

Legal Alert for June 2010 – Directors: Appointment, Duties & Removal

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LEGAL ALERT—Directors, Appointment, Duties & Removal

The very important roles that the Directors of a company play in a company's success or failure, which in turn affects national development, are often not seriously appreciated, understood or highlighted by both the directors themselves and or by the other parties related to a company. Also, the failure or inability of the board of directors of a company to direct and manage a company in a responsible manner has contributed enormously to corporate governance failures and the current global economic crises.

It is a trite principle of law that a company, even though recognised under the law to be an artificial, separate and distinct legal entity from its owners, cannot manage or direct her own affairs because a company is an "abstract" person. This is the reason why the law requires that every company in Nigeria must have at least, at all times, two directors and two shareholders.

Who is a Director?

The Companies and Allied Matters Act ("CAMA") describes a Director as any person appointed by a company to direct and manage the business affairs of the company. The Companies and Allied Matters Act further describes a Director to include any person on whose instructions and direction the Board of Directors of a company is accustomed to act despite the fact that such a person is not officially appointed or listed as one of the Directors of the company.

Directors have also been described as "the directing mind and will of a company". The role of a Director of a company is therefore a very important one.

Appointment of Directors?

The methods of appointing the Directors of a company are usually dictated by the provisions of the Articles of Association of each company. The specific qualities that a Director must possess, though generally common, are dictated by the peculiarities of the industry in which such a company operates.

The first Directors of a company are appointed by the subscribers to the Memorandum and Articles of Association of the company at the time of its incorporation. Subsequent directorship appointments are undertaken by the Shareholders of the company at the company's annual general meeting(s). The shareholders also undertake the re-election and removal of a Director or Directors at their Annual General Meeting.

Not every person can be appointed as a Director of a company. Persons who are insolvent or bankrupt, persons who are fraudulent, persons under the age of 18 years old, persons of unsound mind, Directors that have been absent from Board of Directors meetings for a consecutive period of six months, and persons of like characteristic, cannot be appointed as a Director of a company. Also, any person that is 70 years old and above can only be appointed or re-appointed as a Director of a public company in Nigeria if he/she informs the shareholders of the company, at an Annual General Meeting of the company of the fact that he or she is now 70 years old or more than 70 years old.

Subject to conflict of interest rules or the internal regulations of each company, a Director of a company could also be an employee of the company. Despite a Director being an employee of a company, he can only be appointed and removed as a Director in accordance with the provisions of the Articles of Association of such a company and the Companies and Allied Matters Act.

A company could also have executive and non-executive directors. In practice, both the executive and non-executive Directors are appointed to bring their wealth of experience, expertise and network to the benefit of the company. The non-executive directors play the critical role of providing strong, balanced and independent counsel to the Board of Directors.

For large corporations, one third of the Directors are required by CAMA to retire and submit themselves for re-election at every company's Annual General Meeting.

Common Duties of a Director?

The primary duty of a Director of a company is to exercise due care, skill and diligence in the discharge of his or her duties as a reasonable and prudent Director would exercise such duties in comparable circumstances. The failure by a Director to exercise reasonable care could be a ground for

an action in negligence and breach of fiduciary duty of care owed by such a Director to the company.

Directors of a company also owe the company a duty of utmost good faith, i.e. fiduciary duty of care. This fiduciary duty of care is owed to the company alone. As fiduciaries of the company, Directors must not place themselves in a position where there is a conflict of interest between their duties to the company and their personal interest. Thus, any secret profits made by a Director of a company from the company are accountable to the company. The fact that the company is unable or unwillingly to take the benefit of such profits for itself will not be a defence to such a Director in any legal action for breach of this duty in which the Director did not disclose to the company the secret dealing and profit.

The other statutory duties that a Director of a company owes to a company include attending the board of directors and shareholders' meetings of the company, disclosure of the director's direct or indirect equity interest in the company, giving of Directors particulars on all trade circulars, show cards, business letter headed papers, etc; and providing oversight assistance to the management team of the company.

Removal of Directors

The most common method of removing a Director of a company is either through voluntary resignation or by rotation. Where a company decides to remove one or some of its Directors, whether or not they are employees of the company, the company must serve a special notice of the removal on all the Directors of the company including the Director that is proposed to be removed.

The Director that is proposed to be removed is in turn entitled to make written representations concerning the circumstances of his proposed removal. Such written representation may however not be read at an Annual General Meeting of the company if the company is able to convince a Federal High Court Judge that the Director's written representation is intended to create unnecessary adverse publicity and or are defamatory in nature, and therefore an abuse of the statutory right to be heard conferred on such a Director by Section 262 of the Companies and Allied Matters Act. Where a notice of removal is not served on all the Directors including the Director or Directors proposed to be removed, such removal will be declared by a properly constituted court of law to be null and void.

Bernard Longe v. First Bank of Nigeria Plc

The recent decision by the Supreme Court of Nigeria in the matter of Bernard Longe v. First Bank of Nigeria Plc (2010) 2-3 SC (part III) 67 @ 86

and 94 has brought to the forefront the legal position that a Director, whether also an employee of a company, cannot be removed as a Director of a company at the whim or caprice of his or her company.

The central issue in this matter was whether a Managing Director/Chief Executive Officer could be removed without prior notice of such a removal being first served on the Managing Director/Chief Executive Officer in accordance with Section 262 of the Companies and Allied Matters Act?

The Supreme Court held in this matter that the failure of the Respondent Bank to serve notice of removal on the Appellant Managing Director/Chief Executive Officer invalidated all the resolutions, concerning his alleged removal as a Managing Director, reached by the Respondent company. The Appellant was therefore deemed to still be the Managing Director/Chief Executive Officer of the Respondent Bank with all his entitlements and privileges retrospectively restored eight (8) years after his purported removal.

It is the view of the Supreme Court in this matter that the essence of the notice of removal is to allow the Managing Director of the Respondent company to respond to the grounds under which he is being proposed to be removed. The suspension of the Appellant did not according to the Supreme Court diminish the necessity to serve this notice of removal because once Nigerian law vest a right on a person, a court of law will resolutely resist any attempt, by whatever method employed, to wrestle such a right from such a person.

The Supreme Court also in this matter reiterated that Nigerian law on employment contracts recognised three categorises of contracts of employment namely purely master and servant relationships, servant's contracts which are held at the pleasure of the master or employer and employment with statutory flavour. The first two categories of contracts may only be terminated in accordance with the procedure prescribed under the contract of employment while the third category must only be terminated in accordance with the relevant statutory provisions regulating the operation of the contract.

Conclusion

The roles or duties of the Directors of a company need to be taken more seriously. Some Directors should be encouraged to obtain more education on the significance of their roles as Directors, to both their companies and to national, global development.

Contract of engagement are sacrosanct, and their breach attracts punitive damages. Parties to these contracts should therefore abide by the terms and conditions of the contracts that they have freely and willingly entered

into. The perception that employers or principals have the power to hire and fire at will without adherence to the applicable contract attracts punitive damages and costs.

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