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A CRITICAL ANALYSIS OF MINUTES OF COMPANIES PROCEEDING IN NIGERIA: PROBLEMS AND RECOMMENDATIONS

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ABSTRACT

Over the years, we have seen and heard of corrupt Directors forging the minutes and resolutions of a company in other to fraudulently obtain loans from banks. We have heard and seen forceful take-overs without proper resolutions only for us to find such lies enshrined in a ghost-minutes of the company. We have seen present members rendered absent in the minutes even though we can swear we saw them present. Yes! virtually all that a company does is recorded and in the event of a dispute, enquiry, query, investigation, meetings, resolutions, et al, one important document or record which substantially stand as evidence in resolving or denying any transaction is the minutes of the proceedings of the company. Indeed any foreign holding or subsidiary or partnership company as well as investors may want to know about the legal effects of the Minutes. The minutes become in the letters of the Companies & Allied Matters Act, a *prima facie* evidence of companies proceedings. The effect is that whatever is so recorded in the minutes, so far the chairman's signature is affixed, is the truth of the proceedings. Although, the Act allowed for a rebuttal of the minutes with other proofs, but the Act did not state any other way in which the content of the minutes may be disproved. Again the form in which minutes are to be kept in line with the present 1990 Act is another setback. Indeed, prior to the enactment of CAMA and with recent judicial authorities, the judicial view was that Minute entries made in loose sheets of paper, whether kept in a file or fastened together in a bound book subsequently, were not admissible/permitted evidence of the Minutes of the deliberations and decisions taken at such a meeting (**See Onwuka v. Taymani & Ors [1965] NCLR page 203;** and the English case **- Heart of Oaks Ass. v. James Lower & Sons Ltd[1936] Ch.D page 26)** Later the Supreme Court in **Chika Brothers Case** held differently in interpreting the 1968 Act which unfortunately does not tally literarily with the present 1990 Act. Infact, the situation becomes more disturbing going by the general rule of evidence that no extrinsic evidence of certain documentary evidence is allowed. We can indeed only hope to come under its exceptions, but again, practically speaking, its exceptions are difficult to prove within the settings of a company. This leads to grave dangers in that anyone in the company, especially its Directors, may forge a resolution or otherwise against the company provided the chairman's signature can be forged or generated (moreso, if it is the chairman). The same goes for the board meetings and others. The very principle of corporate governance and its checks and balances is surely incomplete without a proper legal framework to safeguard that most indispensable and invaluable book of a company – The minutes.

1. INTRODUCTION

On the 23rd July 2013, the Vanguard Newspaper (one of Nigeria pioneer newspapers) carried the report of one Mr. Olu osho, a director of a company, who was re-arraigned for false pretence when he took loan in the name of a company after forging the minutes of the company's proceedings where the resolution was purportedly made. The sum of N100,000,000.00 (One Hundred Million Naira) only was obtained falsely.[1] That was one of so many reports and those unreported.

In the event of a dispute concerning whether an act was resolved or not in the General Meeting or the Board Meeting, et al, the first and most valuable instrument to go to is the Minutes. Hence, so many corrupt practices has been backed up by a thwarted version of a company's true minutes.[2] No

wonder Aderigbibe reported that *minutes are an authoritative record of the proceedings of a meeting.* [3]

In the famous and controversial case of **Longe V. First Bank Plc (SC.116/2007),** one of the most important document relied by the court in coming to the conclusion that there was a resolution to remove the director, was the excerpt of the minutes which contained the words under it – *this is a true certified copy of the minutes…* Indeed such a conclusive reliance on such a document extols the fact that the minutes of a company proceeding is indeed an authoritative record! It is true that same can be rebutted but the question that is not answered by the Companies and Allied Matters Act is *How?* The answer as it is will be found under the rules of evidence. Unfortunately the Evidence Act excludes extrinsic evidence in the face of such an official documentary record like the minute. Although there are exceptions, but how practical can the veracity of the minutes be countered within a company setting? Who keeps the Minutes? Where is it kept? Under whose guidance or watch? Is the hard-bound cover required in other to show evidence of the company resolutions and proceedings? Does the Chairman have the time to go over the minutes again after it has been read and adopted, before signing on same? What if someone has tipped the Secretary to mark a member absent? Will the Secretary hide under an honest mistake? What if the Chairman and/or the secretary are in conspiracy? Many loopholes are left unattended to.

In mortgage transactions, banks usually demand collateral, a guarantee, et al. The idea is to hold a property over which money lent can be re-claimed. When a company is involved, the legal department of the bank usually would advise the bank to demand for certain documents so as to ascertain the authorization to collect such a loan. One important document that may be demanded is the resolution of the company and excerpt of the minutes wherein such a resolution was made. Most times, the resolution referred to is that of the Board (depending on the company's articles and restrictions on loan-taking). Now because, a company's minutes book can be any loosed-leaf-book, typed or handwritten etc… as held and confirmed by the Court in **I.A.I Ltd V. Chika Bros Ltd (1990) 21 NSCC (pt 1) 66** it becomes easy for one to forge any such copy and have it signed. This is why many Banks and Companies have been sued and are suing.

2.1 ANALYSIS, EFFECTS AND DANGERS OF THE STATUS OF THE MINUTES UNDER THE COMPANY AND ALLIED MATTERS ACT

The Companies And Allied Matters Act of Nigeria 1990 in **Section 241** made the keeping of minutes mandatory. The Act made use of the phrase *Every company,* the effect is that all types of companies either limited, unlimited, private or public must cause minutes of its proceedings in general meeting, or board meeting or managers meeting if any, to be entered in a book kept for that purpose. It is that record that is referred to as the Minutes. Infact, not to keep same is to be guilty of an offence and liable to a fine of N500. The company itself and then every officer who is in default are the *criminis participis* of the offence. Although one may ask – who does the Act envisage to be the officer of the company in default? It is submitted that only the Directors and the Secretary can be in default by virtue of their duties and functions as enumerated by the Act. But this is not our concern, our task is to demystify the effects and dangers looming in the framework of that sacred book called – Minutes.

Section 241 (2) CAMA 1990,[4] stipulates thus:

Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were held, or by the chairman of the next succeeding meeting shall be *prima facie* evidence of the proceedings.

The opening words above go to show that the minutes are indeed any book which the proceedings of its meetings are entered. This is why the Supreme Court in interpreting **Section 382 and 138 CAMA 1968** in **Chika Brothers Ltd case** and distinguishing **Onwuka's** case and the English

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Heart of Oak's case noted that the minutes of a company's proceedings need not be kept in a bound book but may be recorded in loose-leaf books or any other manner in accordance with accepted usage provided that adequate precaution is taken for guarding against falsification and facilitating discovery. The court held that it is sufficient for the minutes of a company to be recorded in a scrap book and it is for its challenger to call for evidence. When the minutes are permanently pasted and become inseparable parts (i.e numbering) the provisions of the law is satisfied.

Infact the most interesting part of the case above, is the definition of the expression '*to enter in a book'*. The Supreme Court held that - it means to record something in that book. Accordingly, it went on:

when a type-written sheet of paper is so attached, affixed or fastened to a page of a book to the extent that the type-written sheet can no longer be removed from the page without destroying it, that type-written sheet has become a part of the book. In the circumstances, the particulars or details on the type-written sheet is deemed to be entered in the book in question. (p.89)

We may have noticed that the court kept using the word *type-written,* the question is what if it was handwritten and attached and numbered accordingly? Or what if it was handwritten at the back of the papers originally inside the bound book and numbered accordingly? The Supreme Court did not say. Moreso, in the present **1990 CAMA,** the ample provisions above were not made. What could have been the reason? What then is the position of the law?

Indeed, many writers have opined that the minutes can be kept in the form of a bound-book, loose leafs, photographic film form or any storage device or device capable of reproducing the required information in intelligible form such as compact dick, flash drive or other electronic means (see *Essentials of Corporate Law Practice in Nigeria by Nelson C.S Ogbuanya @ p. 438, 2013, revised edition: Novena Publishers Ltd, Ikoyi, Lagos).* These positions were influenced by the 1968 CAMA and the decision in Chika Brothers Ltd case. It would seem that the old Act was more specific and definitive than the present Act on matters pertaining to the minutes. The present 1990 CAMA does not contain the forms under which minutes may be kept. Infact, it would seem that the new Act came to cub the mischief of the old Act. The old Act warned against forms of minutes that by their nature can be falsified. The new Act did not so specify. Indeed, it seems the case of Chika Brothers Ltd is no longer good and authoritative interpretation of the law in light of the new Act. Although Chika brothers case was decided in 1990, the same year the new Act commenced (2nd January 1990) and repealed the 1968 Act under **Section 568.**

Now, apart from the fact that the old Act was repealed and the Chika Brothers case did not consider the new Act, the problem with the above opinion is that the new Act does not specify other forms of minutes other than Book(s) which must be signed by the Chairman. If we take minutes to include photographic or electronic devices, we run a great risk of falsification and perhaps, permanent destruction or eradication of the minutes. This in itself is contrary to both the provisions of the old Act and the decision in Chika Brothers case.

Again, if the signature of the chairman is in electronic form, then God save us all in a world of precarious and capricious men! It is therefore my humble submission that the minutes in the clear words of the new Act can only be kept in book form! **Section 241 (1)© 1990 CAMA** so stipulates *…Every company shall cause minutes of all proceedings of general…directors…managers… to be entered in books kept for that purpose.* The Act did not say photographic storage, electronic storage, flash drives, et al, neither did the Act define books to include any other thing. It is submitted that

books would therefore be given its ordinary meaning – Books! Besides if the new Act omitted the provisions of the old Act, it clearly shows an intention to cure a mischief. One may argue that this is against the trend of ICT and a move back to the dark age, but the law is the law! Of course, scanning such documents in pdf and storing same electronically via cloud backup is a better option (although there are applications now that turns pdf files to word document) but it can only be a backup plan not the required form!

All that the 1990 Act said concerning form is *any such minute.* And they are to be *entered in books kept for that purpose.* It would follow that firstly, there is a separate book(s) kept for the purpose of recording company(s) proceedings. Secondly, at every meeting general, or board or managers or class meeting, minutes will be taken after which it will be signed and then entered in the main book. Nothing stops the company secretary from recording the proceedings in electronic means, but my point is, at the end it should be written or typed and signed by the chairman in compliance with the present Act.

It would seem that if the minutes was handwritten and was signed by the chairman of the meeting or the chairman of the next succeeding meeting, then it remains valid provided no alterations were made to eschew any ground for proving falsification although if mistake is made counter-signing on it may validate such a minute but it is better to have a clean minute and evade any argument.

Now, any such minute purported to be signed by the chairman of the meeting (which we will know by looking at the same minute) or by the chairman of the next meeting (even though he wasn't present at the last meeting but the minutes of the last meeting have been read and adopted in the present meeting) is a prima facie evidence of the proceedings. The Act did not say that the chairman of the subsequent meeting need be present at the last meeting. What the Act does not forbid, it allows. Hence, in such scenario the signature is valid. It is valid however not because he has personal knowledge of the matters, but because those present have affirmed in his presence that the matters so recorded were so.

Section 241 (3) CAMA 1990, goes further to reveal the effects of the signed minutes. It stipulates that the meeting shall be deemed to have been duly held and convened, and all proceedings had at the meeting to have been duly had, and all appointments of directors, managers, liquidators, shall all be deemed valid, until the contrary is proved.

The consequence of the above section is that if I bring a copy of a minute certified by the secretary, which states that Mr. A has been appointed as ABC Ltd Director, and as such Mr. A has powers of a director, then that is enough proof for any third party to believe and act on it. I can take same to banks and obtain grants fraudulently, I can use same in conspiracy with other directors and/or secretary and remove any person from office after all it contains truth of all proceedings, I can make a forged copy and omit the name of a present-member, I can take same to the accounts and fraudulently run away with company's fund, Infact no one can readily come around to falter any irregular meeting on any ground without proof to rebut the validity of the meeting as contained in the minute, etc.

Aha! So we see the wide lacuna and dangers inherent. Infact it has not been canvassed by any case known to me, but I strongly am of the opinion that it is a defence to any action that a meeting was not duly held or convened, to tender the minutes of the company proceeding and that alone shifts the onus of proof back to the challenger who must do more than a mere lamentation or oral testimony of same. Section 241 CAMA 1990 and Section 131 Evidence Act, 2011 supports my stand. He must to controvert that evidence, find reliance in the exceptions enumerated in the Evidence Act.

2.2 THE MINUTES BOOK AND THE EVIDENCE ACT: A CRITICAL EVALUATION

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As noted earlier, the Act conceived of the fact that the minute is rebuttable evidence. However, it failed to show the ways in which same can be rebutted. We are therefore called to embrace the law of Evidence as enshrined in the Evidence Act, 2011.

The Evidence Act enumerated various ways in which evidence may be given to prove or deny a fact. However **Section 128 Evidence Act, 2011** limits the giving of evidence to rebut certain documentary evidence on of which is an official proceeding or any contract etc reduced to the form of a document or series of documents. In such a case no evidence may be given for or against such proceeding or contract except the document itself or secondary evidence in instances where:

a. Fraud, intimidation, illegality, want of due execution, wrong date, existence or lack of consideration, mistake in fact or law, want of capacity to contract or any other matter which if proved would produce any effect upon the validity of the document or part of it…
b. The existence of any separate agreement as to any matter on which a document which is not inconsistent with its terms if from the circumstances of the case infers that the parties did not intend the document to be complete and final statement of the whole of the transaction between them…

Others are inapplicable.
The first question to ask is – Is the meeting of the company an official proceeding? Is the meeting a contract in which its minutes contains its terms? The answer to the second question is in the negative since the elements of a contract are not all present. However, the answer to the first is in the positive. Meeting is a mandatory proceeding required by the Act and it is more so, by the fact that it is a ground for wounding-up proceeding and besides the court can order for a meeting to be held. Neither the Evidence Act nor the CAMA defined the phrase official proceeding.

Now if we take the meetings of a company to be an official proceeding, then it follows that its minutes can only be rebutted upon the grounds stipulated in A and B above, in which case other oral or extrinsic documentary evidence that conform to A and B above may be tendered to contradict the validity of the minutes. How? In an action in court, oral testimony may be given to show that certain signature was forged, or that the minutes was altered and the secretary was intimidated to by the directors, or that there was really no meeting and the minutes was an illegal document, that the minutes was mistaken as to the actual fact that Mr. A was indeed present in the meeting, that a draft copy of the minutes was sent to members and the draft copy included the resolution of its members not to carry out an act, etc.

In all the scenarios enumerated above, there lies a lingering difficulty. The evidence of the one saying a signature was forged has to be one who has the signature or who is conversant with the signature in the ordinary course of business. The testimony of a secretary saying the minutes is real and conclusive and he/she was not intimidated in any form weighs against any counter position. The objection that there was really no meeting must be backed up by majority of the members entitled to attend the said meeting. The defence that Mr. A was present in the meeting must be corroborated less it will fall against the authoritative record of proceedings! The draft copy of the minutes is of no moment in law when the signed-original or certified true copy is before the court! Where then is the protection of the minority? Where then is the face of the rules of corporate governance? In practical litigation and evidence, it is difficult to rebut the efficacy of the minutes especially where there is a conspiracy!

3. THE WAY FORWARD

It is quite unfortunate that an acidic element of corporate practice and governance like the minutes of a company's proceeding will be taking for-granted or be met with over-simplification. The

position of the 1990 CAMA as we have seen does not provide for adequate measures to safeguard the veracity of the minutes. Hopes can only be entertained within the ambit of the Evidence law. Yet, in practice and politics, the Evidence Act may not be of so much help without some solid measures to strengthen the weight of evidence or even prevent such falsification in the first place. Hence, what can be done?

It is my submission that first the court has to interpret the present **section 241 of CAMA** to mean what it states – that minutes are to be in entered in books. Indeed, prior to the enactment of CAMA and with recent judicial authorities, the judicial view was that Minute entries made in loose sheets of paper, whether kept in a file or fastened together in a bound book subsequently, were not admissible/permitted evidence of the Minutes of the deliberations and decisions taken at such a meeting. **See Onwuka v. Taymani & Ors [1965] NCLR page 203; Heart of Oaks Ass. v. James Lower & Sons Ltd[1936] Ch.D page 26**

The position above was far better and secured before the court in Chika Brothers Ltd was called to interpret the 1968 CAMA and distinguished the cases above. Infact, the court in its judicial activism in the case of **Nsirim v. Onuma Construction [2001] 3 SC page 168 @ 173** the Nigerian Supreme Court interestingly held that the decisions of a company need not necessarily appear in a Minute book; the trial Court should uphold, when called upon to determine the question, a resolution of a company if the Court is satisfied that a meeting was convened and such a resolution was passed. My problem with the decision is – wouldn't the minutes at least state that such a resolution was passed? It is submitted that the basis for accepting a resolution is that same was passed at the meeting as expressed in the minutes. If the minutes do not contain such a resolution and there is a conflict between the purported resolution and the minutes, it is the minute that will surely prevail!

It is also important that banks and other contracting companies should take time in verifying the authenticity of documents submitted. One of the ways to do is, is to write or send an agent or attorney to investigate the validity of the document.

Finally, some corporate solicitors have suggested that minutes of the meeting should be distributed ahead to enable any dispute be corrected before its adoption and signature. With respect, a corporate and a litigation lawyer would know that this view is untenable. This is because it's a mere palliative. When the minutes are forged and authenticated by the chairman and secretary, the draft copy that is unsigned will be of no moment in a court of law. The better view is that a video recording of meetings should be embraced as a check-mate to the minutes of a company's proceeding. The beauty of this system is that, such evidence will contain and show those present, what was agreed, what was denied, whether the minutes of the previous meeting was adopted, and also show the chairman signing on it. Harmed with this evidence, one may strongly come under **Section 128 Evidence Act, 2011** and rebut any falsified minutes or resolutions. Moreso, the video recording should be expressed in the articles of the company. Since such inclusion in the articles will not amount to contradiction of the mandatory dictates of the CAMA, it rather compliments the Act. And yes, members should be entitled to the video record instantly after the meeting. This way corporate governance rules will be solidified. I so submit.

NOTES:

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1 **B. Madukwe, 'Man Re-arraigned for Fraudulently Obtaining N100m from First Bank' in Vanguard (23/07/2013) excerpted from http://www.vanguardngr.com/2013/04/man-re-arraigned-for-fraudulently-obtaining-n100m-from-first-bank/**

2 E.O, Oserogho 'Minutes of Statutory Company Meetings' (May, 2003) http://www.oseroghoassociates.com/articles/123-minutes-of-statutory-company-meetings?print=0&download=1

3 O.I, Aderigbibe, 'Mechanisms of Corporate Meetings Under the Companies and Allied Matters Act, 1990' in International Journal of Advanced Legal Studies and Governance (Vol. 2, April 2011) http://www.icidr.org/ijalsg_vol2no1_april%202011/The%20Mechanisms%20of%20Corporate%20Meetings%20under%20the%20Companies%20and%20Allied%20Matters%20Act%20(Cama)%201990.pdf

4 Laws of the Federation of Nigeria 2004.