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The Imperative of Shareholders Participation in Promoting Corporate Governance: Minority Protection and Majority Rule in Focus.

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Abstract: *The basic principle governing the operation of shareholders' democracy is that the rule of majority must prevail. Essentially, this is to ensure that the power of the majority is placed within reasonable bounds and does not result in the oppression of the minority and mismanagement of the company. The minority interests, therefore have to be given a voice to make their opinions count at the decision making level. Therefore, the law must balance the need for effective decision making on corporate matter on the basis of consensus without permitting the person in control of the company, being the majority to run the company in unfairly prejudicial and oppressive manners which may ultimately result in corporate failure. This paper seeks to consider the protection of the minority under the Companies and Allied Matters Act, 2020, as the remedies available to minority shareholders in the Act have been expanded to include damages and injunction while conditions for filing derivative action have been made stringent. While nothing that in taking critical corporate decisions all members of the company must be involved through resolution in their meetings, this paper concludes that balance must be struck between the rule by the majority and the rights of the minority in order to promote good corporate practice.*

Keywords: Majority Rule, Minority Protection, Corporate Governance and shareholder participation.

1. Introduction

Shareholders play a vital role in the affairs of company. They take strategic decisions in the general meeting which affect the life of the company. These decisions are usually by way of resolutions by the majority of members at the general meeting and where any wrong is committed against the company, it is the company that can sue to redress the wrong or ratify the irregular conduct[449]. This provision of the Companies and Allied Matters Act entrenches the famous Common law rule formulated in the case of *Foss v. Harbottle*[450]**.** The rule states that in order to redress a wrong done to a company or to the property of the company or to enforce right on the company, the proper plaintiff is the company itself, and the court will not ordinarily entertain an action brought on behalf of the company by a shareholder. By the fact or codification of the rule, considerable certainty has therefore been introduced in this regard.

Corporate rights are those rights which a member of a company enjoys in conjunction with other individual members. They are rights that can be exercised not by a single individual member but a number of individual members acting in concert by resolution. With regards to the obligation that a person acquired in becoming a member of the company thus, included the obligation to submit to the will of the majority. While the majority rule admits of certain exceptions, however, some exceptions are also created to protect the interest of the minority shareholders who may not have

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[450] (1843) 2 HARE 461, See also Companies and Allied Matters Act(CAMA),2020 s.354

the power to make decisions that would bind the company especially as it affects their rights as shareholders in the company. The protection of minority interests is important because it balances the interests of a company's operation and management and those of the minority investors who have no control over the company's management. The democratic principle of majority rule in corporate governance has been given both judicial and statutory recognitions as could be seen in *Foss v Harbottle's* case and under Section 289(2) of CAMA which provides thus:

> '*the directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and the first meeting of the directors shall be held not later than six months after the incorporation of the company. Unless the articles provide otherwise, any question arising at any meeting is decided by a simple majority of votes, and in case of an equality of votes, the chairman has a second or casting vote'*.

What would be the rationale behind this *Foss v Harbottle* rule that seems to put the minority shareholders at the mercy of the majority? Mellish L. J[451] provides the answer thus;

> *'If the thing complained of is a thing which in substance the majority of the company is entitled to do, or if something has been done irregularly which the majority of the company is entitled to do regularly or if something has been done illegally which the majority of the company is entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only a meeting has to be called, and then ultimately the majority gets its wish. Is it not better that the rule should be adhered to, that if it is a thing which the majority are master of, the majority in substance shall be entitled to have their will followed?*

Therefore, the basis of the rule in *Foss v. Harbottle* (supra) is that court will not interfere with the will of the majority within a company. This is why if there is any irregularity in the management of the company which is capable of rectification, the court insists that the majority, are the only persons who can complain that a thing which they are entitled to do has been done irregularly.

It has been held that if the courts were to allow minority shareholders to bring action whenever they disagreed with the majority on matters within the company, it would be extremely difficult or indeed impossible for the informal management of such a company to be carried on smoothly. The majority would be in a position to carry onward the wishes of the minority upon every transaction and affairs of the company whenever differences arose. The impression one gets from the discussion of the *Foss v. Harbottle* so far is that the minority shareholders of the company are in a situation of helplessness, due to the fact that they do not possess any right as such, to institute action to redress wrong done to their company or to correct certain irregularities in the management of the affairs[452].

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[451] *Mac Dougall .v. Gardiner* (1875) Ch. D 13 at 25

[452] DejiSasegbonOp.Cit. Page 257

Again at what point can it be said that the affairs of a company have been run in an unfairly prejudicial manner? It is when those in a dominant position in a company act over a period of time in a manner that is unfair, burdensome, harsh and wrongful and lacking in probity to the minority then it can be said that the affairs of the company are being conducted in an oppressive manner. Also, conduct that excludes participation in the management of the company or jeopardizes the value of shareholding is unfairly prejudicial manner[453] .

2. Conceptual Clarifications.

These concepts were used in the cause of writing this paper and are very central to a better understanding of the issues raised therein. It is for this purpose that these essential concepts are defined concisely to put the issues raised in the paper at better perspective.

Corporate Governance

Corporate Governance is concerned with the way and manner corporate entities are governed as distinct from the way business within those companies are managed. It addresses the issues facing board of directors such as the interaction with top management and relationship with the owners and other parties interested in the affairs of the company[454]. Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for governance of their companies. The shareholder's role in governance is to appoint the directors and auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the Board include setting the company's strategic aims, providing leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The Board actions are subject to laws, regulations and the shareholders in general meeting [455].

It is therefore noted that the nature and issue of corporate governance transcend the exercise of control of power by Board but include the powers of the shareholders and limitations imposed by law. Key elements of good corporate governance principles includes honesty, trust and integrity, openness, performance orientation, responsibility and accountability, mutual respect and commitment to the organization. Of importance is how directors and management develop a model of governance that aligns with the value of the corporate participants and effectiveness.[456] i.

Shareholders Participation

A shareholder is defined in the Black's Law Dictionary [457] as one who owns or holds a share or shares in a company, especially a corporation. Shareholders are not owners of companies, although

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[453] *Dys Trocca Valessia Ltd & ors v. Sanyaolu & ors (*2016) LPELR-40423(CA) (Pp. 24 paras. B)

[454] Chamber A. , Corporate Governance Handbook'(2008)Tottel Publishing UK P.196

[455] Ibid. p.110f

[456] Owolabi ,S.A ' Quality Accounting Service a panacea to Effective Corporate Governance' (2010)*Journal of Corporate Governance* ,Vol.2 No.1 p.266.

[457] B Garner, Black's Law Dictionary (11thedn , Thomas Reuters 2019)

[10](2001) LPELR - 2471 (SC)

shareholders have some controlling right. With regards to whether shareholders are owners of the company, the Supreme Court has this to say in the case of *Okomu Oil Palm Company Limited v. O. S. Iserhienrhien* [10] "Besides, having a controlling number of shares in a company is not synonymous with its ownership once it is incorporated as an entity of its own and having its own separate legal existence." In my view, the shareholders only have the right as members of the company and as such maintain a direct or remote control over the activities of the company as the company is a corporate entity with its own legal existence. The company therefore has a duty to all its shareholders and not to a particular shareholder as in this case. "Shareholders interact and pass resolutions to take decisions in their meeting on matters regarding the affairs of the company. Shareholders participation ties ownership to engagement. High levels of participation mean shareholders want to be actively involved in the company they co-own. One way of measuring participation is by the number of votes processed in a given year. On point of law, certain responsibilities are mandatorily required to be carried out by shareholders at their meeting which also means they must participate to form quorum required to take such decisions. They include voting to elect directors[458], increase share capital [459] or reduce it [460], approve dividend[461], pass resolution to change name of the company[462] and winding up[463].

While a shareholder has many rights to secure his investment in the company, the right which gives him a power to exercise control over the company which attached to his right to attend and vote at company meeting is fundamental [464] The general notion is that the shareholders control the affairs of the company subject to the provisions in the company's articles which are binding on the company and the shareholders and constitute a contract between them [465].

ii. Minority Protection

A minority shareholder is a person who does not have control over a company. Typically, the minority shareholder has less than 50% of the company's voting shares. A majority shareholder has little if any, power over the management or distribution of its profits. Although, the majority shareholder may hold veto rights; an active minority stakeholder has a voice in the company. They may influence company management decisions, policy development and even a seat on the company's board of directors.

[458] CAMA 2020, sections 248,272,273,
[459] Ibid. section 127
[460] Ibid. section 130
[461] Ibid. section 426
[462] Ibid. section 30
[463] Ibid. section 571
[464] Ibid sections 107 and 138
[465] *YalajuAmaye v Associated Registered Engineering Co.* (1990) 4 NWLR 9Pt.145) 442 SC.

In view of vulnerability of the minority shareholders, law provides for protection for them to move against the majority who have acted in certain circumstance against the company [466] **iii. Majority Rule**

The summary of the rule is that the proper plaintiff in an action in respect of a wrong done to the company or association of persons is *prima facie* the company or association itself. And, the court will not interfere in the internal affairs of a company at the instance of the minority, if the irregularities complained of could be legally done or rectified by the majority.

This position was amplified in the recent case of *APC V. Moses*[467] where the apex court held that the practice of the court is not to run an association (corporate or unincorporated associations) for members. The principle underlying this law is that voluntary associations or organizations are internally run by majority of the members and that, therefore, disputes which arise within them must be resolved by the majority decision of their members. This is the so called majority rule

3. Exceptions to the Majority Rule Under the Nigerian Law

Fully aware of the intoxicating nature of power, the House of Lords in its wisdom proffered five exceptions to the propounded majority rule in *Foss v. Harbottle*, four out of the five original exceptions are codified under Section 343 (a-g) of Companies and Allied Matters Act. These exceptions are codified to promote corporate governance and prevent the misuse of corporate powers by the majority members to further their interests.

The courts have therefore over the years set the exceptions which were subsequently codified to include:

i). Entering into Transaction which is Illegal or *Ultra vires*: This provision of the Act is to the extent that where the act complained of is illegal or ultra *vires* the company, it cannot be condoned or ratified by the majority. In *Edwards v. Halliwell*,[468] Jenkins L.J observed that, in case where the act complained of is wholly *ultra vires*, the company or association, the rule in *Foss v. Harbottle* has no application because there is no majority. Also, in Hutton v. West cork Railway Co.[22], it was held that a company which is being wound up has no power to make such compensation as such power is not incidental to the business of the company at a winding up stage and that the action must succeed.

In a similar case of *Nigerian Stores Workers Union v. Uzor*[469], it was decided that the rule in *Foss v. Harbottle* does not apply to *ultra vires* acts. Any individual or minority shareholders can therefore sue to restrain any *ultra-vires* as for instance, a plan to misapply the funds of the company

[466] Ibid. section 343
[467] (2021) 14 NWLR (Pt.1796) 278 at 327
[468] ·(1950) 2 All E.R 1064
[22] (1882) 23 Ch.D 564
[469] (1971) 2 N.C.L.R 412

contrary to the provision of its memorandum. In *Parke v. Daily News*[470], a minority shareholder brought an action for a declaration that the company was acting *ultra-vires* when it sought to make a gift of corporate funds to employees, he was accordingly granted the relief sought. Thus, in *Benson Oduduro & Another v. National Union of Hotel and Personal Service Workers & Others*[471] where a resolution was passed which was *ultra vires* of the Trade Union's constitution, the court held that the plaintiffs were entitled to sue in spite of the fact that they participated in the meeting at which the resolution was passed.

It is therefore expedient to note in this paper that, it will be against the tenet of good corporate governance to allow majority to perpetrate *ultra vires* act against the company, and the minority stand aloof doing nothing. It is apt and imperative to state further that the above judicial authorities and the exceptions created under section 343(a)(1), is in the interest of sound corporate practice to allow such acts to be challenged by minority members instead of allowing the corporate fortune to nosedive.

ii) **Purporting to do by Ordinary Resolution any Act, which by Its Constitution or Act Requires to be done by Special Resolution.**

This provision of Section 343(a)(ii) is that where a company is trying to do by ordinary resolution that which, its own constitution requires to be done by special resolution, the court may, on the application of any member, grant an injunction or make a decision restraining the company from doing so. The rule in *Foss v. Harbottle* is based on the notion that the majority can manage the affairs of the company as they like, subject to the provision that the rule can only be in case of irregularities which can only be ratified or put right by a simple majority. In case of *Mbere v. Ofili*[472], Kazeem J. observed that the rule in *Foss v. Harbottle* does not prevent an individual member from suing, if the irregular act in respect of which he is using is one which could validly be done or sanction not by a simple majority of the members of the associations, but only by some special majority.

In the above case, Jenkins L . Jadopting the views of Romer J. *in Cotter v. National Union of Seamen*[473] said:

> '*If the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, as, for instance, in the case of limited company, under the Companies Act, a special resolution duly passed as such ... the reason for that exception is ... if the rule were applied in its full rigour, a company which by its directors has broken its own regulations by doing something without a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do de*

[470] (1962) AII E.R 929, (1950) 2 AII ER 1064
[471] Unreported suit No FCA/L/226/83, FCA decision
[472] (*1968) 1 A.L.R Comm. 235*
[473] *(1915) ch. 503*

> *facto by ordinary resolution that which according to its own regulations could only be done by special resolution'.*

This exception is necessary to prevent the majority from ratifying by a wrong procedure an act which is in itself wrong. Also, in *Baillie v. Oriental Telephone Co. Ltd*[474], a company purportedly passed a special resolution without giving the required notice and a shareholder successfully brought an action to restrain the company from acting on it.

iii) **Any Act or Omission Affecting the Applicant's Right as a Member Where the Personal Rights of a Member or a Shareholder has been infringed**. Here the rule has no application and the minority member can sue. In *Edokpolo and Company Ltd v. Sem-Edo Wire Industry Ltd*[29], the applicant, a minority shareholder holding 40 percent of the company's shares, alleged collusion between 2" and 3 respondents, of shares out of the (40) forty percent belonging to the applicant. The Supreme Court held that the applicant minority shareholder was entitled to sue to protect its personal right to the shares held by it. In the case of *Central Bank of Nigeria v. Kotoye*[475], the Court of Appeal per Kalgo J.C.A (as he then was) held that:

> *'It is my considered view that in the circumstance of this case, and in respect of directors touching on the shareholder of the Plaintiff/Respondent in the 3rd Defendant /Applicant, is entitled to sue in his own name in the protection of his civil rights and obligation*s'.

In *Obikoya v. Enzenwa*[476]**,** it was held that the memorandum and articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other. If a member discovers that his right under the articles has been infringed, he is allowed to bring an action to redress such wrong.

In the case of *Quin & Axtens v. Salmon*[477], it was held that a shareholder can sue a member in order to protect a personal right which is common to all members —that is, the right to see that the articles are observed. Therefore, the *locus-classicus* on the point that an individual can bring an action where his personal rights have been trampled upon is the case of *Pender v. Lushington*[478]. It was decided that where the articles of association of a limited company provided that the company should not be affected with notice of any trust, and contained provisions that every member should be entitled to one vote at a general meeting for every ten shares, but should not be entitled to more than 100 votes in all; and that no member should vote at any general meeting unless, he had been possessed of his shares for three months previously thereto. It was held that, according to the articles, a member of the company was a person whose name was on the register

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[474] *Edokpolo v. Sem- Wire Industries (*1994) 2 NWLR (Pt.367)149
[29]*(1994) NWLR (Pt.330) 66.*
[475] (1973) 8 N.S.C.C 509
[476] (1909) 1 ch, 311
[477] (1877) 6 chD 70
[478] (1971) I U.I.L.R 314

of shareholders; that the register was the only evidence by which the right of member to vote at general meeting could be ascertained, and that at general meeting no votes of shareholders properly qualified and whose name had been three months on the register should be rejected on the ground that their shares had been transferred to them by other shareholders for the purpose of increasing their own voting or with an object alleged to be in the interest of the company, or on the ground that the holders were not beneficial owners of the shares. An action was brought by a shareholder whose vote was rejected, on behalf of him and all others who had voted with him, naming the company as a co-plaintiff, against the directors, for an injunction to restrain them from acting on the footing of the votes being bad. It was held that the plaintiffs were entitled to an injunction and held also, that till a meeting could be called to decide whether or not the company's name should be used as plaintiff, the company's name should remain on the record.

There are however two cases, one English decision and the other a Nigerian decision, where the court seemed more concerned with the internal management aspect of the case rather than with illegal infringement of the right of the plaintiff under the contract established by the articles.

The first case is Mac Dougall v. Gardiner (supra) where the wrongful refusal or a poll, duly demanded as required by the articles of the company, was said to be a matter of internal irregularity to which the rule in *Foss v. Harbottle* applied. James, L.J , in the case stated thus:

> *'I cannot conceive that there is any equity on the part of the shareholder, on behalf of himself and the minority, to say… we have a right.....and every individual has aright to have a meeting held in strict form in accordance with the articles'.*

The second case is *Georgius Cole v R.C Irving & Co Nig Ltd*[479]where the appointment of the company's Managing Director and Chairman were not supported by resolution, and also payment of allowance was made to him without the requisite resolution. This was held by Kazeem J. of Lagos High Court as constituting internal irregularity which could be ratified by the company at a general meeting. This decision was reached by the judge notwithstanding the fact that the matters complained of, and which were said to be justified on the evidence before the court, constituted an infringement of the contract contained in the articles of the company. This is a violation of the personal right of an individual member of the company. It is therefore difficult to reconcile these cases with *Pender v. Lushington* (supra). Accordingly, one can only conclude that the cases stand in glaring contrast at the centre of modern company law.[480] iv) **Fraud on the Company or the Minority**[481]

This appears to be the most important exception. At common law, 'fraud' would include dishonesty and deceit. Hence, in *Associated Registered Engineering Contractors Ltd v. YalajuAmaye*,[482] the Supreme Court held that in going on a withdrawal spree from the bank account, and forging minutes of meeting to cover lack of a resolution to change the signatories to the cheque, the

[479] DejiSasegbon ,Op Cit. P.257

[480] section 343 (d)

[481] (1990) LPELR-3511(SC) (Pp. 25-26 paras. D)

[482] (1950) 2 All E.R 1064. See also Burland v. Earle (1902) AC 83; see also Gook v. Deeks (1916) 1 AC 554

majority had committed fraud on the company. However, under this exception 'fraud' is not restricted to its common law definition. The Supreme Court defined it in a wider sense as "any act which may amount to an infraction or unconscionable conduct, or abuse of power as between a trustee and his shareholder in the management of the company", in which case the minority shareholder was allowed to sue. Thus, 'fraud' is used in a loose and equitable sense as an abuse or misuse of power on the part of majority of directors. Consequently, no actual fraud needs to be proved, it may simply be presumed. In this sense, it includes expropriation of the company's property or other members' property and any attempt to release the directors' from liability arising from breach of duty of good faith.

In case *of Edward v. Halliwell*[483], Jekins L.J. opined thus:

> *'Where what has been done amount to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule in Foss v. Harbottleis relaxed in favour of the aggrieved minority who are allowed to bring what is known as minority shareholders' action on behalf of themselves and all others'.*

What is necessary in determining what constitutes fraud is that the majority are proposing to appropriate to themselves or for their own use or benefit property belonging to their company even in the belief that they are doing nothing wrong.

It is noted that before an individual member can bring an action under this exception to address corporate governance concerns, he must show two things:

(a). that there has been an appropriation of the company's property amounting to fraud. (b). that the wrongdoers themselves control the company and this prevent the company itself from bringing action in its own name. This exception is needed because if the minority shareholders were denied the right to maintain the action, their grievance would never reach the court, since the wrongdoers being themselves in control would not allow the company to sue.

Also, in *Menier v. Hooper's Telegraph Works* [484], the court held that where the majority of a company proposed to benefit themselves at the expense of the minority, court may interfere to protect the minority. In such a case, the suit is rightly filed by one shareholder on behalf of others against the company.

v). **Impracticability of Calling on Meeting to Redress a Wrong done to the Company or to Minority Shareholders**[485].

An obvious absurdity has been said to exist in barring an action by a minority shareholder merely because the company could have rectified the position if, in fact the company has never had an

[483] Section 343 (e).
[484] (1967) ch. 254; (1966) 3 AII ER 420
[485] (1970) ch. 212, CA

opportunity in deciding whether or not it wishes to do so. The vogue now is that the courts in recent years have reasonably declined to stay an action until a validating resolution is passed.

In *Hogg v. Cramphorn Ltd*,[486]Buckley J. held that an individual shareholder could sue when his complaint was that the director, in issuing further shares, had exercised their powers for an improper purpose. It also decided that their action could be ratified by a general meeting and gave the company an opportunity to doing so on the director's undertaking not to exercise the votes on the new shares. In *Bamford v. Bamford*,[487] the new shares had been issued not to the directors themselves but to the company. The issue was later ratified by the general meeting, the other company not voting, and the action was then stayed. But the case of *Hodgson v. N.A.I.G.O*[43] seems to have gone a step further. Here it was held by Goviding .J*,* that a minority shareholder's action would be permitted where a company meeting cannot be called by the minority shareholders.

This exception also seeks to establish that the mere fact that action taken could be ratified by the general meeting will not necessarily prevent a minority shareholder from being started, action, whether in a personal capacity or on behalf of the company, though it will be stayed if and when it is so ratified.

Where a meeting becomes deadlock among the members including the board or perhaps the machinery for convening the meeting is not ready in place or an urgent action is needed and it will amount to an unnecessary delay, to wait for a meeting requiring notice to be convened. The facts of the Nigerian case of *Omisade v. New Africa Development Co. Ltd*[488] though decided before the 1990 Act, could fall under this exception. In that case, the wrong done to the company was that the contract between it was taken over by a new company that was formed by one of the minority shareholders of the former company. This was as a result of crisis of confidence that arose between the two equal shareholders of the company. Pursuant to this, an action was brought by one of them. The issue for determination was whether such an action could be brought as an exception to the rule of majority enunciated in *Foss v. Harbottle* since none of the shareholders was a majority shareholder. The Supreme Court, per Bello Mohammed, CJN, held as follows:

> *It is clear that the disagreement between the two equal shareholders was such that it could be impossible to get the company to sue. The plaintiff got his solicitor to write that it has become impossible for them to work together and there was a threat of physical confrontation. He also complained that he was barred from entering the company's office ... in the circumstances, there is no doubt that it would have become impossible for the company to take any decision to sue.*

While it is true that in the above case, there was no minority shareholder since both shareholders had equal shareholdings, the principle in this case nevertheless clearly illustrates a situation where

[486] (1972) 1 W.L.R 130; (1972) 1 AII E.R 15
[487] (1987) 2 NWLR (Pt. 155) 158
[43]Section 128, Companies Act, 1968.
[488] Section 343 (f) CAMA

a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company.[489]

This subsection is aimed at promoting good corporate governance especially when the meeting to be convened will discuss issues that affect the running of the company and protect the minority members of the company.

vi). **Where there is Likelihood that the Directors are Likely to Derive Profit or have Profited from their Negligence or Breach of Duty[490]**

It is noted that in all cases of fraud where minority is involved either misappropriation of property or some fraud in the sense of an improper motive, the question, therefore is whether for wrong of other type done to the company, there is no remedy so long as the wrong doers control the company. Some cases suggested that this is so. In *Turquard v. Marshall*[491], the director by misrepresenting the state of a company caused larger dividends to be paid than ought to have been paid. The shareholders as a body cannot make the director liable to repay those dividends. The court held that the directors could not be made liable for the sum so advanced and lost. On the ground that it had been improperly advanced.

It has also been held that a minority shareholder who had no voting rights complained that the directors had negligently sold an asset of the company at a gross under valuation, a minority shareholders action would not be allowed[492].

The above cases seem not to permit an individual shareholder to sue for any breach of duty committed by the directors. So the director can continue to fritter away the company's assets through negligent loans and no action would lie.

However, the trend now is that courts frown at directors benefiting from their own negligence and have in some decided cases held that where the directors made a profit out of their own negligence, an action by the minority shareholders would lie even though fraud was negative[493]. Therefore, directors who use their powers so as to obtain benefits for themselves at the expense of the other shareholders, without informing them of the facts, cannot be allowed to retain those benefits, but must account for them to the company, so that all the shareholders may benefit in them[494].

The same conclusion was reached in the case of *Daniel v. Daniel*. The facts of the case were that there was a sale of the company's property, and assets at gross undervaluation to one of the directors and the controlling shareholders. It was held that the directors and controllers were

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[489] (*1869) L.R 4 ch. App 376*

[490] *Pavlides v. Jensen (1956) ch 565*

[491] *Alexander v. Automatic Telephone Co. (1900) 1 Ch. 56 CA*

[492] *(1891-1900) The Law Reports, Digest of cases Vol. 4 P. 203;* DejiSasegbon Op. cit 257 Section 211 CAMA LEN*2004*

[493] *Daniel v, Daniel (1978) ch. 406*

[494] *Pender v. Lushington (Supra); Ballie v. Oriental Telephone Co.* (*Supra*)

expropriated to themselves the property of the company. The fact that they had not intended to defraud the company was irrelevant. Templeman J[495]observed thus:

> *'A minority shareholder who has no other remedy may sue where director use their powers, intentionally, fraudulently or negligently in a manner which benefits themselves at the expense of the company'.*

The spirit and intent of this provision is covered by this principle laid down by the learned justice. In all the exceptions to the rule in *Foss v. Harbottle* examined above, a question becomes imperative as to what forms of action can a minority shareholder bring where he has a case that falls under any of these exceptions? The actions that a minority shareholder could bring in this circumstance include:

i. ***Personal Action*:** The provision has been expanded to include damages and injunction unlike the repealed provision in the Old Act under section 301. A minority shareholder could bring action in his personal capacity where his right as an individual member of the company is infringed upon. Member's personal action is provided for under Section 344(1) of Companies and Allied Matters Act 2020. It provides thus:

> *'Where a member institutes a personal action to enforce a right due to him personally, or a representative action on behalf of himself and other affected members to enforce any right due to them, he or they are subject to subsection (2), entitled to- (a) damages for any loss incurred on account of the breach of that right; or (b) declaration or injunction to restrain the company or the directors from doing a particular act'.*

It is noted that where a minority shareholder brings a personal action to protect a right which is personal to him, the existence of such personal right may originate from the regulation of the company, or from a separate and independent contract between the shareholder and the company, or from some special duty owed to the shareholder by the directors. For instance, where there has been or there is about to be, an infringement of the articles of a company, there is scarcely any doubt that it is opened to any shareholder to institute a personal action to remedy the wrong[496]

Also, a shareholder has the right to bring a personal suit to restrain an *ultra vires* act. In which case, the shareholder could be said to be protecting his personal right and ensuring that the provisions of the memorandum of association are complied with.[497]

As provided for under Section 344(1) of CAMA, and stated under the two situations mentioned above, a minority shareholder can ask the court to grant him an injunction to restrain the infringement or a declaration that the alleged infringement was wrong. The court can also give judgment in the form of damages in favour of the minority shareholder.[498] Note also that a

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[495] *Russel v. Wakes field water works Co. (1875) L.R 20 Eq 474 at 481*

[496] See Gower & Davies (Supra) P. 595

[497] *Allen v. Hyatt (1914)* 30 T.L.R 444

[498] *Obikoya v. Ezenwa* (supra) see also section 41 of CAMA

shareholder who had been induced by the directors of his company to part with his shares to his detriment has a personal right of action against such directors[499].

More importantly, in order to prevent oppressive conduct, a minority shareholder can maintain a personal action in respect of anything which happened before he became a member of the company, since his rights are usually incidents of membership based on the contract established by the regulations of the company.[500] ii. ***Representative Action:*** This form of action is opened to any minority shareholder suing on behalf of some other shareholders who share an interest with him in the proceedings. There must be a common interest and a common grievance and also the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent[57]. This type of action serves a useful purpose where the plaintiffs share a common interest. However, for a suit to be filed in a representative capacity, the following conditions must be fulfilled: a. those represented must have a common interest and common grievance (b) the relief sought must in its nature be beneficial to all those being represented (c). the parties to be represented must give express permission or authority to those who are to represent them.

It is further noted under Section 344 (2) of CAMA, that where a member institutes a representative action on behalf of himself and other affected members to enforce any right due to them, he shall not be entitled to any damages but to a declaration or injunction to refrain the company and or director from doing a particular act. This is similar to a personal action but it must be pointed out that where any member of the company institutes a personal action or a representative action, the court may award costs to him personally, whether or not the action succeeds.

iii. ***Derivative Action*****:** This is an action in the name or on behalf of the company. Being a corporate action, the real purpose of those instituting it is to protect the interest of the company or remedy a wrong done to the company.

In this action, the member sues in the name or on behalf of the company against the wrong doers, the company being a nominal defendant. The action is an equitable device to enforce the right of the company. This is different from a personal action where the member sues on his own behalf and other members. Accordingly, Section 346 (1)[501] provides that:

> *'An applicant may apply to the Court for leave to bring an action in the name or on behalf of a company or a company's subsidiary, or to intervene in an action to which the company or the company's subsidiary is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company or the company's subsidiary'.*

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[499] *Tika-Tore Press Ltd v. Abina (*1973) 8 N.S.C.C 233

[500] CAMA 2020, section 346.. See also the case of *West African Oilfield Services ltd v. Gregory (2019)* LPELR47292(CA) *(Pp. 24-*28 paras. C) [57]Section 307 CAMA.

[501] Such as Corporate Affairs Commission, a director or officer of the company or any proper person in the discretion of court.

The process of commencing the action is contained under Section 346(2) as no action might be brought unless the court is satisfied that:

> *'a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company;(b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the Court under subsection (1);(c) the directors of the company do not bring, diligently prosecute, defend or discontinue the action;(d) the notice contains a factual basis for the claim and the actual or potential damage caused to the company;(e) the applicant is acting in good faith; and(f) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.*

Although the Old CAMA did not make provisions for obtaining information and documents from an adverse party in a derivative action, however, the general position of the law as provided in the Federal High Court Rules, 2019 is that parties could make applications for discoveries. With the advent of the New CAMA, a Plaintiff in a derivative action, now has the right to obtain any relevant documentation from the defendant(s) and witnesses at trial and may in pursuance of that right, request categories of documents from such persons even without identifying the specific documents. In derivative action, the court has no such discretion. An applicant must not be required to give security for cost[502]

Apart from the exceptions to the rule in *Foss v. Harbottle* and the forms of actions that minority members can bring, any member of the company may apply to court for relief on the ground that the affairs of a company are being conducted in an unfairly prejudicial or oppressive manner. Under Section 353 (1) of CAMA, persons other than members of the company can exercise this right or action,[503] where the affairs of a company have been run in an unfairly prejudicial manner, the court is empowered under Section 355 (2) to make order to wind up the company, prosecute, defend or discontinue specific proceeding in the manner or on behalf of the company, directing an investigation to be made by the Commission or appoint a receiver or receiver/ manager of property of the company.[504]

4. Shareholders Participation and the Impact on Corporate Governance.

Shareholders include both the minority and majority members of the company. Subscribers are generally by the provisions of the company's articles not expected to interfere with the management of the company. The ultimate control of a company rests with them in general meeting. In other words, the major means by which a shareholder can participate in the affairs of a company is at the general meeting. He therefore has to be in attendance in order to exercise this ultimate control reserved for shareholders by the company's articles of association. The Companies

[502] Section 312 (2) (a-j)
[503] CAMA,2020 section 235
[504] Ibid. section 237

and Allied Matters Act provides that a public company shall hold the following meetings after it officially commences business: statutory meeting[505], annual general meeting [506]and extra-ordinary general meetings. **[507]**

Under the Business Facilitation (Miscellaneous Provisions) Act, notice of participation of members of a company at a meeting has been extended in such a way that[508] notice may now be given by the company to any member — (a) personally or (b) electronically or (c) by sending it by post to him or to his registered address; or (d) where he has no registered address within Nigeria, to the address, supplied by him to the company for the giving of notice to him. Also, to enhance participation of members of a company, restriction imposed on virtual meeting for public company has been lifted by deleting the word private from section 240 of CAMA, 2020 [66]. This was amended to allow equal participation of members in the affairs of the company.

The Act requires every public company to convene a general meeting of its members within six months of its incorporation. This meeting is called statutory meeting. The members in attendance could also raise matters on the content of the statutory report delivered to them prior to the meeting. Also, annual general meeting can be convened to transact ordinary business of the company. The annual general meeting is the most common and popular. It affords shareholders the best forum where they can have some measures of participation in the management of their company and the opportunity to meet the directors and ask question about the general management of the company. It also gives the members opportunity of having first-hand information about its profit performance which of course affects the return on their investment. An extra-ordinary general meeting may be called under section 239 of the Act where the company needs to carry out transactions that cannot await the next annual general meeting.

As stated earlier on, shareholders have right to attend company's general meeting. Every member who has paid all calls and or the other sums payable by him on the shares which he holds in a company is entitled to attend, speak and vote at any general meetings of the company. As a precursor to the above, every member, person upon whom the ownership of shares devolves as a legal representative[509], receiver or trustee in bankruptcy of a member is entitled to receive the notice concerning a meeting. Such a person has the right to appoint a proxy to attend in his stead. Note that, a member to whom notice of meeting has not been sent can apply to court for an injunction to restrain the holding of that meeting, and if the meeting has been held, for a declaration setting aside what transpired at that meeting.**[510]**

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[505] Ibid. s 235

[506] Ibid s 237

[507] Idid. s 239,

[508] .2022 No 5. Section 12.,By this Act, Pubic company is now allowed to hold virtual meeting

[66]Section 244 of CAMA

[509] *Onwuka v. Taymani (1968) ALR 313*

[510] JO Lokulo- Shodipe"Shareholders' Participation in the Affairs of Public Companies: An insight" (2010) *International Journal of Advanced Legal Studies & Governance* vol. 1 p.8

A shareholder can demand on any matter at a general meeting except on the election of the chairman of the meeting, the adjournment of meeting (where the Articles of Association so forbids) and on the election of members of the Audit Committee under Section 359 of the Act. Members of the company have right of access to the statutory books of the company. This right furthers the lofty aim of disclosure philosophy at providing the members with information of the company. These books are required to be kept at the company's registered office for accessibility. A company therefore is required to maintain a register of members which a shareholder is entitled to inspect without a charge.

The first directors of the company may be appointed by the subscribers to the memorandum of association or by naming the directors in the articles or the association. The subsequent directors are to be appointed by an ordinary resolution of the members at a general meeting, usually the annual general meeting. Where a casual vacancy occurs in the office of directors as a result of death, resignation, retirement or removal, the board of directors is authorized to appoint new directors. Such appointment is subject to the approval or the members in the next annual general meeting.

The members of a company may by ordinary resolution passed at a general meeting remove a director from office. This power may be exercised even before the expiration of the director's tenure notwithstanding anything contained in the articles of association or any agreement between the company and the directors. With this, the enormous power of members to hire and fire is indeed preserved**.**

Some of the businesses transacted at the general meeting are important for the shareholders to exercise their powers apart from the appointment of directors; the shareholders could decide on the appointment of the company's auditors where necessary and accordingly fix the remuneration payable to them. The shareholders also have the power to analyze the accounts of the company and raise questions on the state of affairs of the company. The members at the general meeting wade enormous powers and it has been recognized that good corporate governance must device a means by which the 'guards' can be guarded.

With the businesses usually transacted at the general meetings, the most acceptable means of corporate monitoring is through the general meeting. Although, the general meeting is not saddled with management power *per se* but they perform some supervisory roles over the exercise of management power by the Board of Directors. The reason being that members at general meeting are those that really have pecuniary interest in a company as the success of such company enhance their earning, whereas the directors have nothing to lose in event of liquidation except where they are also members of the company.

The best way therefore, the general meeting can control the directors is by giving of direction, alteration of the articles, removal of directors and ratification of directors' acts. From the critical analysis of the true ambit of majority rule as presently enacted by the Companies and Allied Matters Act 2020, it is evident in recognition of the prevailing need exemplified by existing judicial

authorities, that the Act has extended the exceptions beyond common law established exceptions. The exceptions recognized by the Act would appear to furnish substantial means of protection of minority rights and interest in the company to promote corporate governance.

Participation of members in the affairs of a company will reduce oppressive tendencies, enhance corporate strategies and risk management, promote full disclosure and transparency and ultimately enhance corporate governance.

5. Conclusion

It has been observed in this paper that participation of shareholders is very crucial to promoting sound corporate governance. Therefore, the minority members of the company must be protected from the abusive tendency of the majority members. The new Act seems to make personal and representative actions more attractive because aggrieved minority shareholders can now claim damages in addition to injunction and declaration, a right which was not available under the Old 1990 CAMA. Also, the conditions for leave to commence a derivative action are now more stringent. While it is not too clear why this is the case, perhaps it is introduced to minimize frivolous actions or reduce the level of litigation against companies. However, to the extent that directors can now be held personally liable for their wrongdoings, the need to proceed against companies should naturally reduce. In essence, the new Act generally protects companies more and exposes errant directors.

While virtual meeting allowed for public companies in the Business Facilitation (Miscellaneous Provisions) Act will enhance participation of both minority and majority shareholders in the Company, it is suggested that such notice of meeting should be sent to all members that are by law entitled to attend the meeting. The company secretary should follow up the notice to ensure that same is delivered to enhance equal participation.