

PROTECTION OF MINORITY SHAREHOLDERS UNDER NIGERIAN COMPANY LAW*

Abstract

The protection of the minority shareholders within the domain of corporate activity constitutes one of the most difficult problems facing modern company law. The aim must be to strike a balance between the effective control of the company and the interest of the small and individual shareholders. As such, a proper balance of the rights of majority and minority shareholders is essential for the smooth functioning of the company. This study examined the provisions of Companies and Allied Matters Act 1990, on the legal protection of the minority shareholders in company management with a view of exposing its strength and weaknesses. Doctrinal method of research was used in this study which entails looking at the law as it is and considering the general principles underpinning the law. This study found out among other things that company meetings have been provided as an important tool for minority shareholders protection in Nigeria but that has been circumvented through the system of voting adopted especially in the election of directors that makes it difficult if not impossible for minority shareholders to elect their representative on the board of directors and also the shareholders or their proxies physical attendance at the meeting. It is therefore recommended among others that the Companies and Allied Matters Act should provide for mandatory cumulative voting system and electronic participation of shareholders or their proxies at the company's meetings.

Key words: Minority shareholders, Company Law, Nigeria, Protection, Companies and Allied Matters Act

1. Introduction

In a democracy you indeed have to win by a majority. Similarly, a company which is a large group of individuals acts in accordance with the decisions taken by the majority of its members.¹ Thus, the basic principle relating to the administration of the affairs of the company is that the Courts will not, in general intervene at the instance of the shareholder in the matters of internal administration; and will not interfere with the management of a company by its directors so long as they are acting within the powers conferred on them under the articles of the company.² Nothing connected with the internal disputes between the shareholders is to be made subject of an action by a shareholder.³ This rule, commonly known as the rule in *Foss v Harbottle*⁴ is intended to avoid multiplicity of suits and also to protect the courts from interfering in the internal affairs of a company. In such instances, the minority shareholders cannot ask for court intervention because the rule in *Harbottles* case does not allow minority shareholders who complain of a wrong done to the company to bring an action to redress such wrong provided that the majority shareholders do not wish to take any action against the wrong committed.

However, the law recognizes the interests of these minority shareholders in the company and in proper cases accord to them a relief or remedies especially where activities of the majority shareholders will affect their interests. This protection afforded by the law to the minority shareholders is vividly reflected under the Companies and Allied Matters Act.⁵ This study therefore examines the provisions of CAMA on the protection of the minority shareholders in company management by identifying its strength and weaknesses with a view of providing plausible recommendations for reforms for better protection of the minority shareholders in Nigeria.

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¹S S Dari, 'Majority Rule and Minority Protection under Companies Act 1956 with special Reference to *Foss v Harbottle*' (2014) 1(9) IJR, 127.

²*Mac Dougall v Gardiner* (1875) 1 Ch D 13.

³*Ibid.*

⁴(1843) 2 Hare 461.

⁵ Cap C20, Laws of the Federation of Nigeria, 2004. Hereinafter referred to as CAMA.

2. Defining Minority Shareholders

Unfortunately, the CAMA does not define the term ‘minority shareholder’. There are several provisions in the CAMA which refer to some special rights which are enjoyed by those shareholders representing at least 15% of the issued share capital.⁶ These provisions do not imply that a minority shareholder is the one who represent at least 15% of the issued share capital. The minority shareholders are to be considered case by case by analyzing the capital structure of the company. In effect, Minority shareholders are individuals who have minority stakes in a company that is controlled by majority shareholders. They are shareholders who own less than fifty percent of the total shares of a company and often the ones dependent on the will of the majority shareholders, who are in controlling position, because of the bigger amount of the share capital they own. In essence, they are small investors in companies that generally due to their small shareholding are not able to affect business decisions. Abduljaami also saw minority shareholders as shareholders that do not have controlling interests in the companies.⁷ *Black’s Law Dictionary* further defined a minority shareholder as ‘a shareholder who owns less than half the total shares outstanding and thus, cannot control the corporation’s management or single handedly elect directors. They are at the mercy of the majority shareholders who owns or controls more than half the corporation’s stocks.⁸ In general terms, minority shareholder can be understood to mean person who holds such amount of shares which does not confer control over the company or render the shareholder with having a non-controlling interest in a company.

3. Minority Shareholders Protection under CAMA.

Protection against Unfairly Prejudicial or Oppressive Conduct

Section 311 (2) (a) of CAMA provides that a member of a company may apply to the court by petition for an order on the ground (i) that the company’s affairs are conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against a member or members, or in a manner that is in disregard of the interests of a member or members as a whole; or (ii) that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial or unfairly discriminatory against a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole. As such, the restrictive term of ‘oppression’ referred in section 201 of the repealed Companies Act 1968 has been replaced by the more widely interpreted terminology of ‘unfair prejudice’. However, it is not yet clear what the term ‘unfair prejudice’ means since there is not a definition provided for that term in CAMA. Furthermore, problems with the section 201 of the repealed Companies Act oppression remedy was the inclusion of the need to establish that the oppressive conduct must be a continuous nature right up to the time of the petition and that the conduct affected the petitioning member, *qua* member and not in some outside capacity. Therefore, the addition of the term unfairly prejudicial conduct, made by section 311 of CAMA, was a successful movement from a restrictive approach to a broader one, which provides flexibility to the courts to interpret the term in such a way as to provide protection to minority shareholders.

Moreover, if the court is satisfied that the petition under section 311 is well founded, then section 312 of CAMA provides the court with a power to grant relief. Such reliefs may be to wind up the company or regulate the conduct of the company’s affairs in the future or direct an investigation to be made by the commission or requiring a person to do a specific act or thing or appointing a receiver or a receiver and manager of the property of the company or restraining a person from engaging in specific conduct or from doing a specific act or thing. Also, an order may authorise civil proceedings to be brought in the name and on behalf of the company, or varying or setting aside a transaction or contract to which the company is a party and finally, the court may order the purchase of shares.⁹ The most commonly

⁶ CAMA, s 46(1);

⁷ S H Abduljaami, ‘Treatment of Minority Shareholders’ <<http://www.shajlaw.com/media/reports/Treatment of Minority Shareholders. pdf>> accessed on 20 November 2012.

⁸ B A Garner, *Black’s Law Dictionary* (9thedn, Minnesota: West Publishing Co., 2009) p.1500.

⁹ *Ibid*, s. 312.

used remedy is the purchase order meaning that, the minority shareholder's shares are to be purchased at a fair value by those who control the company or the company itself.

These remedies are quite substantial unlike what was available under section 201 of the repealed Companies Act of 1968. The writer is of the view that they not only provide an instructive catalogue of potential orders that will provide guidance for judges, but alert minority shareholders on the scope of relief available to them in case of unfairly prejudicial or oppressive conduct. In essence, basic improvements have been made by section 312 of CAMA which is commendable and a welcome development to the protection of minority shareholders.

However, from the wordings of section 312 of CAMA, the minority shareholder does not have a 'right' to specific remedy. The power of discretion to order for instance either winding up or purchase of shares belongs solely to the court. Accordingly, this may either create hold-up problems on the minority side or, conversely, decrease the majority's incentives to respect the minority shareholder's interests. This uncertainty may operate as a disincentive for the minority shareholder to use his right, which eventually decreases the incentives on the majority to respect minority rights. Hence, a legislative reform is necessary in this respect. It is also important to note that section 310 of CAMA had expanded the categories of persons who can petition under section 311. This was an improvement of what was obtainable under the repealed 1968 Companies Act where only a member can apply for relief under section 201.

Petition for Winding up

Another protection afforded minority shareholders by CAMA is the right to petition the court on just and equitable ground.¹⁰ The winding up order is the most drastic form of shareholder relief. CAMA sets out a number of circumstances under which a court may order a winding up of the company.¹¹ This also include where an oppression remedy claim has been met¹² and, perhaps most importantly, where it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.¹³ The courts have, in the exercise of their powers under the 'just and equitable' doctrine, made it abundantly clear that each case must be determined on its own facts. However, Courts certainly have tended to be against making such an order when a company is clearly solvent except where the company cannot conduct its affairs¹⁴.

Nevertheless, the just and equitable provision has usually been used to provide a remedy in the situation of deadlocks within the company which have arisen without any fault on the part of those involved¹⁵, where the Substratum or Main Object of the company has Failed¹⁶ and also where the minority shareholder or company has been defrauded.¹⁷ Exclusion from Office.¹⁸ Finally, where the court makes an order that the company be wound up, then the relevant provisions of the CAMA relating to the winding up of companies will apply with such adaptation as are necessary, as if the order had been given upon an application filed in the court by the company. And under Section 313, it is an offence punishable by fine or imprisonment for any person to contravene or fails to comply with any order made by the court relating to winding up.

¹⁰ CAMA, s 408 (e).

¹¹ *Ibid*, s. 408.

¹² *Ibid*, s.312 (2).

¹³ CAMA, s. 408 (e).

¹⁴ A Keay, 'Company directors behaving poorly: disciplinary option for shareholders' (2007) JBL 656 -678 678.

¹⁵ *Re yenidji Tobacco company ltd* (1916) 2 Ch 426; *Re Stevedoring (Nig) Ltd* (1962) ALL NLR 164.

¹⁶ *Re German Date Coffee Company* (1882) 20 Ch D 169; *Re Bleriot Manufacturing Aircraft Company Ltd* (1916) 32 TL 253. The court may invoke the provisions of section 408(e) where the substratum of a company had failed. The petitioner will need to establish that the object for which the company was formed has failed.

¹⁷ *Re Williams Brooks & Co. Ltd* (1962) NSWLR 142.

¹⁸ *Re Lundie Brothers* (1965) I WLR 1051.

Investigation of Company's Affairs

This constitutes extra-judicial remedy to minority shareholders by way of application to the Corporate Affairs Commission to appoint inspectors to investigate the affairs of the company. It is one of the new and unique innovations provided by CAMA to protect the rights of the minority shareholders and generally to ensure proper administration and management of the company.¹⁹ The background for the appointment of inspectors was well entrenched in the case of *Norwst Holst v Secretary for Trade*.²⁰ Lord Denning, also in *Wallersteiner v Moir*,²¹ restated the need for inspection of companies. His lordship was of the view that it is because companies are beyond the reach of ordinary individuals that this legislation has been passed so as to enable the Department of Trade to appoint inspectors to investigate the affairs of the company. Gower, on his own part opined thus:

It is now widely recognized in all countries that the only way of preventing impropriety in the management of corporate enterprise is to ensure effective supervision by some government agency. The idea that shareholders can be relied upon to supervise management and take effective steps to protect themselves is an anachronism... even if shareholders have the determination and the financial means they will often lack the inside knowledge of the facts which is needed before any legal action can be commenced. Accordingly, the tendency in all countries is to provide wide powers of investigation and inspection.²²

The inspectors may, and if directed by the Commission must, make interim reports to the Commission, and on conclusion of their investigation must make a final report to it. This report is of immense important to the minority shareholder. According to Pennington, its value is that:

It may reveal information about the company which individual members could not discover for themselves, or it may reveal irregularities in the management of the company's affairs about which its members or creditors were ignorant or had only vague suspicion, but the report obviously does itself not remedy any irregularities in the conduct of company's affairs which it discloses. Members may of course take the proceedings normally open to them for this purpose.²³

Again, a copy of the report certified by the Commission to be a true copy may be admissible in any legal proceedings as evidence of the inspector's opinion, but not of facts found by him.²⁴ In furtherance of this, section 321 of CAMA provides that if from the report made, it appears to the Commission that any civil proceeding ought, in the public interest, to be brought by the company, the Commission may itself bring such proceedings in the name and on behalf of the company. The Commission shall indemnify such company of any cost or expenses incurred in connection with that proceeding and such cost or expenses may be defrayed from the consolidated revenue fund. Also, the report shall be referred to the Attorney-General of the Federation who may direct the prosecution of the officer involved where it appears that any one has been implicated of any criminal offence. The Commission may also present a petition for winding up of the investigated company.²⁵ Notwithstanding, the importance of the appointment of inspectors to both the minority shareholders and the company, CAMA did not provide for the qualifications of persons to be appointed inspectors and as such, there is need to make provisions for the qualification of inspectors which will guide the commission in making such appointment.

¹⁹ U E Azu, 'Examination of Recent Trends in Corporate governance as it Affects the Majority Rule and the Minority Protection' (2010) 1(1) *International Journal of Advanced Legal Studies and Governance*, 87.

²⁰ (1978) 3 ALL ER. 280.

²¹ (1974) 3 ALL ER 217, 292.

²² Quoted in KD Fraser, 'Administrative powers of Investigation into Companies', (1971) 34 *MLR* 260.

²³ RR Pennington, *Pennington Company Law* (6thedn, London: Butterworths, 1990) p. 690.

²⁴ CAMA, s. 325(1).

²⁵ CAMA, s 323.

Alteration of the Objects of the Company

Companies are bound to operate within the objects listed in the memorandum of association. However, a company can change its objects by passing a special resolution.²⁶ Notwithstanding this, section 46(2) of the CAMA offers protection to minority shareholders. It provides to the effect that holders of not less than fifteen percent of nominal value of the issued share capital or company's debentures entitled to object to alterations of the memorandum may apply to court to oppose the amendment of the objects provided they did not vote in favor of the alteration. Thus, section 46(2) of the CAMA gives minority shareholders recourse when they are forced to contend with the voting power of the majority. It gives them the option to oppose the majority decision as the court may annul or vary the special resolution passed by the majority shareholders.

Variation of Class Rights

Where shares in a company are divided into separate classes, section 141 of CAMA makes provision for varying the rights of a class. The holders of at least fifteen percent of the issued shares of the class so varied may apply to the court to have the variation cancelled.²⁷ The applicants must not have consented to or voted in favour of the variation.²⁸ In essence, this provision allows minority shareholders who did not consent to or vote in favour of variation of class rights to petition the court for a cancellation of the variation. However, an unfavourable provision exists in the said section 141 of CAMA in that it requires shareholders holding not less than fifteen per cent of the issued shares of that class to apply to the court for cancellation of the variation. This threshold is high and the writer recommends that the threshold should be reduced to at least five percent especially as regards public company with dispersed membership.

Re - Registration as a Private Company

A public company may by special resolution be re-registered as a private company.²⁹ Holders of not less than five percent of the shares, or of any class of shares, or not less than five percent of the company's shareholders, may apply to the court to have the resolution cancelled.³⁰

Appraisal Remedy

Another protection afforded minority shareholder under CAMA is the introduction of appraisal remedy. Sections 130, 147(2) and 312 (2) (d) of CAMA give minority shareholders a way out of a company in cases of mergers, takeovers and oppression remedy. In essence, it gives the majority the right to control the company, while at the same time creating a means for the dissenting shareholders to exist. Thus, the remedy permit the business entity to continue, but do not permit the aggrieved minority shareholder to continue in the business. Although it guarantees that the minority shareholder receives fair value for his shares, problems of valuation and the loss of future earnings will place the departing minority shareholder in a disadvantageous position. As such, the writer recommends that CAMA should provide for a standard method of valuation of fair value so that both parties have a clear idea of the value of the said shares at about the time a demand for payment is made. Also, the basis for granting this remedy is few under Nigerian law and as such, the writer recommends that Nigeria should take a cue from the revised Chinese Company Law where there are provisions that give minority shareholders a way out of a company not only in cases of mergers, takeovers and oppression remedy but when they have voted against a shareholders' meeting resolution concerning matters which seriously affect a shareholders' rights or where dividends have been withheld.³¹

Other Minority Protection Measures

The other modes of protecting minority shareholders under the CAMA relates to the manner of holding general meetings and extra ordinary meetings. Members have a right to be given notice in advance of

²⁶*Ibid*, s 46(1)

²⁷*Ibid*, s 142 (1).

²⁸ *Ibid*.

²⁹CAMA, s 53(1) (a).

³⁰*Ibid*.

³¹ Chinese Company Law 2005, Article 75.

general meetings under Section 219 of CAMA. In the event there is failure to hold an annual general meeting in the prescribed period, any member of the company is empowered to apply to the Commission for direction.³² One of the directions to be given by the Commission would be for the member to constitute the meeting after issuing adequate notice in writing.³³ This gives a leeway to any member including a minority shareholder to discuss matters in the form of abuse on the minority. Section 215 (2) of CAMA also allows a member or members of the company representing not less than one tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, to convene an extra ordinary meeting. Furthermore, section 219 of CAMA grants members of a company certain rights that relate to notice of annual general meeting and resolutions thereof and failure to give such notice will invalidate the meeting.³⁴ Also members are entitled to attend and vote at the meeting including minority shareholders.³⁵ Unlike Nigeria, section 61(10) of the recent South Africa Companies Act³⁶ requires public companies to provide for electronic participation by shareholders in shareholder meetings by allowing shareholders and their proxies to participate by electronic communication in all or part of the shareholder meeting that is being held. This provision is commendable as it ensures that all those persons participating in the meeting are able to communicate concurrently with each other without an intermediary and also enables minority shareholders who may not be able to attend the meeting effectively participate in the meeting.

Furthermore, shareholders also have the right to vote on any resolution before the meeting.³⁷ This right is considered one of the rights of property inherent in the ownership of the share, and one of the basic tools that ensure the active participation of shareholders in determining the company's affairs and making decisions related to it.³⁸ Voting according to Section 224 of CAMA shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded. Poll voting is the alternative voting technique recognized by the CAMA. This implies voting according to shareholding. This system shuts the minority shareholders out from influencing company policy directions. In the event that a single individual is the majority shareholder, he/she elects to the board, members loyal to him/her and wields unlimited control over the company. Other countries³⁹ have adopted a system of voting that actually protects the interests of minority shareholders especially in the election of the board of directors. This system of voting known as cumulative voting allows a shareholder to multiply the number of votes he/she has, as determined by the number of shares he holds, by the number of directors to be elected and to cast all his votes for any one candidate or distribute his votes among the candidates in any way he chooses⁴⁰ The core distinction is that each shareholder has right to divide his/her votes between the candidates or cast all votes for a single candidate. This is not allowed in poll voting. That is why in case of poll voting the majority will be able to elect all their candidates for the board. In any event, in cumulative voting the minority shareholders have potential opportunity to elect their candidates to the board by uniting all their votes. Sadly, there is no room for cumulative voting under the CAMA. The consequence of this is that the majority shareholders actually retain the unilateral power to appoint the directors. There is virtually no chance for minority shareholders to vote their representatives to the board of directors. Without cumulative voting, it would be much easier to ignore the minorities. It is therefore recommended that Nigeria amend her CAMA to provide for mandatory cumulative voting especially in the appointment of directors.

³² CAMA, s 213 (2).

³³ *Ibid.*

³⁴ *Ibid.*, s 221.

³⁵ *Ibid.*, s 86

³⁶ South Africa Companies Act 71 of 2008

³⁷ CAMA, s 81.

³⁸ M A Helalat, 'Protection of Shareholders Minority in Joint Stock Company Pursuant to Jordan Companies Law' (2016) 9 *Journal of Politics and Law*, 25.

³⁹ Countries like China, USA etc.

⁴⁰ H Weiguo, 'Improving the Protection of Minority Shareholders in Chinese Company Law' [http://www.nigerianlawguru.com/articles/companylaw/PROTECTION OF](http://www.nigerianlawguru.com/articles/companylaw/PROTECTION%20OF) accessed on 20 January, 2017.

Derivative Action

Another mode of minority protection under CAMA is the right to bring an action on behalf of the company.⁴¹ However, this derivative action is available only against directors who are in control of the company.⁴² In essence, it cannot be brought against former directors, shadow directors or even a third party. The writer is of the opinion that it is desirable that a claim against both former and shadow directors and even a third party should be permitted in certain circumstances.⁴³

Again, Minority shareholders may make certain disclosures concerning inactions of the directors or even the employees of the company. In such circumstance CAMA do not make a provision protecting the minority making such disclosures. However, under section 159 of the South Africa Companies Act⁴⁴ there is a remedy to protect the whistle blowers. The gist of this provision is to afford minority shareholders protection for making certain disclosures. There is no such provision under the Nigerian Law. It is therefore recommended that Nigeria should amend her CAMA to provide for protection for whistle blowers.

4. Shortcomings in the CAMA

No Cumulative Voting

There is no room for cumulative voting in CAMA. The consequences of this omission is that the majority shareholders actually retain the unilateral power to appoint the directors. There is virtually no chance for minority shareholders to vote their representatives to the board of directors. Although it should be true that all the directors, whether chosen by majority shareholders or by minority shareholders, should act for the best interest of the corporation, there is no denying that the directors chosen by minority shareholders will be less likely to work partially for the interest of majority shareholders.

Lack of Provision for Board of Supervisors

A relevant provision which is also missing in CAMA is that of board of supervisors to supervise the activities of the directors which are provided for in Chinese Company Law.⁴⁵

Limited Basis for Appraisal Remedy

The basis for granting appraisal remedy under CAMA is limited unlike in China and South Africa where such remedies can be granted in circumstances such as:

- (a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares;
- (b) the disposal of all or the greater part of the assets or undertaking of a company;
- (c) the conclusion by a company of a transaction of amalgamation or merger;
- (d) a scheme of Arrangement.⁴⁶

Lack of Protection for Whistleblowers

There is no protection in CAMA for whistleblowers. The gist of this omission is that minority shareholders are not protected for making certain disclosures.

⁴¹CAMA, s. 303.

⁴²*Ibid*

⁴³ For instance, where by reason of a breach of duty by the director, a third party has come into possession of property of the company which it should be required to hand back or where the director has acted in cohorts with a third party.

⁴⁴South Africa Companies Act 71 of 2008.

⁴⁵Articles 52 & 118.

⁴⁶ S. 164 of South Africa Companies Act of 2008; article 75 of Chinese Company Law 2005.

5. Conclusion and Recommendations

The principle of majority rule is, no doubt, a democratic corporate rule that seek in principle to maintain equilibrium amongst shareholders in terms of their varying shareholding strength. Traditionally, the principle applied strictly in favour of the majority shareholders who hold the greater of the equity shareholding relative to the populous impressionable ordinary shareholders who constitute the minority. The unpalatable consequence is that the minority are only seen and not heard as their opinions are destined to defeat each time company resolutions are taken at the polls. However, contemporary developments in corporate governance have swayed to mitigate the frustrations posed to the minority with the result that at specific circumstances, the minority could sue the company despite contrary opinions of the majority. Thus, the writer can safely say that the generous protection given to the selfish and unfair exercise of power by the majority shareholders has been removed by CAMA. That a company is a proper plaintiff is no longer an absolute truism, the court can now listen to non-controlling shareholders about the way the Company's affairs are run and not bother about the doctrine of non-interference in the internal affairs of companies. The domain of the company majority has therefore been considerably reduced in favour of the minority shareholders. Notwithstanding, the writer recommends the provision of mandatory cumulative voting especially in the appointment of directors, imposition of fiduciary duty on the majority shareholders, education of Shareholders by SEC which will keep the shareholders, especially minority shareholders well informed of their rights and remedies available to them where such rights have been abused. There is also need to provide for Broader Bases for Buyout Remedies. CAMA should also provide for establishment of board of supervisors by companies to exercise supervision over the performance by the directors, to initiate legal proceedings against any director and perform other functions and powers as may be provided for in the articles of association of the company. And those necessary expenses the board of supervisors may incur in connection with the exercise of its functions and powers shall be borne by the company and also provision for the protection of whistle blowers. This will afford minority shareholders protection for making certain disclosures.