308(3))

The doctrine of collective responsibility emphasizes the rule that every member who participates (or is suppose to participate) in a decision making group is equally responsible for the consequences of the decisions taken, should fully support and abide by the group's decisions (whether or not he or she participated in the decision making process), otherwise should resign from the group.²³

To what extent does this doctrine affect the directors of a company? How is the individual responsibility of a director affected by the decisions of the Board? The position of the law is to the effect that each director is individually responsible for the actions of the board in which he participated, ***and the absence from the board's deliberations, unless justified, shall not relieve a director of such responsibility.***²⁴

It is not strange to see absentee directors being held responsible for the decisions of the Board, and this is not unrelated to the duty of care and skill of the directors. The burden of proof is on the absentee director to show the court the justification for his absence from the Board deliberations. In the case of ill health, it shall not be enough

²¹ S.308(1) CAMA

²² S.308(2) CAMA

²³ www.businessdictionary.com/defl (accessed at 2:53pm on 7/10/2020)

²⁴ See S.308(3) of CAMA

for the director or his witness to orally tell the court that he was indisposed because of ill health; doctor's report may be required. Travels not unconnected with the company can only be a justification if it is shown to be of utmost importance and the role of the director at the place travelled to could not have been reasonably and sufficiently performed by any person other than the director.

Another legal implication of S.308(3) of CAMA is that the absentee director may not be able to question the validity or legality of the decision Board on the sole ground that he was not present during the deliberations. An example of such decisions is increase in the number of directors of the company, provided, however that it does not exceed the maximum allowed by the articles of the company.²⁵

Also, a company is seen as a unified entity and the board of directors is considered to be a single pillar of a company. Thus where a company is held criminally responsible for an offence created by statute, the whole members of the Board of directors are usually the first target irrespective of the particular director whose action or inaction results in the offence. In some cases, statutes go further to create separate punishment for the officers including the directors of the company.

Management and directorship of a company is a serious business, and there is no room for mediocrity either of an individual director or of the Board. Companies and the Board are advised to put machineries in place to ensure that every aspect of each director's duties is in accordance with the company's articles and the law. In this way, liability of the company and the board will be reduced.

5. Power of the Board of Directors to Delegate their Duties:

The Directors of the company are deemed to be agents of the company, and they are allowed to take joint decisions at the board meetings. However, the law envisages a situation where the board may not be able to readily take decisions and carry out some task as a result of limited time or expertise. The law therefore empowers the board to delegate its powers. Section 289(5) of CAMA provides as follows:

The directors may delegate any of their powers to a managing director or to committees consisting of such members of their body as they think fit and the managing director or any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be made by the directors.²⁶

²⁵ See S.274(3) of CAMA

²⁶ S.289(5) CAMA

The above is one of the neglected provisions of the Law by most companies. Most committees constituted by the board either do not have any regulations or are allowed to make the resolutions themselves. The use of the discretionary term “may” in the last line of the subsection gives the impression that regulations made by the board is not compulsory whenever a committee is formed and powers delegated to it. But it is the writer’s view that the regulation is necessary and no delegation of power to a committee should be made without same. The regulation is the only document encapsulating the schedule of duties and exercise of powers of the committee. It is also the first reference point whenever any issue as to proper exercise of power or the principal’s vicarious liability arises. Companies and Boards are therefore advised not to dispense with the regulations in any such circumstance.

6. Vicarious Liability of the Company and the Directors(S.314; S.315)

Vicarious liability arises where a person is held responsible for the misdeed of another. Vicarious liability may arise in tort and contract where agency relationship is found or deemed to exist. The same responsibility has been found to exist in criminal law where companies are found to be criminally liable for failure of its officers or agents such as in law of taxation. To be responsible, it must be established that the agent was acting in the course of duty when the wrong was done to a third party²⁷. To what extent does this principle affect a company?

The position of the law is to the effect that any act of members of a company in a general meeting, the board of directors, or of a managing director while carrying on business in the usual way of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent, as if it were a natural person. The only proviso here is that there shall not be liability if the third party had a prior knowledge that the officer or agent had no power to act in the matter or had acted in an irregular manner or if having regard to his relationship with the company, the third party ought to have known of the absence of such power or of the irregularity.²⁸ Insofar as a director or agent of a company is acting within the scope of his employment, there is nothing to derogate from the vicarious liability of the company.²⁹

It is worthy of note also that a company will still be vicariously liable notwithstanding that the officer or agent has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company except where there is collusion between the officer or agent and the third party,³⁰ and the act of a director cannot be utterly invalid to negate the company’s liability

²⁷ See *Eseigbe v. Agholor* [1987] 1 NWLR (Pt. 48) 172

²⁸ S.89 of CAMA

²⁹ S.89(3) of CAMA. See also *Ifeanyichukwu (Osondu Ltd) v. Soleh Boneh Nig. Ltd* [2000] 5 (Pt. 656) 322

³⁰ S.94 of CAMA

notwithstanding any defect that may be discovered *afterwards* in his appointment or qualification.³¹

Conversely, a director may be personally liable for acts of the company. It shall not lie in the mouth of the director that the act was that of the company which is a distinct person in law. The CAMA for instance, provides that where a company receives money by way of loan for specific purpose or by way of advanced payment for the execution of a contract or project and with intention to defraud, fails to apply the money for the purpose for which it was received, every director or other officer of the company who is in default shall be personally liable to the third party from whom the money was received for a refund of the money.³² The personal liability of the directors or officers here does not however affect the liability of the company itself. The only logical reason for this provision may be that inasmuch as a company has a separate personality in law, it operates through human beings (the members in a general meeting, board of directors, officers and agents). Those are the only category of persons that are capable of forming an intention to defraud. **Section 50B (4) (c) of the Asset Management Corporation of Nigeria Act (as amended)** provides that the term debtor or debtor company shall as may be applicable include “all directors and shareholders of the borrower”³³. Tax laws and other statutory instruments also have provisions for individual liability of directors or officers of a company.

Conclusion and Recommendations

There is generally a rise in the vicarious liability of companies globally, and there are several steps that may be taken to mitigate the effects of the liability. Companies and the board seeking to reduce these risks are hereby advised to look again and again at their legally binding documents.

While a company may not avoid liability for the acts of its directors or other officers, it is believed that the company can still recover its losses from the officer whose unreasonable act or omission resulted in the liability.

A company may by its contract of employment with its executive directors require the affected director to indemnify the company for any damage or cost arising from the company being held vicariously liable due to unreasonable act of the director. Same purpose may also be served with regulations by the Board whenever there is a power delegation to a committee or a specific officer of the company.

Similarly, an indemnity clause may be included in any contract between the company or its board and external agents of the company. The court will not find it difficult to uphold such binding obligation between two consenting parties³⁴.

³¹ S.286 of CAMA

³² S.317(1) of CAMA

³³ See S.17 of the AMCON (Amendment No. 2) Act 2019

³⁴ Western Construction Company Ltd. v. Batalha (2006) LPELR-3478(SC)

On the other hand, individual directors or agents of a company may also take similar advantage of an indemnity clause in the company's article or contracts.³⁵ This may reduce the risk and liabilities attached to the office and assure them of safety.

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³⁵ See S.91 of CAMA