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LAW
REVIEW

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VOLUME 4, NO. 2 (2021)

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ABSTRACT

The purpose of every statute or law promulgated is to ensure the overall welfare of the generality or a class of the public. It is therefore deducible, that where a statute no longer serves this primary purpose, it is in the best interest of the society and of justice that such law is either repealed or should be re-enacted with the necessary modifications that will suit the society's need. In a nutshell, this was the problem with the former Companies and Allied Matters Act (1990), which has now been repealed by the Companies and Allied Matters Act (2020).

Keywords: Statute, Repealed, Re-enacted, Companies and Allied Matters Act, Corporate Governance.

1.0. INTRODUCTION

By means of introduction, Nigeria is said to have the largest economy in Africa.¹ This, unfortunately, has not translated into Nigeria being a conducive environment to operate a business for a number of reasons; ranging from economic insecurities to poor state of social amenities, political issues, and lack of adequate laws to govern businesses and ensure the ease of operating a business within the country. Accordingly, the World Bank Doing Business Rankings for the year 2020² ranked Nigeria 131 out of 190 countries. One of the variables

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¹ P. Naidoo, "Nigeria Tops South Africa as the Continent's Biggest Economy", available at <https://www.bloomberg.com/news/articles/2020-03-03/nigeria-now-tops-south-africa-as-the-continent-s-biggest-economy> (accessed 12 August 2020).

² World Bank, "Ease of Doing Business in Nigeria", available at <https://www.doingbusiness.org/en/data/exploreconomies/nigeria> (accessed 12 August 2020).

used was the relative ease or otherwise of doing business in Nigeria, and the country was ranked 105 out of 190 countries in this regard.

On 7 August 2020, President Muhammadu Buhari assented to the Companies and Allied Matters Act (2020)³ which repealed and replaced the Companies Allied Matters Act (1990) that had been in force for more than 20 years with little modifications. This new Act contains provisions that would improve the ease of doing business in Nigeria and thus serve as a reassuring commitment of the Federal Government to remain abreast of the ever-changing business and economic culture. The purpose of this essay is to provide a comprehensive insight into the newly enacted Act, citing the major legal and economic impact of the Act *viz-a-viz* the Repealed Act. CAMA 2020 has seven parts and 870 Sections as opposed to the Repealed Act which had 696 Sections and four parts. The parts of CAMA 2020 are as follows:

Part A: CORPORATE AFFAIRS COMMISSIONS

Part B: INCORPORATION OF COMPANIES AND INCIDENTAL MATTERS

Part C: THE LIMITED LIABILITY PARTNERSHIP

Part D: THE LIMITED PARTNERSHIP

Part E: BUSINESS NAMES

Part F: INCORPORATED TRUSTEES

Part G: GENERAL.

2.0. KEY HIGHLIGHTS OF THE ACT

2.1. Partnerships

New Corporate structures have been introduced into Nigerian Corporate law. These are Limited Partnerships (LP) and Limited

³ The Companies and Allied Matters Act (CAMA) 2020 shall herein be referred to as “The Act” or “CAMA 2020”. While the Companies and Allied Matters Act 1990 shall subsequently be referred to “Former Act”, “Repealed Act” or “CAMA 1990”.

Liability Partnerships⁴ (LLP). These new legal entities will provide more options for investors seeking to structure their holdings in Nigerian businesses as well as venture capital and private equity fund managers who adopt such structures for their investment funds.

2.2. Provision of Single Member/Shareholder Companies

Prior to the enactment of CAMA 2020, a company required a minimum of two directors and shareholders to operate. This constituted a major challenge to SMEs which operated as sole proprietorships and often resulted in the inclusion of passive owners or participants for the sake of compliance. Consequent to section 18(2) of the CAMA 2020, it is now possible to have single shareholder or single director companies; an option that is available to small companies.⁵ These provisions would make it possible for single-member/director companies operating as sole proprietors to register a company without the need to bring in new directors/owners upon incorporation and continue to operate as before, and with the advantages of limited liability and access to credit. However, it is important to note that private companies that do not qualify as small companies can have a single shareholder but such a company must have at least two directors, pursuant to section 27(1).

2.3. The Definitions of Small Companies

The Act has a new qualification for a small company by increasing the threshold of turnover and net asset. Prior to the enactment of CAMA 2020, a small company is a private company which has a turnover of not more than ₦2,000,000 (Two Million Naira); has net assets of not more than ₦1,000,000 (One Million Naira), among other criteria. Under the new CAMA 2020, a small company is a company that in addition to other criteria, has a turnover of not more than ₦120,000,000 (One Hundred and Twenty Million Naira) and net assets of not more than ₦65,000,000 (Sixty-Five Million Naira).⁶ The additional benefits that small companies enjoy are that they do not

⁴ CAMA 2020 Part D, ss. 795-810.

⁵ CAMA 2020, s. 27(1).

⁶ CAMA 2020, s. (3)(b) and (c).

have to hold annual general meetings,⁷ appoint auditors,⁸ or a company secretary.⁹

2.4. Electronic Innovations

CAMA 2020 contains several innovative provisions that reflect the realities of conducting business in this modern era. Section 731(2) of the Act provides that company records can be maintained in electronic format. Section 175(1) makes provision for electronic share transfer forms. Additionally, a private company may now hold its general meetings electronically, provided that such meetings are conducted in accordance with the articles of the company.¹⁰ This in particular is long overdue, considering the fact that the ongoing pandemic has made companies and even courts resort to virtual meetings and proceedings. This will facilitate participation at such meetings from any location within and outside the shores of the country, at minimal costs. Under the previous CAMA, annual general meetings must be physically held, which presented some form of inconvenience for directors and shareholders who reside at a distant location.

2.5. Share capital, Shareholder and Shares

The concept of “authorized share capital” has been removed in the CAMA 2020. Instead, companies are now required to ensure that they maintain issued share capital required under the CAMA 2020 and that a quarter of their issued share capital is paid up as provided under section 128(1). The importance of this amendment is that the share capital of the company would reflect a true state of affairs with regards to the capital of the company that has been issued and paid-up, as the concept of authorized share capital did not reflect this. With minimum share capital, promoter(s) of a business need not pay for shares that are not needed at a specific time. The minimum issued share capital

⁷ CAMA 2020, s. 237(1).

⁸ CAMA 2020, s. 402(1)(b).

⁹ CAMA 2020, s. 330.

¹⁰ CAMA 2020, s. 244(3).

for private companies is ₦100,000 (One Hundred Thousand Naira) while for public companies it is ₦2,000,000 (Two Million Naira).

Furthermore, CAMA 2020 has implemented key changes in relation to the sale of shares or assets of private companies in section 22(2)(a)-(c). Firstly, in order to transfer shares in a private company, the shareholder intending to sell must first offer the shares to the existing shareholders before the shares can be offered to a third party. Secondly, according to the new CAMA 2020, shareholders cannot sell more than 50% of the shares of a private company to a buyer who is not a shareholder unless that buyer has offered to acquire the shares of the remaining shareholders on the same terms.

Additionally, by virtue of section 184 of the CAMA 2020, companies may now buy back their shares from existing shareholders either through a scheme, on the open market or from the company's option scheme. It should be noted that the company's Articles of Association must permit the share buyback and it will have to be approved by a special resolution. Only shares that are fully paid up can be acquired by the company and the share buyback may only be funded from the company's distributable profits. The acquisition must be published in the newspapers, and creditors or aggrieved shareholders may file an action in court to cancel the resolution. However, a company will not be permitted to buy back its shares if, after doing so, all other issued shares of the company will be redeemable shares or treasury shares.

Another major change in the CAMA 2020 with regards to shares is treasury shares. These are shares that are previously issued shares of the company that it acquired from its shareholders. The old CAMA referred to this concept in its second schedule (Format of Balance Sheets), but there were no provisions regulating it.¹¹ CAMA 2020 recognizes this concept, defines it, and provides what a company can do with such shares under section 868. However, section 187 of the Act provides that a company cannot hold more than 15% of its issued share capital as treasury shares.

¹¹ CAMA 1990, Second Schedule, s. 13.

The restriction contained in the provisions of section 86 of the Old CAMA prohibits the entry of a notice of trusts over shares in the register of members or the records of the Corporate Affairs Commission (CAC). This restriction is not contained in the CAMA 2020. The consequent effect of this is that trust arrangements in relation to shares may now be formally recognized by companies and recorded in the register of members as well as the records of the CAC.

The CAMA 2020 revisited the concept of share buyback as a corporate management tool. According to section 184 of the new CAMA 2020, companies may now buy back their shares from existing shareholders either pursuant to a scheme or on the open market or from the company's employee stock option scheme, subject to certain conditions. However, the company's Articles of Association must allow for a share buyback and must be approved by a special resolution.

2.6. Corporate Governance and Multiple Directorships

The CAMA 2020 introduces certain corporate governance requirements. Firstly, the chairman of a public company is not permitted to act as the Chief Executive Officer of that company pursuant to section 265(6). Additionally, public companies are now required to have at least 3 independent directors, following other criteria contained in section 275; in the two years preceding their nomination as an independent director, the relevant director and/or such director's relative(s) must not have:

- a. Been an employee of the company;
- b. Made or received payments from the company exceeding ₦20 million (Twenty Million Naira) nor owned, either directly or indirectly more than 30% of the shares of an entity that received such a payment from the public company;
- c. Been engaged, either directly or indirectly as an auditor of the company.

Another key amendment with regards to corporate governance is with respect to the restrictions on multiple directorships of public companies. According to section 307 of CAMA 2020, no person can

be a director in more than 5 public companies at once. Any person who is currently a director in more than 5 public companies is required to resign from being a director of all but five 5 of those companies, as five public companies is the maximum number that a person may hold directorship in. The Act further provides that the resignation should be done within two years from the commencement of the Act. For instance, if a person is a director of eight (8) public companies, such a person would be required by law to resign from three (3) of the 8 companies. Lastly, CAMA 2020 retains the procedure for the removal of directors contained in the repealed CAMA but with a twist. Under the new CAMA 2020, directors who are suspended or removed in a general meeting of the company pursuant to section 288 will be disqualified from being directors of other companies. With respect to small companies, the CAMA 2020 provides in section 271(1) that small companies can operate with one director. This improves the practicality of bringing SMEs within the formal sector of the economy.

2.7. Framework for Implementing Mergers

Nigeria, over the years, has housed some of the biggest mergers in Africa. On this basis, the CAMA 2020 provides under section 711 for a framework for implementing mergers or other forms of arrangement or reconstruction between two or more companies. Under this framework, when the transaction is approved through voting by at least three-quarter in value of the shares held by shareholders present at the separate meetings ordered by the court, the merger therefore becomes binding on the companies even before the court sanction is filed at the CAC.¹² The court sanction must, however, be filed at the CAC within 7 days.

It is pertinent to note that CAMA 2020 does not make it mandatory to refer the scheme to the Securities and Exchange Commission (SEC) to consider the fairness of the scheme. However, schemes made under the provisions of section 715 can be referred by the court to the SEC to determine the fairness or otherwise of such scheme.¹³

¹² CAMA 2020, s. 711(1)-(3).

¹³ CAMA 2020, s.715(2).

Further, schemes made under section 715 are not effective until the order of the court sanctioning the scheme is filed at the CAC. Where there is a default in this regard, the company and each of the officers of that company are liable to a penalty.¹⁴

3.0. OTHER PROVISIONS

3.1. Common Seal

The procurement of a common seal is no longer mandatory as opposed to section 98 of the repealed CAMA. The amendment is in line with international best practices as most jurisdictions around the world have expunged the requirement from their respective laws.

3.2. Company Secretaries

The role of company secretaries has evolved over the years. The repealed CAMA made it compulsory for every company, public or private, to have a company secretary. Basically, a company secretary owes a duty to the management, board of directors, shareholders, and the company in general. However, the CAMA 2020, under section 329, exempts all small companies from the requirement to have a company secretary and restricts it to public companies. Additionally, private companies do not need to keep a register of secretaries as required under the repealed CAMA. CAMA 2020, however, includes provision which require all companies, including small companies, to file annual returns which are to be filed along with a certificate signed by a director and a company secretary.

3.3. Business Rescue Provisions for Insolvent Companies

CAMA 2020 introduces a framework for rescuing a company in distress and to keep it alive as against allowing such entity to become insolvent. Provisions were made with respect to Company Voluntary Arrangements,¹⁵ Administration,¹⁶ and Netting.¹⁷

¹⁴ CAMA 2020, s. 715(4) and (5).

¹⁵ CAMA 2020, ss. 434-442.

¹⁶ CAMA 2020, ss. 443-549.

¹⁷ CAMA 2020, ss. 718-721.

3.4. Disclosures of Persons with Substantial Control

CAMA 2020 makes provision for disclosure of persons with significant voting rights (persons who have more than 5% of voting rights) in public and private companies,¹⁸ as well as LLPs.¹⁹ The Act also provides that the CAC will maintain a register of such persons with significant voting rights, which will contain the information received from companies, thereby discouraging asset shielding and encouraging transparency.

3.5. Reduction of Filing fees for Securities

In the repealed CAMA, the CAC filing fee for registering security interests was 1% of the secured amount for private companies and 2% for public companies. However, according to section 222(12) of the new CAMA 2020, the filing fees for securities cannot be more than 0.35% of the secured amount. This is a 65% reduction for private companies and an 82.5% reduction for public companies. The effect of this cannot be overstated as the regulatory cost in relation to the creation of security for debt financing was way too significant under the repealed CAMA.

3.6. Incorporation of Company Limited by Guarantee

CAMA 2020, in section 26 provides for Companies Limited by Guarantee. A major amendment here is that under CAMA 2020 a Company Limited by Guarantee can be incorporated without the consent of the Attorney General of the Federation (AGF) when all necessary documentation has been made furnished to the AGF and no decision has been made within a 30-day period. The promoters of such company shall place an advert in three national newspapers and invite objections.²⁰ In the event of objections, the CAC may either request further documentation from the applicant or may uphold or reject such objection.²¹ Where there is no objection at all or no subsequent objection, the CAC upon being satisfied with the memorandum and

¹⁸ CAMA 2020, s. 119.

¹⁹ CAMA 2020, s. 791.

²⁰ CAMA 2020, s. 26(7)(a) and (b).

²¹ CAMA 2020, s. 27(c).

articles of association, shall register the company and issue a certificate of incorporation.²² In consonance with recent economic realities, the minimum amount stipulated in the memorandum of association which should be contributed by the members to the assets in the event of the company's wound up has been increased to ₦100,000 (One Hundred Thousand Naira) from ₦10,000 (Ten Thousand Naira).²³

4.0. EMERGING ISSUES WITH THE CAMA 2020

Despite the vital modifications and advancements brought about by the newly enacted CAMA 2020, certain contentious issues have arisen or are predicted to arise. The major issues will be discussed herein.

4.1. Regulations of Non-Governmental Organizations (NGOs)

NGOs (religious bodies inclusive) under the repealed CAMA were classified as corporate bodies in section 673. Further, section 608 of the repealed CAMA provided that an NGO shall be dissolved by the court on a petition brought in this light by the governing board, trustees, members of the CAC on the ground that; first, it has realized its purpose; or it has become time-barred; or the purpose of such NGO has become illegal or contrary to public policy; and it has become just and equitable to dissolve such body. It is pertinent to note, that the repealed CAMA, in section 593, provides that where contributions are collected, the account of such an NGO must be audited.

CAMA 2020, however, provides in section 839 that the CAC shall upon the order of the court, suspend trustees of an association and appoint an interim manager to manage the affairs of the association where it is reasonably believed that there has been misconduct or mismanagement in the administration of the association; or it is necessary in order to protect the property of the association, achieve the object of the association or the purpose of the property of the

²² CAMA 2020, s. 26(8)-(10).

²³ CAMA 2020, s. 27(4).

association or it is in the interest of the public, or the affairs of the association is being run fraudulently.

Though this provision is in accordance with the best international practices, it has sparked a lot of controversies. The Christian Association of Nigeria in rejecting this provision noted that such provision “would snuff life out of the church and rank the church as a secular institution under secular control”.²⁴ The body further described the provision of section 839 *inter-alia* as “satanic”, “ungodly” and “reprehensible”. The authors are of the opinion that this provision is simply in the best interest of justice and the public at large. All corporate bodies must be subject to the regulations and control of governmental bodies and the law.

4.2. Instituting an Action against the Corporate Affairs Commission

CAMA 2020 provides in section 17 that a suit shall not be commenced against the Commission before the expiration of 30 days after a written notice of intention to commence the suit is served on the Commission by the intending plaintiff. In other words, an action cannot be brought against the Commission if a 30-day Pre-Action notice has not been served on the institution. This provision has been misconstrued to mean that an action cannot be brought against the Commission. This line of thought is utterly false; in that an action can only be brought successfully against the Commission once a Pre-Action notice consistent with the provisions of the Act has been served on the Commission.²⁵

It is worthy to note, that the concept of Pre-Action notice is not alien to Nigerian statutes and this requirement is also present in the Acts governing the operations of the Nigerian Agency for Food and Drug Administration Control (NAFDAC),²⁶ the Nigerian Ports Authority

²⁴ K. Oyero, “CAN Rejects CAMA, Says Govt Cannot Control Churches”, available at <https://punchng.com/can-rejects-cama-says-govt-cannot-control-churches/> (accessed 24 August 2020).

²⁵ CAMA 2020, s.17(1)-(2).

²⁶ S. 27(1), National Agency for Food and Drug Administration and Control (NAFDAC) Act, Cap. N1 Laws of the Federation of Nigeria (LFN) 2004.

(NPA),²⁷ the Nigerian National Petroleum Corporation (NNPC)²⁸ only to mention a few.

Accordingly, the CAC, just like other governmental bodies, is a legal entity which can sue and be sued in so far as the stipulated conditions are met.

4.3. The Express Inclusion of Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN)

The provisions of sections 705 and 707 seem to put BRIPAN in a more favourable position than other Commissions. CAMA 2020 provides that a person is only qualified as an insolvency practitioner where he obtains a degree in law, accountancy or other relevant disciplines; has a minimum of five years post qualification experience; has been certified either by BRIPAN or any other professional body recognized by the Commission; and holds an authorization granted by the Commission²⁹. The Act further provides that the Commission may declare and recognize a body once its members are permitted under the rules to act as insolvency practitioners; are fit and proper persons to act; and meet the requirement as to education and practical training³⁰. An application, therefore, made to the Commission to become an insolvency practitioner must be made in line with the manner stipulated by the Commission; be accompanied by a certificate issued by BRIPAN or any other professional body approved; and the prescribed fee must be accompanied with the application.³¹

The main bone of contention here is why BRIPAN, a private company limited by guarantee,³² should be expressly stated by the Act as a recognized body that insolvency practitioners should be registered under. Though the Act then further states that any other professional body recognized by the Commission shall have members practice as

²⁷ S. 92, Nigerian Ports Authority (NPA) Act, Cap. N126 LFN 2004.

²⁸ S. 12, Nigerian National Petroleum Corporation (NNPC) Act, Cap. N123 LFN 2004.

²⁹ CAMA 2020, s. 705(1).

³⁰ CAMA 2020, s. 706(1)-(2).

³¹ CAMA 2020, s. 707(1)-(2).

³² CAMA 2020, s. 26(1).

insolvency practitioners, the condition that such body is subject to recognition and approval by the Commission clearly gives BRIPAN the upper hand.

This has warranted some to accuse the lawmakers of being guilty of legislative cronyism by expressly naming BRIPAN as one of the government recognized body not subject to approval by the CAC.³³

5.0. CONCLUSION

There is no doubt that the CAMA 2020 has largely lived up to the expectation of the Nigerian business community as the innovations in the Act are ambitious and serve as a reflection of the assurance of the Federal Government to ease the means of doing business in Nigeria and creating an environment where small businesses can thrive and grow. Though the new Act has not been entirely free from criticism, it is a familiar lesson of history that the success or otherwise of any Statute lies in the judiciary, for good laws with a corrupt legal system shall lead to abrupt destruction and chaos and bad laws with a fair and just legal system shall promote peace and development.

³³ Nairametrics, “Explainer: The 5 Allegations against CAMA”, available at <https://nairametrics.com/2020/08/20/explainer-the-5-allegations-against-cama/> (accessed 25 August 2020).