

# The Rising Profile of a Promoter in the Life of A Company: The Nigerian view point

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## Abstract

The article examined the fact that a company is brought into existence through the activities of persons called the promoters, who take various steps necessary for the establishment of the company. They painstakingly undertake to assemble relevant documents to get the company operational. The Companies and Allied Matters Act of Nigeria 2014, has made it mandatory though with certain exceptions, that for a syndicate of more than twenty persons to be carrying out any business for profit or gain it must be registered as a company under the Act. In this wise, text books, text writers, cases both reported and unreported were consulted. The article sought to argue that the promotion of a company is usually a preliminary incidental to the formation of the company, and as such contributes to the growth, enlargement or prosperity of a particular company by encouraging its advancement with the consciousness of the concept of corporate governance as obtainable in more advanced economies. The article argued further that the promoter remains a human agent, whose activities often give birth to the company as a legal entity.

**Keywords:** Promoter, legal entity, incidental, corporate personality, advancement.

## Introduction

The term "Promoter" has received judicial interpretation in the case of *Garba vs. Sheda International (Nig) Ltd.* (2002, FWLR, pt.113 at245) A promoter is equally defined by section 61 of the Companies and Allied Matters Act of Nigeria (2004) to wit: any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who with regard to a proposed or newly formed company under takes a part in raising capital for it, shall, *prima facie* be deemed a promoter of the company. This was equally the holding by Cockburn C.J in *Twycross v. Grant* (1877, 2QD, 409) However, persons acting in a professional capacity for persons engaged in procuring the formation of the company such as accountants; legal practitioners; acting in that professional capacity are by the proviso of the section of companies and allied matters be deemed or seen as promoters. Promoters in essence are therefore person engaged in procuring the formation of the company for which they have; and share an interest. (Inyang:1999:12)

## WHO THEN IS A PROMOTER?

The term promoter is construed to include persons who assist in the formation of a company and set it going; for example those that negotiate an agreement for the purchase or otherwise acquiring property for the company to be formed, those issuing prospectus or agreeing to place shares, those that agree to subscribe to the memorandum of association of the company as members. In the words of Orojo (2008:71), the best known type or specie of promoter in Nigeria is the trader or businessman who decides to form a company for the purpose of running his existing business or starting a new one in which he is the major shareholder. This then means that the time a person becomes a promoter is a question of fact depending on whether he took any part in forming a company and or setting it going. (Charles Wild & Stuart Weistein, 2009:45). In *Tyrrel v. Bank of London* (1862, 10HL, case 26), it was held that a solicitor may, of course, become a promoter in some other capacity such as where he joined with another to negotiate property for the proposed company at a profit.

## ROLES OF PROMOTERS

A promoter as preliminary incidental to the formation of a company usually engages in deciding the name, object, capital, and extent of liability of each member, the situation of the company's registered office, and to incorporate this decision in the memorandum of association. He equally draws up the rules for the internal management of the company and arranged to embody it in the articles of association of the company and arranges for the printing of same. The promoter also nominates who the first directors are which in most cases are themselves, the auditors, bankers and even the company secretary. The company's director and or secretary nominated are those that would be responsible for the signing of most of the pre-incorporation documents meant for registration.

Equally, the promoter prepares, print and issue prospectus where the company is a public company in a bid to raise capitals for the effective takeoff and management of the business, and finally goes ahead to register or ensure the registration of the company. (Parrins, Jefferys:1975). Ordinarily, a promoter will usually be in some

sort of controlling position with regard to the company's affairs, both before and after it is formed and during the early stages of its existence and will be in a position analogous to that of a director during that period. Charles (2009:45) asserted that basically, a promoter is a person who promotes a business project through the medium of a company. Ogbuanya(2010:171), asserts that such a person could be a solicitor and if such a professional is interested in the new company personally, he is deemed to be a promoter even if he rendered professional services. Consequently, his promotion activities would subsume his professional service and he would be deemed to be a promoter and subjected to the duties and liabilities of a promoter. In the words of Bowen J in *Whaley Bridge Printing Co. v. Green(1880,3QBD,109)*, the term promoter is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In *Garba v. Sheba International Co.* (2002,1NWLR(pt.748,372 at 401), the court held that a promoter is neither an agent of nor a trustee of the company but he occupies a fiduciary position to the company. He must account to the company for any money he receives as a promoter.

### **POSITION OF A PROMOTER:**

Section 612 (1) of the Companies and Allied Matters Act, placed the promoter in a fiduciary position in its relation with the company sort to be formed with third parties, although not seen as an agent of the company, and owes the company utmost good faith and duty to disclose any profit made, and interest had in its dealings with and in relation to the company. Thou all the transactions the promoter enters with third party on behalf of the company with the aim of floating the formation, registration and eventual incorporation of the company; such transactions referred to by the marginal notes of Companies and Allied Matters Act as pre-incorporation contract; binds the company upon it being incorporated as the company then attains a distinct personality different from that of the promoters Section 62 (3) Companies and Allied Matters act allows for ratification of such transaction if entered on behalf of the company by such a promoter after a full disclosure of all material facts known to the promoter in respect of the transaction to the company.

### **COMPANY FORMATION**

The Company and Allied Matters Act (2004) is the statutory threshold of company promotion, formation, registration and incorporation in Nigeria. It provides the legal framework for not only the promotion of a company, but equally the formation; registration; incorporation and protection of the company and its members specifically. Therefore, before a company is incorporated with the Corporate Affairs Commission which is the point in time it becomes a distinct legal entity, and only then can it exercise the function of a legal person, the leeway for its formation is usually carried out by persons; natural or artificial; that share that interest for its formation.

The Company and Allied Matters Act vest in the Corporate Affairs Commission (CAC) the duty of regulating and supervision of the formation, registration and incorporation; among others; of companies, whilst the right to form and incorporate a company by persons who so desire is equally guaranteed under Section 18 of the Company and Allied Matter Act, subject however to certain requirements with respect to registration of such a company as stipulated in Act. Some of the requirements are stipulated in section.20 (1) of Companies and Allied Matters Act, which include that such an individual willing to form a company shall: -

- a) Not be less than 18 years of age; or
- b) Not be of un-sound mind and has been so found by a court in Nigeria or elsewhere
- c) Not be an un-discharged bankrupt.
- d) Not be disqualified under section 254 of the Act from being a director of a company, and section. 254 of the Act are to the effect that:-
  - a) Where a person is convicted by a High Court of any offence in Connection with the promotion, formation or management of a Company, or in the course of winding up of company it appears that a person:-
    - i. Has been guilty of any offence for which he is liable whether he has been convicted or not under Section. 513 of this Act or
    - ii. Has otherwise been guilty while an officer of the company of any fraud in relation to the company or any breach of his duty to the company cannot partake in the promotion, formation or management of yet another company.

However, section 20 (2) of the Companies and Allied Matters Act permits a person who is less than 18 years of age to partake in the formation of a company if two others persons not disqualified under the Act have subscribed to the memorandum of the company sort to be formed as members.( Section79(1) Companies and Allied Matters Act,2004)Equally, in the formation of a company the kind of company to be formed must be

taken into consideration as the provision of the law in respect of the requirements to be met by the two kinds of company differs. A company being incorporated it may either be a private or a public company.

As regards a private company, its minimum number of members shall not be less than two and shall not exceed fifty; though not including persons in the employment of the company or persons who while in the employment of the company were members of the company and have continued to be a member even after the determination of that employment. The minimum share capital of the company shall not be less than N10, 000 where the company is limited by shares, and ascribed by its members, although the law enjoins it to restrict the transfer of its shares whereas, as regards a public company, the minimum number of members is seven and the authorized share capital shall not be less than N500, 000.

A private company is that which its Memorandum of Association so states whilst a public company is that other than a private company and stated in the Memorandum of Association of the company as a public company.

## REGISTRATION

The Corporate Affairs Commission carries out registration of a company in accordance with the provision of the Section 35 and 36 of the Companies and Allied Matters Act. Section 35 (2) a-e and subsection 3 provides for incorporation documents that are to be delivered to the corporate affairs commission by a company seeking registration in Nigeria. The incorporation document includes:

- a) Memorandum and Article of Association of the proposed seeking to be registered,
- b) The notice of the address of the registered offices of the company and the head office if different from the head office. But not a post box address or a private bag address as provided by the provision of Section 35 (2) (b) CAMA.
- c) A statement in the prescribed form containing the list and particulars together with the consent of the person who are to be the first directors of the company. These list practical sense, of a person who are to be saved as the first directors are usually those of the promoters who come together to as a syndicate to incorporate the company, in a bid to protect their business having regards to the eminent position of direction in the arrangement of the business as the number and names of the first directors are determined in writing by the subscribers of the memorandum of association or a majority of them. The directors may be named in the article of association, and these subscribers of the memorandum of association who happen to be the first members of the company are usually the promoters otherwise called the investors in the proposed incorporate company.
- d) A statement of the authorized share capital signed by at least one director.
- e) Any other document required by the corporate affairs commission to satisfy the requirement of any law relating to formation of a company and
- f) A statutory declaration in the prescribed form by a legal practitioner that those requirements of the company and other matters for the registration of the company have been complied with is to be produced. Upon the presentation of the document and the payment of the necessary fees at both the Corporate Affairs Commission and the stamp duty office, the commission shall then register the company after satisfying itself that:
  - A. The provisions of the Company and Allied Matters Act has been complied with.
  - B. That the business or object for which the company sought to be registered is not illegal.
  - C. That any of the subscribers of memorandum of association of the company sought to be registered is not incompetent or disqualified in accordance with Section 20 of the Act.
  - D. That there is compliance with the requirement of any other law as it relates to registration and incorporation of the company.
  - E. That the proposed name a company is sought to be registered with does not conflict or is likely to conflict with an already existing trademark or business name registered in Nigeria.

Note that in practice, other than the Memorandum and Article of Association, all other incorporation documents are obtained from the corporate Affairs Commission after the payment of the prescribed fee of N500.

By the provision of section 36 (5) Companies and Allied Matters Act, it is upon registration of the memorandum and article of association of the company along side other incorporation document that the Corporate Affairs Commission certify under its seal that the company is incorporated, and a certificate of incorporation shall be issued in the name of the company under the hand of the registrar of the commission. The issuance of the certificate of incorporation is a *prima facie* evidence that all the requirements in relation to registration of a company under the Act has been complied with, and on the date of incorporation; which is in most cases written on the certificate of incorporation; the subscribers of the memorandum together with such other persons who might later become members of the company shall then become a body corporate (corporate syndicate) not in their individual names but in the name contained in the memorandum as the name of the company, now having a distinct legal personality being a recognized entity, from its members, and although seen as an artificial person it performs the functions of a natural person in the eye of the law which include the power to hold properties, the power to sue and be sued in its own name.

Suffice it therefore to said, that registration entails the filing of all the incorporation documents at the Corporate 'Affairs Commission and paying the necessary fees as an application for incorporation, awaiting the action of the Registrar of the commission in respect of incorporating the company.

### **INCORPORATION OF THE COMPANY**

As already stated, upon the issuance of a certificate of incorporation of business as a company under the hand and seal of the Corporate Affairs Commission by the registrar of the Commission, the company is incorporated and attains, a personality quiet distinct from those that aided in its formation whom are the promoters and in most cases eventually become the subscribers of the Memorandum of Association known as the legal personality of a company being distinct from its members, and this has received judicial notification first in the case of *Salomon V Salomon & Co. Ltd*, (1897,AC,22)where in Lord Macnaghten held that the company is at law different person all together from the subscriber to the memorandum, although it may be that after incorporation business is precisely he same as it was before, and the same persons and managers and the same hands receive the profit the company is not in law the agents 'of the subscribers or trustees for them, nor are the are the subscribers a members liable..., except to 'the extent and in the manner provided by the as it is bore out of the fair of a company having distinct legal personality from those behind its formation, its members and directors alike, that the promoters of the company device means of exercising some degree of contract over the affairs and management of the business of the company.

It's is for this same reason of a company attaining a distinct personality upon being incorporated that the court held in *Melwani vs. Feed Nation Industries (Nig.) Ltd*92002FWLR, pt.113 at 135), does not affect the existence of the company the withdrawal of the shareholder as member of the company, as legal personality is proof only by production of certificate of incorporation. In relation to foreign companies intending to operate in Nigeria, and having the intention of carrying out business in Nigeria are by the provision of Section 56-59 of the Companies and Allied Matters Act, enjoined to take all step necessary to obtain incorporation as a separate entity in Nigeria for that purpose or else can only serve as a document or processes collecting center as matters preliminary to incorporation just as any other syndicate e seeking incorporation

### **PROSPECTUS**

Prospectus, which is defined by Investment and Security Act (ISA) as: including offers for sale, advertisement, circular, letter, notice, scheme of arrangement or other equivalent document published or circulate relating to the' unit trust scheme and as any prospectus, notice circular, advertisement or other invitations offering to the public for subscription or purchase any shares or debenture of a company and includes, any document which save to the extent that it offers security for a consideration other than cash in prospectus, is a machinery only at the disposal of a public company only at the disposal of a public company for the invitation and issuance of shares to the public to come shareholders where the company is one with share capital or otherwise members. Prospectus would be viewed as it relates to an invitation for an allotment of shares as shares, are medium by which persons which were initially not members eventually becomes members .of a company restricted by shares capitals where eventually allotted shares and registered. Section 48 of the Investment and Securities Act makes it mandatory for a public- company who intends to apply and advertise shares to the public to do so by the issuance of the prospective and the prospectus issued by or on behalf of a company or in relation to an intended company shall take effect on the date written on the prospectus and shall be taken on the date of which the prospectus is publicized. The prospectus by the provision of section 50 (1) of I.S.A, shall contain the matters specified in Part 1 of the 3rd schedule .to the Act and equally set out the reports specified in part 2 of the said schedule which are herein annexed, so as to enable prospective members have an inside information about the business they are intending to invest into.

### **CONCLUSION**

As regard laws governing incorporation of syndicate, there are adequate laws except that at the point of registration and subsequent incorporation of there are delays being experience in practice as a result of corruption of some staff of the Corporate Affairs Commission who push relevant application for registration of company to the office of the Registrar of the Commission. Equally there are Bureaucratic procedure and red-tapism.

Finally, in a country like Nigeria that wants to boost its economic base, as such incorporated businesses not only serve as a source of revenue to government but also provide jobs opportunities, its capital base in respect of both private and public company should be statutorily increased so as to compel promoters to ensure verse number of investors as members of an incorporated company.

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