

The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria

Dr.AGBONIKA John Alewo Musa Dr. OLONG Matthew Adefi
Dr. AGBONIKA, Josephine, Aladi Achor
Faculty of Law, Kogi State University, Anyigba, Nigeria

Abstract

The article examined the fact that Investors converge with a common business interest having being pregnant with business ideas. Ordinarily such investors go through the gestation period the ante-all procedure and process before eventually giving birth to a body corporate: a legal person. The birth of the legal person more or less like the birth of an actual person would have to be registered and a birth certificate issued. Statutes, cases, both reported and unreported, journals, textbooks and the opinion of text writers was resorted to in the preparation. The article further revealed the inherent import of the articles of association on the life and times of the company ensuring compliance with the ideals and ideas of corporate governance in Nigeria. The articles position ensured strict compliance with corporate governance for business effectiveness and efficacy.

Keywords: Articles, Corporate Governance, Effectiveness, Gestation Period, Body Corporate.

Introduction

In Nigeria the body to contract the registration is the Corporate Affairs Commission and at the end of a successful registration a birth certificate called certificate of incorporation is issued. In *Salomon v. Salomon & Co* (1897,AC,22) and *NI.B Investment West Africa v Omisore*(2006,LCNWR.172), the court held that a company is at law a different person from the subscribers and though it may be that others incorporated the business or as it were, even though the same persons are managers and same hands received profit, the company is not in law the agents of the subscribers or trustee of them. It can hold land, acquire and own property, have perpetual succession, borrow money, enter into binding contract and repudiate same. Two basic documents are pre-requisites upon where the registration of a company is premised. They contain the biological date of a business concern. The trust of the author's write up is to x-ray the conferential implications of the articles and memoranda of a business concern and examine the legal implication on the company. Its advantages to the members and the relationship between same with the company, *interse* as regards corporate governance in the 21st century Nigeria.

1.2 Conceptual Clarifications

Company:

A company it is often asserted has no strictly legal meaning, the term implies an association of a number of persons for some common object or objects purely for economic reasons, which is for profit or gain. The Black's Law Dictionary (Byran:2009:3) and Paul(2003:10), define a company as a corporation or, less commonly, an association, partnership or union that carries on a commercial or industrial enterprise, a corporation, partnership, association, joint stock company, trust fund or organized group of persons whether incorporated or not and (in official capacity) any receiver, trustee in bankruptcy, or similar official or liquidating agent for any of the foregoing.

Articles of Association:

On the other hand, the article of association of a company is the domestic regulations of the company and governs its internal administration. It determines how the powers conferred on the company by the memorandum of association shall be exercised (Farrar:1991:). Also, the articles of association regulate the right of the member of the company *interse* (among themselves) and determine the manner in which the business of the company shall be conducted. The articles deal with such matters as the appointment, removal and powers of directors, general meetings of the company, the voting rights of members, the transfer of shares, and dividends(Keenan:1996). The article must be printed (not typewritten) and divided into paragraphs numbered consecutively. It must be signed by each person who subscribed to the memorandum and the signature must be attested, though one witness for all the subscribers' signatures is enough.

Historical Position of Articles of Association at Common Law

Prior to the Joint Stock Companies Act 1856, companies were formed on the basis of a deed of settlement- an elaborate form of partnership deed. The Act of 1844 provided for the registration of the deed of settlement and the grant of corporate status in return, the 1856 Act introduced a new constitutional framework based on two documents- the memorandum of association and the articles of association(Sealy:1992).

The memorandum is the more fundamental document as is reflected in the case of *Guinness v. Land Corp. of Ireland*(1882,22Ch.D,349), where it was held that if there is any conflict between the terms of the memorandum and the articles, those of the memorandum shall prevail and by statutory provisions such as the

Companies Act of 1985, section 125 which makes it possible to entrench rights by writing them into the memorandum with a prohibition or restriction on their alteration. Whilst the memorandum proclaims the world the external aspects of its constitution, the articles are concerned with matters of internal organization which are primarily of interest to its own members and officers for example the procedure for paying the subscription price for shares, and directors meetings, the appointment, removal of, remuneration of directors and the payment of dividends.

Thus the articles determined how the power conferred on a company by the memorandum of association shall be exercised. The court in *Ashbury Railway Carriage & Iron Co Ltd v. Riche*(1875CR,7HL653),held that the memorandum is at it was, the area beyond when the actors of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.

In *Ashbury v. Watson*(1885,CH.D476), it was held that the articles are subordinate to the memorandum in the sense that they cannot confer wider powers than the memorandum and any alteration to the articles which conflicts with the memorandum is void to the extent of the conflict. The articles cannot be resorted to, to fill in gap in the memorandum in respect of any matter which by law is required to be in the memorandum. The first set of articles in the modern form were set out in table B of the schedule to the Joint Stock Companies Act of 1856 and most modern companies now have articles which are based to some extent or the form set out in table B.

The courts regard articles as commercial documents and apply a liberal construction to them. Jenkins in *Homes v. Keyes*(1959,Ch199 at 215,CA,) described their approach to wit that the articles of association of a company should regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the articles, in preference to a result which would or might prove unworkable.

Articles cannot be rectified by the courts. The power to alter is purely statutory. Any alteration must be effected by special resolution of the company and if there is any inconsistency between different parts of the articles, the courts will follow ordinary cannons of construction and look to the whole seeking to achieve harmony between the different provisions and ensure compliance with the law.

In *Mc Neil v. Mc Neil's sheepfarming Co. Ltd*(1955 NZLR.15), the company's own articles provided for one man, one vote but the table A provision of one vote per share also applied. The court had that the express article took precedence. In *Rayfield v. Hands*,(1960,CH.1), the judge interpreted an article referring to directors as if it referred to members, to enable a provision requiring them to put the plaintiff's shares at a fair value to take effect. The articles cannot contain anything which is illegal or contrary to public policy. In *Re Victoria Onion and Potato Growers Association ltd. V. Finnigan, Ryan and Farrel*,(1922,VIR,384), an article was held void as being an unreasonable restraint of trade.

Form and Content of an Article of Association

The form and contents of articles of association as stated in the Nigeria Companies and Allied Matters Act 2004, unveils the form and contents of articles of association of a public company having a share capital, a private company having a share capital, a company limited by guarantee and an unlimited company, set out in parts 1, ii,iii and iv respectively of table A schedule I of the Act with such additions, omissions or alterations as may be required in the circumstance.

In the case of a company limited by guarantee, the articles of association shall state the number of members with which the company proposed to be registered for the purpose of enabling the commission to determine the fee payable registration.(Companies and Allied Matters Act,2004).

Thus the articles of association shall

- (a) be printed and (b) be divided into paragraphs numbered consequently; and (c) be signed by each subscriber to the memorandum of association in the presence of last one witness who shall attest. The article shall have a stamp as if they were contained in a deed.

LEGAL EFFECTS OF ARTICLES OF ASSOCIATION AT COMMON LAW

At common law the articles when registered bound the company and the share holders to the same extent as if each shareholder had subscribed his name and affixed his seal thereto or otherwise executed the same. Thus it constitutes a contract between the company and each member and each member in his capacity as member is bound to the company by the provisions in the article.

All monies payable by any member shall e a debt due from him to the company. In England and Wales, it shall have the nature of a specialty debt. It means that there exists a statutory contract resulting thereto. That it constitutes a contract between the company and its members and the company's business must be conducted in consonance with their articles of association. In *Hickman v. Romney Mash Sheep Breeders*,(1938,CH,708) the articles provided for the reference of disputes between members and the company to arbitration in the first instance. Hickman a member brought an action against the company in court, the company applied to the court

for a stay of proceedings on the ground that Hickman was bound by the agreement contained in the articles. The court ordered a stay of the action on the ground that members are bound to observe the provisions of the articles in their transactions with the company.

Secondly the articles are by reason of case law a contract between the members themselves. Thus one member can sue another if that other fails to observe a provision in the articles, there is no need to call upon the company to sue. In *Rayfield v. Hands*(1876,134D88), the articles of a private company provided by article that every member who intends to transfer his shares shall inform the directors who will take the said shares equally between them at a fair value. The plaintiff held 725 fully paid shares of \$1 each and he asked the defendants, the three directors of the company to buy them but they refused. He brought this action to sue upon the contract created by the articles without joining the company. It was held that the directors were bound to take the shares.

Thirdly no right given by the articles to a member in a capacity than that of member for instance, as Solicitors can be enforced against the company. The articles is seen as a contract not with outsiders but merely with the members in respect of their rights as members. However a provision in the article can become part of a contract between the company and a member or outsider in the following ways:-

- (a) Where there exist an express contract and a provision in the article expressly incorporated into the contract by a provision therein.
- (b) Where a provision in the articles is incorporated by implication arising out of the conduct of the parties, or where an express contract between the parties is silent on a particular aspect. In the case of a director, the length of his appointment, in such a case reference may be made to the articles to fill the gap, if it contains a relevant provision.

Again the article do not *per se* constitute an enforceable contract between a company and an outsider. Outsider means a person who is not a member or a member acting in a capacity other than that of a member. Any right claimed by an outsider, must be conferred by a separate contract or relationship outside the articles.

However in *Swabey v. Post Darwin Gold Mining Co.* (1970,NWLR,PT.145,SC422), the courts were prepared to imply an extrinsic contract of service upon the terms of the article. A clause providing for exclusion, if in the original article will be regarded as falling within the contract and the rules of natural justices will not necessarily be implied.

THE LEGAL EFFECTS OF AN ARTICLE OF ASSOCIATION UNDER THE NIGERIAN COMPANIES & ALLIED MATTERS ACT, 2004.

In *Yalaju Amaye v. A.R.E.C.*(1994,NWLR,PT.357), the court held that a memorandum and articles of the company bind the company and the managing director for the documents constitute a contract between them. In the same case, Karibi white further stated that the power to appoint a director can only be exercised where there is an enabling provision in the articles. The court in *Omenka v. Morison Ind Corp.*(2001,12NWLR PT.729), held that a director of a company can be removed from office. The mode of removing a director may however be spelt but in the articles of association concerned. In the absence of such provision in the articles of association, a resort may be had to the Companies and Allied Matters Act.

To further buttress the import of an article of association on a company, the removal of a director of a company not in accordance with the memo and articles of association of a company is illegal. In the wordings of section 41(1):

Subject to the provision of the act, the memorandum and articles of association when registered shall have the effect of a contract under seal between the company and it's members and officers and between the members and officers themselves whereby they agree to observe and perform the provision of the memorandum and articles as altered from time to time in so far as may relate to the company, members or officer as such.

Section 41 (3) provides that where the memorandum or articles shall be enforceable by that person notwithstanding that he is not a member or officer of the company. The rationale for this provision perhaps is to protect persons who set up a company and call upon other persons to manage it for and on their behalf.

Section 41(4) provides that in any action by any member or officer to enforce any obligation owed under the memorandum or articles to him and any other member or officer, such member or officer may, if any other member or officer is affected, by the alleged breach of such obligation with his consent, sue in a representative capacity on behalf of himself and all other members or officers who may be affected other than any who are defendants and the provisions of part ix of this act shall apply.

This section in effect expressly allows any member or officer to initiate proceedings in a representative capacity as a means of restraining corporate irregularities. To appreciate S. 41 of the Companies and Allied Matters Act 2004, it is pertinent to note the fact that it replaced S. 16 of the 1968 Companies Act and in the words of Lord Greene in *Beattle v Beattle Ltd*, it has been "the subject of considerable controversy in the past and it may well be that there will be considerable controversy about in future," (Soforowa:1992).

One of the enviable innovations in section 41 is the fact that "officers" are being bound by the articles

of association and section 650 defines officers to include a director, manager or secretary. From this definition it means cases decided on directors at common law would be decided differently today meaning that they do not have to rely on a separate and independent contract of service before they can enforce their rights. They can rely on section 41 of the Companies and Allied Matters Act 2004, since by virtue of the definition of an officer under section 650, directors are included. So directors can now be bound for contracts entered into by them.

But one who sues as a solicitor as the case of *Eley v Positive Life Assurance Ltd*, would be regarded as an outsider. The question is will a solicitor come within the purview of section 650 of the Companies And Allied Matters Act, 2004? In the words of Sofowore “include” enlarges where as “means” restricts. This shows that a solicitor may be included in the definition section; but the danger in the approach is that it offends another rule of interpretation of statutes- expression unions *est* exclusion i.e. mention of certain things means the exclusion of all other things not mentioned(Agbadu:1998:41). And also section 650 of the Companies and Allied Matters, Act 2004, is supposed to be treated as being open-ended, so as to include categories of persons not contemplated as officers.(Ola:2002:).

ALTERATION OF THE ARTICLES OF ASSOCIATION

Companies can alter its articles of association and such alteration is only vested in the majority shareholders, subject however to certain common law regulation which have been law down in a variety of judicial formulations. The power to alter the article must be exercise *bonafide* for the benefit of the company as a whole. It is for the shareholders and not the court to say whether an alteration of article is for the benefit of the company. If they have acted honestly in what they believe to be for the benefit of the members as a body the court will not interfere unless there are no grounds on which reasonable men could have reached the same decision.

The court will restrain an alteration which is discriminatory or amount to an expropriation of individual shareholder. In *Brown v. Abrasive Wheel Co. Ltd*, the minority shareholders refused to sell their shares to a large majority, the majority then passed a special resolution altering the articles to enable nine-tenth of the shareholders to buy out any other shareholder. The court held that the alteration was not *bonafide* and was therefore invalid. A company cannot be restrained from altering its articles on the ground that the alteration will amount to a breach of contract entered by it but the other party to the contract may have an action in damages.

ALTERATION UNDER THE NIGERIAN COMPANIES AND THE MATTERS ACT, 2004.

A company may by special resolution passed by at least three fourths of votes cast by members of the company at a general meeting of which twenty one days which has been given, alter its articles of association. Thus section 48 Companies & Allied Matters Act, 2004 provides that a company may by special resolution alter or add or alter its articles.

Any alteration or addition so made shall subject to the provisions of this act be as valid as if originally contained in the special resolution made subject to alteration. The under listed are rules that should be noted as regards alteration of articles:

- a. The alteration must be subject to the conditions or other provision of the memorandum of association, and memorandum prevails
- b. The alteration must be subject to the act and the alteration must not violate section 49, of CAMA which provides that a member of the company shall not be bound by any alteration made in the articles after the date on which he became a member which increases his liability to contribute to the share capital of the company or otherwise to pay money to the company or take or subscribe for more shares than he held unless the member consents in writing.

Conclusion

The articles of association remain one of the main organs of a company and it binds the company the members and the members qua members and as such its import in the existence of a company remains immeasurable. Members of a company in whatever capacity should be given the right to sue in respect to contract entered into by them in whatever capacity.

Again section 41 (3) of the Companies and Allied Matters Act, 2004 should always be understood as to mean that such power conferred can be enforceable by any person be he a member or not. Finally section 650 of the Companies and Allied Matters Act, 2004, should be broadening enough as to include solicitors, shareholders and all those of genuine interest in the affairs of the company.

REFERENCES

- Agbadu, J.T.(1988) Principles of Nigerian Company Law, Ogun: IPS Educational Press Ltd.
Bryan A.G(2009) Blacks Law Dictionary, 9th Ed, USA: Westgroup.
Farrar,J.h.(1991) Farrays Company Law,London: Butterworths.

Keenan D, (1996) Smith & Keenan Company Law for Students, great Britain, Pit Mig Publishers.
Paul L.D,(2002) Gowers Principles of Modern Company Law,6th Ed, London ; Sweet & Maxwell.
Paul L.D,(2003) Gowers Principles of Modern Company Law,7th Ed, London ; Sweet & Maxwell.
Ola, C.S(2002) Company Law in Nigeria, Nigeria: Heinemann Educational Books.
Sofowora

Cases.

Ashbury v. Watson(1885,CH.D476)
Ashbury Railway Carriage & Iron Co Ltd v. Riche(1875CR,7HL653)
Omenka v. Morison Ind Corp.(2001,12NWLR PT.729),
Guinness v. Land Corp. of Ireland(1882,22Ch.D,349)
Homes v. Keyes(1959,Ch199 at 215,CA,)
Mc Neil v. Mc Neil's Neil's sheepfarming Co. Ltd(1955 NZLR.15),
Hickman v. Romney Mash Sheep Breeders,(1938,CH,708)
Re Victoria Onion and Potato Growers Association ltd. V. Finnigan, Ryan and Farrel,(1922,VIR,384)
Salomon v. Salomon & Co (1897,AC,22) and *NI.B Investment West Africa v Omisore*(2006,LCNWR.172),
Swabey v. Post Darwin Gold Mining Co. (1970,NWLR,PT145,SC422)
Companies and Allied Matters Act, 2004
Section,34(4)
Section,41(1)
Section,41(3)
Section,41(4)
Section,650

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:
<http://www.iiste.org>

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

