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A Review of the Status of the Secretary of a Public Company Under the Companies and Allied Matters Act Based on the Supreme Court's Decision in *Longe Versus First Bank of Nigeria Plc*

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Abstract

The position of the secretary of a public company has been viewed as being lower in status compared to that of the directors on a company's board. While the directors acting as a board were seen as the directing will and mind of a company, the secretary was seen only as a servant of the company employed to work for the company, perhaps because of his qualification, experience and expertise. This was similar to the decision in Yalaju Amaye v. Associated Registered Engineering Contractors where it was held that the status of a managing director is lower than that of directors on the Board. The current position of the law is the Supreme Court's decision in Bernard Ojeifo Longe v. First Bank of Nigeria where it was held that a managing director is a director like any other director and, as such, is entitled to the protection and the procedure laid down in the Companies and Allied Matters Act (CAMA). First, this paper argues that the secretary of a public company should be accorded the same status as that of a managing director. Thus, since Longe's case has equated the managing director as a director, then the secretary of a public company should be accorded the status of a director whether the secretary doubles as a director or not. This is based on the fact that a secretary is also an officer of the company like directors. Second, the paper further argues that where the secretary of a public company is to be removed, the provisions laid down in CAMA for removing directors should be followed. Following this, this paper therefore argues that the provisions relating to the removal of the secretary of a public company should be expunged from CAMA since those for the removal of directors will now cover the secretaries of public companies. The whole essence of this is to further protect and secure the job of the secretary of a public company and enable him to perform his multi-dimensional roles without fear or favour. His employment is statutorily protected and it is not exposed to the unsecure master-servant relationship. He, like other officers of the company, is a partner in achieving the corporate objectives of the organization.

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Introduction

Legally speaking, the office of the secretary of a public company is a statutory office.[1] The company secretary is a high-level official responsible for ensuring that a company complies with all the statutes and regulations that apply to the company within a particular jurisdiction. He keeps the organs of management, particularly the board of directors, informed of their legal and corporate governance responsibilities. Company secretaries have high-level responsibilities including advising on governance structures and mechanisms, corporate conduct within the company's regulatory environment, interface with the relevant regulatory bodies such as the Nigerian Stock Exchange (NSE), National Insurance Commission (NAICOM), National Pension Commission (PENCOM), Central Bank of Nigeria (CBN) amongst others. They are also responsible for board orientation, meetings of the board and its committees, compliance with legal, regulatory and listing requirements, training and induction of non-executives, reports to shareholders, trustees and other stakeholders, involvement in issues of employees' benefits such as pensions and employees' share ownership schemes, and so on. The research, therefore, seeks to examine the status of a secretary in a modern-day public company by arguing that aside from being an officer of the company, his employment is clothed with statutory flavour bestowed on it by the Companies and Allied Matters Act (CAMA) 2004. This makes his status equal to that of a director to the effect that in the event of a secretary's removal, due process must be followed else such removal will amount to illegality and lead to possible reinstatement or payment of appropriate damages as laid down by the Supreme Court's case of *Longe v. First Bank.*[2]

The managing director, therefore, is now no longer a mere servant or employee, as previously thought. In critically analyzing Longe's case, this research aims at establishing that a company secretary should equally be elevated to the status of a director just like a managing director. While it is true that the office of a company secretary, like that of a director, is a creation of statute, in reality, the company secretary has not been so treated even where he doubles as a director. This paper, therefore, argues that the status of a company secretary should be elevated to that of a director as it relates to the procedure for removal. The procedure for the removal of a company secretary should be similar to that of a director of a company as laid down by the Supreme Court in Longe's case and the consequences of failure to comply with the procedure laid down under the Companies and Allied Matters Act 2004 should be followed. By implication, the researcher argues that the provisions for the removal of a company secretary as currently provided in CAMA should be expunged. This is because it does not adequately provide for the job security of a company secretary, and it still subjects a secretary to the whims and caprices of the Board.

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1 By virtue of the office of a company secretary being a creation of statute (CAMA), the inference is that his employment has gone beyond that of master-servant or employer-employee relationship. His employment status is in the category of employment with 'statutory flavour'.

2 *Longe v. FBN Plc* (2010) 6 NWLR (Pt 1189) SC 1.

A Review of the Case of *Bernard Longe Versus First Bank of Nigeria Plc* vis-à-vis the Status of the Secretary of a Public Company

Before we proceed with this paper, it is necessary to extensively review this case since our argument relies heavily on the decision in the case. In 2010, the Supreme Court of Nigeria delivered a landmark judgement in favour of the plaintiff, Bernard Longe. The Court also declared that the Board of First Bank Nigeria Plc (FBN), which sacked Longe as the bank's managing director, could not legally hold a board meeting without giving due notice to Longe. Therefore, it declared that all decisions taken at any such meeting were unlawful, null and void and incapable of having any legal effect. The effect of this is that the decision of the Bank to sack Longe at a board meeting that was held in his absence was illegal, null and void as it did not follow the due process stipulated under Sections 266 (1), (2) and (3) of the Companies and Allied Matters Act (CAMA).[3]

Facts of the case

By a resolution of the FBN's Board of Directors dated February 24, 2000, Longe was appointed as the Managing Director and Chief Executive Officer of FBN. Before then, Longe had been FBN's executive director. In 2002, Longe was alleged to have negligently granted an unauthorized facility to Investors International (London) Limited for the purpose of acquiring shares in NITEL. This resulted in losses for FBN. Consequently, on April 22, 2002, Longe was suspended by the Board. At a board meeting convened on June 13, 2002, Longe's appointment was revoked. Following this development, Longe brought an action against FBN under Section 266 of CAMA on two grounds, that:

(i) he was entitled to be given notice of the meeting where his appointment was revoked;
(ii) he was not given notice of the meeting.

On these two grounds, he prayed the court to declare the meeting invalid and, accordingly, that all decisions taken at the meeting be declared as unlawful, null and void and incapable of having any legal effect, and most especially, the decision to revoke his appointment. On its part, the Bank canvassed that since Longe was on suspension, he was not entitled to further notice of the meeting where the decision to revoke his appointment was made. The Federal High Court and the Court of Appeal both dismissed the claims of Longe. Not satisfied with the lower courts' decisions, Longe appealed further to the Supreme Court.

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3 It is now cited as Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2004. It should be noted, however, that the 2004 CAMA has been repealed and replaced with the 2020 CAMA. In this paper, however, all references to CAMA shall be to the repealed 2004 CAMA as the new 2020 CAMA is yet to take effect and this paper was written before the repeal of the 2004 CAMA. There is virtually no major difference between the provisions relating to the secretary of a public company. The 2020 CAMA only relieved small companies from the requirement of having a secretary if they choose to, unlike the 2004 CAMA that requires every company to have a secretary.

The decision of the Supreme Court

In its judgement delivered on March 5, 2010, the Supreme Court considered the combined provisions of CAMA under Sections 262 (1) and (2) and 266 (1). It held that for the purpose of removing a director, notice of the meeting where the decision to remove him is to be discussed must be served on him. The meeting shall be invalidated in the absence of such notice. By virtue of Section 262 of CAMA, a company may, by ordinary resolution, remove a director before the period of his office expires. This is regardless of any relevant provision in the Company's Articles or any other agreement between the director and the Company. However, under that section, special notice is required for any resolution to remove a director. The same resolution covers a situation where another person is appointed as a director in the meeting at which the director is removed. Upon receipt of notice of an intended resolution to remove a director under that section, the Company must instantly send a copy of it to the director concerned. The director is entitled to be heard at the meeting, regardless of whether he is a member of the Company or not.

In addition, Section 266 (1) provides that every director[4] is entitled to receive notice of directors' meetings, unless he is not qualified by any reason under the Act from continuing with the office of a director. The Supreme Court declared, on this note, that the decision to remove Longe was a gross violation of the law. It added that such violation attracts the penalty prescribed under Section 266 (3) of CAMA. In other words, failure to give notice invalidates the meeting and any decision made at the meeting. Following this, the court declared that Longe was still the managing director and chief executive officer of First Bank.

Analysis of the decision vis-à-vis the status of the secretary of a public company

This case demonstrates the unique status of a company's director under CAMA and the need for strict legal compliance by parties, especially regarding the rights and protections afforded to citizens. The decision has brought to the fore the consequences of the decision on an employer's common law right to 'hire and fire' for good, for bad or for no reason at all, as affirmed in a number of other cases.[5] However, this case merely pronounced on the protection afforded to a company director under CAMA. From the inception, Longe was a company director whose status was created and regulated by CAMA. The Supreme Court's emphasis, in this case, was to meticulously and procedurally follow the prescriptions of the law. In his leading judgement, Oguntade JSC (as he then was), stated thus:

> To accept as the court below did, that suspension of the plaintiff would deny him protection afforded him under Section 266 is to confer the right on the defendant to vary the status of the plaintiff without complying with the procedure laid down for doing so. The defendant cannot first suspend the plaintiff without notice to him of the meeting at which the

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4 Regardless of the nomenclature of 'executive'; 'non-executive'; 'independent'; and 'non-independent'.

5 *Chukwumah v. Shell Petroleum Development Company of Nigeria Limited* (1993) 4 NWLR (Pt 289) 512; *Osisanya v. Afribank (Nig) Plc* (2007) 6 NWLR (Pt 1031) 565.

> suspension was discussed and agreed to turn round to say that the suspension has removed the necessity to give him notice as mandatorily required under Section 266 (1) of [the Act]. The court cannot grant a litigant the right to disobey the law under any artifice or guise.[6]

Section 244 (1) of CAMA defines directors as "persons duly appointed by the company to direct and manage the business of the company." The Supreme Court considered the judgement of the Court of Appeal regarding the creation of dual tiers of directors in a company. It stated that by virtue of Section 244 (1) of CAMA, a director is simply a person duly appointed by the Company to direct and manage the business of the Company, notwithstanding the fact that he was appointed by the Company's Board of Directors. In addition to this, the Supreme Court confirmed that the status of a director in a Nigerian company was governed by CAMA. The Appeal Court, in its decision, held that regardless of the fact that the appellant was not notified of the board meeting, the meeting remains valid as stated here:

> On suspension of the appellant's appointment as Managing Director/Chief Executive, all his rights, privileges and powers consequential or attached to the employment, including attending Board meetings ceased. The notice of Board Meetings is not given for the fun of it.

The apex court unequivocally rejected this declaration on the danger of its encouraging bodies governed by CAMA to circumvent the applicability of Section 266. It thus declared that the:

> Suspension of an employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Suspension is not a demotion and does not entail a diminution of rank, office, or position.

Upturning the Appeal Court's judgement, therefore, the Supreme Court said:

> The Statutory definition of directors under Section 244 (1) of [the Act], does not recognise the nomenclature raised by the court below as between executive and non-executive directors. Rather, directors are appointed by the company "to direct and manage the business of the Company... The further reasoning of the court below that an executive director is not the same as a non-executive director is untenable. From other angles[7] it may be correct, but for the purpose of removal under Section 266 (1) [the Act], all directors are the same as long as they are all engaged to direct and manage the business of the company.[8]

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6 See also https://www.internationallawoffice.com/Newsletters/Litigation/Nigeria/Kola-Awodein-Co/Supreme-Court-rules-on-removal-of-managing-director. Visited 28 April 2020.

7 Such other angles include the Corporate Governance Codes where the distinction between executive and non-executive is clearly made. The Codes even went further to make distinctions between independent and non-independent directors. However, as far as CAMA is concerned, there are no such distinctions.

8 See https://www.internationallawoffice.com/Newsletters/Litigation/Nigeria/Kola-Awodein-Co/Supreme-Court-rules-on-removal-of-managing-director. Visited on 22 April 2020.

On the use of the word 'director', CAMA never differentiated between directors, whether executive or non-executive. Both an executive director and a non-executive director would fit into the description of a director as provided under Section 244 (1) of the Act. This is our position in this paper as well. As an employee with statutory flavour and not an employee under a master-servant relationship,[9] the company secretary of a public company should be accorded the same status as an executive director and, by extension, as a director *simplicita*. That being said, since CAMA did not distinguish executive from non-executive directors, but regard all as directors on the authority of Longe's case, that shield should cover the company secretary of a public company. To that extent, therefore, whatever protection afforded a director under CAMA should be extended to the company secretary of a public company considering his capacity as an officer of the Company and as an 'executive director', just like a managing director. Also, a person who performs the functions of a director is a director even if he is not called by the name director. This is one of the fallout of Section 567 of CAMA. It follows, therefore, that company secretaries, even if they are not called 'directors' in the strict sense of the word, as long as they perform the functions of a director, can and should be accorded the status of director with all the benefits and liabilities ascribed or attached to that position.

This decision has settled the legal uncertainty surrounding the appointment and removal of a director and, by extension, the company secretary. The Appeal Court was trying to differentiate between the rights of executive directors and non-executive directors. This distinction is strange to the Nigerian company law. Instead, the law clearly provides that every director is a director for all intents and purposes. By deciding in favour of Longe, the Supreme Court also took the law a step further by deeming that Longe had, right from time, remained the managing director of FBN, a declaration which Longe did not even seek.[10] Eventually, the Supreme Court held that the decision to remove Longe as a director of FBN was irregular, *ultra vires* and illegal, and subsequently reinstated Longe as a director immediately and not retrospectively.

Historical Journey of the Status of a Company Secretary

The early company statutes in the United Kingdom had no provision for the appointment of a secretary. It was only in 1948 that the appointment of a secretary became compulsory by virtue of Section 177 (1) of the United Kingdom Companies Act, 1948.[11] As at that time, the roles of company secretaries were limited to the ministerial and administrative. This effectively excluded them from involvement at the managerial level of the company.

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9 Company secretaries of private companies may come under master-servant relationship as CAMA, in Section 296 (2), specifically provides for steps to be followed in removing the company secretary of a public company. It particularly mentioned 'secretary of a public company' and this effectively excludes the removal of company secretaries of private companies who are now left at the mercy of their employers under master-servant relationship.

10 This appears an exception to the maxim that the court of law is not a Father Christmas and as such, does not grant a prayer not put before it.

11 J.O. Orojo, *Company Law and Practice in Nigeria* Fifth Edition, LexisNexis Butterworths, 2008, p. 285.

The status of the company secretary is one of both common law and statute law from England down to Nigeria where the secretary graduated from a mere servant to the status of an officer of the company. Lord Esher, MR stated the common law position of the secretary, in the case *Barnett, Hoares & Co. v. South London Tramways Co.*[12] where he said as follows:

> A secretary is a **mere servant**; his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all nor can anyone assume that statements made by him are necessarily to be accepted as trustworthy without further enquiry.[13]

From this judgement, one can infer that at common law a secretary is a mere servant with the status of a clerk; the secretary lacks authority to represent anything and, as such, he is not in a position to make representations, induce persons to enter contracts, nor can he by word or deed bind the company with outsiders. Third parties are obligated to make additional enquiries and seek further clarifications from the company before relying on the secretary's representation.[14]

As company law practice developed, so did the importance of the company secretary. The courts were forced to change their views about the secretary because company law practice had moved on to upgrade the status of the company secretary. Thus, the 19th century view of the company secretary status as a servant has since changed. The company secretary is now an officer of the company charged with numerous administrative duties and responsibilities. The enhanced status of the modern company secretary has now been recognized by the court as stated by Lord Denning, M.R. in 1971 in the case of *Panorama Developments (Guilford) Ltd v. Fidelis Furnishing Fabrics Ltd.*[15] Lord Denning, M.R. recognized the rising status of a modern company secretary when he stated:

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12 (1887) 18 (QBD 815 at 817).

13 (1887) 18 QBD 815. See also: *Houghton & Co. V. Nor hard, Lowe & Wills Ltd* (1928) AC 1, where it was held that a company secretary has no implied authority to bind the company by contract; *Daimler Co. Ltd v. Continental Tyre Co. Ltd* (1916) 2 AC 307 where it was held that a company secretary has no implied authority to issue a writ in a company name or lodge defences in the name of the company; also Learned Justice Pennycuik V.C. delivering judgement in Re Maidstone Building Provisions Ltd said: "*So far as the position of a secretary as such is concerned, it is established beyond all questions that a secretary, while performing the duties appropriate to the office of the secretary, is not concerned with the management of the company. Equally, I think he is not concerned in carrying on the business of the company.*" See also *Newlands v. National Employer's Accident Association* (1885) 54 L.J. Q.B.D. 428, *Rueben v. Great Fingall Consolidated* (1896) A.C. 439.

14 Dele Israel Offiaji Ikeorha, An Evaluation of the Role of the Company Secretary in Corporate Governance in Nigeria. Case Study: Finbank Plc. Available at https://deleikeorha.wordpress.com/2014/02/23/an-evaluation-of-the-role-of-the-company-secretary-in-corporate-governance.

15 (1971)2 QB 711. In this case the 28-year-old company secretary of the defendant company capitalized on the absence of the Director and hired series of high quality cars from the plaintiffs purporting to have hired them on behalf of the company but which he used for his own purpose. He was convicted and imprisoned

> But times have changed. **A company secretary is a much more important person than he was in 1887.** He is an officer of the Company with extensive duties and responsibilities. This appears not only in modern Companies Act, but also by the role which he plays in the day to day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the Company and enters into contracts on its behalf which come within the day to day running of the Company. He is certainly entitled to sign contracts connected with the administrative side and so forth. Such matters now come within the ostensible authority of a company secretary.[16]

Section 567 of CAMA[17] specifically reiterated the decision in Panorama's case when it stated that the company secretary is now an officer of a body corporate in Nigeria. The section equally refers to a director as an officer of the company. One possible inference from this is that CAMA accords a director and a company secretary the same status. CAMA, under Section 293 (1), mandatorily requires every company to have a secretary.[18]

We agree totally with the opinion of Professor Gower, where he observed that the secretary has evolved to being an organ of the company. Though appointed by the directors, he is not their servant but an officer of the company. He has substantial authority in the administrative sphere and with powers and duties derived directly from the Articles and the Companies Act.[19] Gower opined that in the performance of his statutory duties, the secretary is obviously entitled to resist interference from the members, board of directors, or even the managing director.[20] According to Gower, the only area where the secretary differs from them (the directors) is that he is not saddled with the responsibility for the corporate policy or for making managerial decisions. He only plays administrative roles in ensuring that the policy and managerial decisions are implemented, and are regulatory-compliant. We however differ from this latter part of Gower's submission in that as long as the company secretary now performs

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for the fraud. However, the debt remained unpaid to the Plaintiff, who brought an action for recovery of the outstanding debt. Despite his lack of actual authority, the Court of Appeal departed from earlier common law position on the status of a company secretary, unanimously held that the Plaintiff could rely on the Defendant Company Secretary's representations as the Secretary does have ostensible authority to bind his company by virtue of his position as the "Chief administrative office" of the company. Accordingly, the Defendant Company was ordered to pay the hire charges incurred by its company secretary.

16 *Panorama Development (Guildford) Ltd case,* p. 716. The company secretary regularly makes representations on behalf of the company and enters into contracts on its behalf in the same way directors will do. To that extent, therefore, the company secretary deserves the same status with directors, whether they double as director or not.

17 Cap C20 LFN 2004.

18 The new CAMA 2020 only requires a public company to have a secretary. This means small companies may dispense with the requirement to have a secretary if they choose to.

19 Gower's *Principles of Modern Company Law*, page 198.

20 It is only by so doing that the company secretary can effectively discharge the onerous responsibilities bestowed on him.

multi-faceted roles as the chief administrator of the company, the compliance officer, the liaison officer among all the stakeholders, at times the legal officer and the custodian of the company's information and records, his roles can even, with due respect, be said to be more important than some of the directors who only attend meetings occasionally and leave the so-called policy decisions made to the company secretary for advice and execution.[21]

In a plethora of cases, Nigerian courts have elevated the status of the company secretary as seen in the case of *Okeowo and ors v. Milgliore*[22] where it was held that "a company secretary is the principal officer of the company." It was also held in the case of *Wimpley (Nigeria) Limited v. Balogun*[23] that "a company secretary is indeed a high ranking officer in the company set-up and is indeed part of the management of the company." The simple inference from this decision is that if the company secretary is indeed part of the company's management, like the executive directors and even the managing director, then we submit, with respect, that it is not out of place to accord the company secretary of a public company the full status of a director of the company. We submit that the company secretary ought to be so treated. This is in line with the decision in *Longe v. First Bank* where the Supreme Court rejected the distinction between executive and non-executive directors as held by the Court of Appeal. The apex court held that there is no distinction between an executive and a non-executive director regarding their status in terms of appointment and removal.

According to Ogbuanya,[24] steps taken to codify the current status of the company secretary in Nigeria were summarized under Sections 293-298 of CAMA in the following ways:

- Statutory provision for the office management position;
- Power of the board to appoint and remove company secretary;
- Qualification of company secretary of a public company;
- Protection of dual status as director and secretary; and
- Statutory prescription of duties.

Now, under CAMA, Section 567 defines an 'officer' in relation to a body corporate to include a director, manager or secretary. Again, by virtue of this provision of CAMA, a company secretary is an officer of the company just like the directors.[25] His role under

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21 The company secretary in some companies doubles as the corporate governance officer and the board heavily relies on him for compliance.

22 (1979) LPELR-SC.36/1979.

23 (1986) 3 NWLR (Pt 28), p. 328; see also *Adebisi v. May and Baker Ltd* (1978) 4 F.R.C.R 322 where the Federal High Court recognized the secretary as an officer of the company with important duties and responsibilities. See also the case of *Migliore v. Metal Construction (W.A.) Ltd* (1977) 3 F.R.C.R. 117.

24 Nelson C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers Limited), p. 400.

25 It is however surprising that even though the directors and company secretary are guaranteed equal status under the CAMA as officers of the company, Section 296 of the same CAMA gives the power of appointment, remuneration and removal of secretary to the directors of a company. This indeed ridicules

CAMA[26] includes the following: to attend company board and committees meetings; to render secretarial services in meetings; to advise on issues of compliance with applicable rules and regulations; maintaining registers and other statutory records; rendering proper returns and giving notification to the Corporate Affairs Commission as required under the CAMA; and carrying out such administrative and other secretarial duties as directed by the directors or the company. The only *caveat* is that the secretary is not to exercise any powers vested in the directors without the authority of the Board of Directors. We posit here that the Board can as well authorize any of its members (directors) not to singularly exercise any powers vested in the directors (as a Board) without the authority of the Board of Directors. This still places a director and the company secretary on the same pedestal in terms of status.

Under the Code of Corporate Governance for Public Companies 2011 (the Code),[27] a company secretary is mandated to assist the Board of Directors on compliance with the Code of Corporate Governance. Also, by the Code, company secretaries are expected to be appointed through rigorous selection processes as applicable to the appointment of new directors. Their primary duty is to assist the Board and management in implementing and developing good corporate governance practices and culture in accordance with the Code. The Code[28] provides that the company secretary shall be responsible for providing the Board of Directors with detailed guidance on how their responsibilities should be properly discharged in the best interest of the company, coordinating the orientation and training of new directors, among others. However, despite the elevated status and roles of a modern-day company secretary as guaranteed under CAMA, the Code and recent judicial precedents, their independence has been grossly undermined by virtue of their mode of appointment, remuneration and removal. The same CAMA that elevated the status of the company secretary, on the one hand, also bestows the powers to appoint, remunerate and remove a company secretary on the Board of

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and reduces the status of a company secretary to that of a mere errand Boy and this impedes their abilities to carry out their duties as chief compliance officer of the company especially when such duties conflict with the wish of the director. We will discuss this further in the course of our work subsequently.

26 Section 298 of CAMA.

27 The concept of corporate governance rests on the basic philosophy that it is designed to ensure the efficient and effective administration of modern business enterprises in order to guarantee their long-term growth and survival in the interest of society and all stakeholders. Good corporate governance thrives on some universally accepted principles such as accountability, conflict of interests, shareholders' approval, transparency and full disclosure, protection of all interest groups, economic efficiency and the concept of independent directors. Principal stakeholders in corporate governance include: the shareholders, the directors, executive officials and managers. Important to note is that Clause 8.2 of the Code placed a primary obligation also on the company secretary to assist the board and management in implementing the Code and developing good corporate governance practices and culture. For further study, see Prof. J.O. Irukwu, *Corporate Governance in Modern Africa* (Safari Books Ltd, Ibadan, Nigeria, 2010).

28 Section 8.4 (a)-(f).

Directors on the other hand.[29] This has over the years made corporate industry practitioners continue to ask if the status of the modern-day company secretary has indeed been elevated from that of the servant it used to be under case law in 1887 to that which is guaranteed by judicial pronouncement in 1971 and recently under the Code and under CAMA in 1990 and 2004.

Given the powers vested in the Board of Directors to hire and fire a company secretary, a modern-day company secretary, despite his qualifications[30] and experience, has understandably continued to play the role of a servant and may not wish to act against the directives of the board, especially where he finds himself in difficult situations where he has to choose between doing the bidding of the Board of Directors in order to protect his job, and fulfilling his duties, such as compliance obligations and rendering other administrative services to the company.

For instance, where the directors have refused to convene meetings by not authorizing the company secretary to summon an extraordinary general meeting (EGM), and given the fact that members have to requisition the EGM to transact special businesses, such as the removal of a director, in such instances, the company secretary must, therefore, understand that he owes, first, a fiduciary duty to the company to ensure that the administrative and clerical services required to hold the members' requisitioned EGM are put in place. Notices required to be issued from the Company will have to be issued to ensure that the business of the members' requisitioned EGM are not frustrated by the secretary's absolute loyalty to the directors for the sole aim of retaining or protecting his job. Where he fails in his duties, he should be liable to the company and not to the directors.

Directors oftentimes rely on their inherent powers to hire and fire to arm-twist and usurp the company secretary's role by generating minutes and board resolutions even where no meetings were held and no notices of meetings sent to directors in the case of board meetings or members in the case of AGMs or EGMs. This brings us to interrogate the validity of such procedure for producing such board resolutions or minutes without compliance with the requirements of either CAMA or the Memorandum and Articles of Association of the

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29 Section 296 of CAMA.

30 Section 295 of CAMA provides that for a person to be qualified to be a company secretary, he should have requisite knowledge and experience to discharge the functions of a secretary of a company and in that regard, a company secretary of a public company is expected to be (a) a member of the Institute of Chartered Secretaries and Administration; or (b) a legal practitioner within the meaning of the Legal Practitioners Act, 1975; or (c) a member of the Institute of Chartered Accountants of Nigeria or such other bodies of accountants as established from time to time by an Act; or (d) any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding the appointment in a public company and a body corporate or firm consisting of members each of whom is qualified under aforementioned paragraphs.

company with respect to convening meetings. This practice clearly conflicts with Sections 217[31] and 221[32] of CAMA.

Acts of the Secretary

According to Orojo,[33] the power of the secretary to bind the company depends on his express and ostensible authority. The express authority may be given by the directors or by statute. Regarding the ostensible authority, since the secretary is the Chief Administrative Officer of the company, he possesses powers to perform those functions relating to such administrative matters.[34] Under Section 298 of the Act, a secretary cannot without the authority of the Board exercise any power vested in the directors. Thus a secretary cannot call a general meeting without an authorization from the directors,[35] he cannot affix the company's seal to an instrument without the approval of the Board,[36] nor alter the company's share register without the authority of the Board,[37] neither can he borrow money on behalf of the company without the approval of the directors,[38] issue a writ in the name of the company without such approval from the board,[39] nor file a defence in the name of the company without seeking the approval of the board.[40] Orojo is also of the opinion, and we share the same view with the learned author, that since an unauthorized act is expressly prohibited by Section 298 (2), such an act cannot be ratified by the board since it is void *ab initio.*

Liability of the Secretary as an Officer of the Company

As an officer of the company,[41] the secretary of a public company may be liable for wrong acts and he is also entitled to reliefs by the court under Section 538. Due to the fact that the secretary is charged with certain statutory duties, he may be liable for default in performing

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31 A 21-day Notice is required for all general meetings by virtue of Section 217 of CAMA.

32 It stipulates that failure to give notice of any meeting to a person entitled to receive it shall invalidate the meeting unless such failure is an accidental omission on the part of the person(s) giving the notice.

33 J.O. Orojo, *Company Law and Practice in Nigeria* Fifth Edition, LexisNexis Butterworths, 2008, p. 290.

34 Such functions have been held to include signing contracts connected with the administrative side of the company's affairs, such as employing staff and hiring cars for the company. Similarly, if he is shown to have implied authority by being so held out through a course of dealing, he will have authority to bind the company.

35 *Re State of Wyoming Syndicate* (1901) 2Ch 431.

36 *South London Greyhound Racecourse Ltd v. Wake* (1931) 1 Ch 496.

37 *Re Indo Chine Stream Navigation Co.* (1917) 2 QB 711.

38 *Re Cleadon Trust* (1939) Ch 286 CA.

39 *Daimler Co. Ltd v. Continental Tyre Ltd* (1916) AC 307.

40 *Edington v. Dumber Steam Laundary Co.* (1903) 11 SLT 117 (OH).

41 Section 567 (1).

those duties.[42] Even in a situation where a secretary is not expressly charged with such a statutory duty, he may be liable to a fine in appropriate cases as an officer in default.[43] For instance, failure to deliver a return of allotment,[44] keep a register of directors and secretaries or permit inspection.[45] It is noteworthy that the company secretary is not personally liable for breach of trust or misfeasance by directors where he has merely acted in his administrative capacity.[46] Also, the company secretary does not owe fiduciary duties to the company as such but he will do so if he acts as an agent of the company and in such a situation he will be liable to account for where he makes any secret profit, misuse of company's confidential information for personal use or where he lets his duties conflict with his personal interest.[47]

Removal of the Secretary

In furtherance to the proposed enhanced status of the company secretary, there is a need to discuss the provisions relating to his removal under CAMA and compare it with the removal of directors under the same statute. The rationale for this is to identify the differences in the mode of removal of each of these officers of the company. Even though CAMA protects the job of the company secretary by making his removal subject to strict adherence to the procedure laid down in Section 296 of CAMA, most employers do flout these provisions without any punitive measures meted out to them. This can be compared to sanctions awaiting those that violate the procedure of removing a director as we have seen in Longe's case. They cannot go scot-free as First Bank did not go scot-free for not following the procedure of removing a director as laid down in CAMA. This is the major reason why we canvass for Section 296 of CAMA, which relates to the removal of a company secretary, to be expunged from the statute.

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42 A good example is late filing of annual returns as provided for under Section 378(1). This section equates directors with company secretaries by stating, among others, that "...the company and every director or officer of the company." In other words, since the company secretary is also an officer of the company, the section is equally apportioning penalty to officers, which clearly includes directors and the company secretary. It is interesting to note that Section 378 (2) equates a company secretary with a director when it defines 'officer' to include "any person in accordance with those directions or instructions the directors of the company are accustomed to act."

43 An officer in default refers to any officer who knowingly and wilfully authorizes or permits or connives at default, refusal or contravention specified in the provision. See Section 567(3), CAMA and also the section provides that an officer of a company who is in default shall be liable to a fine or other penalty or personally liable to any third party.

44 Section 129 (2), CAMA. If default is made with complying with the act with regard to return of allotments to the commission every officer of the company who is in default shall be liable to a fine of ₦50 for every day during which the default continues.

45 Section 292 (7) provides that if default is made in complying with the provisions of the section under subsections (1-4) the company and every officer who is in default shall be guilty of an offence and liable to a fine of ₦50.

46 See the case of *Joint Stock Discount Co. v. Brown* (1869) LR 8 Ex 376 at 396.

47 Section 297 of CAMA.

In its place, Sections 262 and 266 which provide for the procedure of removing a director of a company and the required notice respectively should also be made applicable to the removal of a company secretary. In other words, Section 262 should be titled 'removal of director and company secretary' and Section 296 expunged from the Act. This should be done before the revised 2018 CAMA is passed into law.

Removal of secretary of a private company: Section 296 (1)

The secretary of a private company is appointed by the Board of Directors and is removable by them. What they need is a resolution of the board removing him from office. The company secretary cannot, however, be removed by a single director or the managing director or chairman of the board acting alone unless the articles or the board by a resolution delegated the power to them. As we said earlier, the status and position of the company secretary of a private company is more of a master-servant relationship. Even in England, the current position of the law is that a private company need not appoint a secretary. It will be appropriate to say that the removal of the secretary of a private company is still subjected mainly to the common law of hire and fire for good, bad or no reason at all.

Removal of secretary of a public company

Unlike the secretary of a private company, the procedure for the removal of the secretary of a public company is prescribed by statute, in this case, CAMA. The procedure for the removal of the secretary of a public company is clearly provided under Section 296 (2); (3) (a)-(c); and (4) of the Act. The procedure must be strictly adhered to for such removal to be valid. While the procedure, on the face of it, appears to have secured the job of the secretary of a public company, the truth is that this is far from the truth. The procedure, as provided in Section 296 (2) of CAMA, is as follows:

Where it is intended to remove the secretary of a public company, the board of directors shall give him notice –

(a) *stating that it is intended to remove him;*
(b) *setting out the grounds on which it is intended to remove him;*
(c) *giving him a period not less than seven working days within which to make his defence; and*
(d) *giving him an option to resign his office within a period of seven working days.*

In case the secretary resigns, the process terminates. If he does not resign and does not also make any defence, the board may remove him and make a report of their decision to the next general meeting. If the secretary does not resign but puts forward a defence, the board shall consider it and if it decides that the defence is not satisfactory, then two options are open. If the allegation against the secretary is one of fraud or serious misconduct, the board may remove him and make a report of their action to the next general meeting. On the other hand, if the allegation is not of fraud or serious misconduct, the board may only suspend the

secretary and make a report to the next general meeting. The general meeting shall have the final say as to whether the removal will be reversed or ratified and when it should take effect.

A close examination of this provision reveals that the word 'satisfactory' might be subjective. What if the 'offence' of the secretary considered not satisfactory by the board only offends the board but done in the overall interest of the company? The so-called general meeting that has the final say, in most cases, hardly opposes the decision of the board on such matters. Furthermore, the section does not provide for compensation for removal as it did in the case of removal of a director under Section 262 (6) of CAMA. If directors and secretaries are officers of the company as provided by CAMA, it reasonably follows that the company secretary should be entitled to compensation or damages where his removal is not valid. To further buttress our position, let us take a look at the provisions concerning the removal of directors.

Removal of Directors

The Board is one of the two principal organs of the company.[48] Like the company secretary of a public company, their removal is also governed by the statute because their appointment is clothed with statutory flavour. Therefore, strict observance of the provisions of removing directors must be meticulously and procedurally followed for such removal to be valid. This was the decision in Longe's case under consideration.

Section 41 (3) of CAMA provides that the memorandum or articles of association of a company may empower any person to appoint or remove any director or other officer of the company. Where this is the case, then the director (or other officer, which may be the company secretary) may be removed from office pursuant to Section 41 (3). The person who may remove a director or such other officer by the power conferred by Section 41 (3) shall be a person other than the company itself. This is one way by which a director may be removed. The other and most popular way is by complying with the procedure in Section 262. This procedure will be employed where the company itself wishes to remove its director or when any other person wishes to procure a company resolution to remove a company director.[49] In the case of a life director, though he is appointed for life, he may be removed under Section 262 by an ordinary resolution of the company's general meeting subject to payment of damages.[50]

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48 The other organ is the general meeting of the company and the two organs are collectively called the *alter ego* of the company.

49 See generally, Section 262 of CAMA.

50 Section 262 (6), CAMA. However, he may also be removed by amending the company's articles of association to delete the clause which appointed him a life director. This procedure is however very difficult as it requires three-fourths majority of total votes cast at the meeting. After a successful amendment, the life director stands removed. In this case, there is no damage to be paid to him under Section 262 (6) of CAMA since the basis for his claim has been removed, i.e. the clause under which he could have claimed breach of his appointment has been removed through the amendment that was made deleting the clause in the articles that appointed him. He can no longer sue under the new articles since they no longer contain the clause for life directorship.

A company may, by ordinary resolution of the general meeting, remove a director from office, notwithstanding anything in its articles or any agreement with him.[51] This, however, does not deprive the director so removed from claiming damages for breach of his contract of service where there was a contract between him and the company for a fixed period.[52] A cursory look at Section 262 of CAMA generally will reveal that the director to be removed has the right to request the company to send a copy of his representation sent to every member of the company.[53] The company is under obligation to send the representation as requested by the director, except the company receives the representation too late and, therefore, made it impossible to act as requested. The proviso to Section 262 (3) (b) gave additional right to the director where the company receives his representation too late. Such director, ***in lieu*** of the representation being sent to members of the company, further requests that it be read out at the company's meeting. The import of this section is that subjectivity is clearly removed in considering the case of the director to be removed as his case will have the input of members of the company that receive a copy of his representation. This is contrary to the case of the removal of a company secretary where such right of a copy of his representation being sent to members of the company or in lieu of that, read out at the meeting is not provided for by CAMA.

Another very important distinction in the provisions relating to the removal of a director compared with that of a secretary of a public company is Section 262 (6) of CAMA.[54] There is no equivalent or similar provision by the statute in the case of the removal of a company secretary of a public company. The section simply provides for compensation or damages for loss of office following the removal of a director regardless of how he was removed. This is a noble provision that really enhances the status of a director. It is our submission in this paper that this provision should be made applicable when the secretary of a public company is removed from office, regardless of the manner in which he was removed.

Recommendations

From the foregoing analysis, we advocate reforms with respect to the powers of directors to appoint, remunerate and remove the secretary of a public company. As an officer of the company, or its chief compliance officer, the allegiance of the secretary of a public company should be to the company and not the directors or chairman of the board. Therefore, it is only when the powers to appoint, remunerate and remove him ultimately resides with the members

51 Section 262 (3) (a) and (b) of CAMA.

52 Specifically, Section 262 (6) of CAMA

53 Section 262 (3) (a) and (b) of CAMA.

54 Specifically, Section 262 (6) of CAMA provides that "Nothing in this section shall be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as a director or of any appointment terminating with that as director, or as derogating him from any power to remove a director which may exist apart from this section."

at general meetings that his independence will indeed be guaranteed and his statutory functions preserved.

Second, executive directors are those employed by the company for running the day to day affairs of the company. They are officers of the company just like the company secretary. To this end, the secretary of a public company should therefore be accorded the status of an executive director. Since there is no distinction between executive and non-executive directors on the authority of *Longe versus First Bank of Nigeria Plc*, the only reasonable inference is that the secretary of a public company should be accorded the status of a director. This status should carry with it all the benefits and liabilities of a director, including their appointment and removal.

Also, while anybody not otherwise disqualified[55] by CAMA can be appointed a director of a company, not everyone can be appointed as a secretary of a public company. To be so appointed, a person must fulfil the requirements under Section 295 of CAMA. This strenuous qualification is enough to accord the secretary of a public company the status of a director and be so treated in all ramifications.

Further, we advocate that Section 296 of CAMA, which makes provisions for the removal of secretary of a public company, be expunged and Section 262 of CAMA, which provides for compensation or damages to directors upon removal from office, be extended to secretaries of public companies. This is fair and equitable considering the fact that both directors and secretaries are officers of the company. The company and all its stakeholders will be the final beneficiaries of the enhancement of the status of secretaries of public companies because it will motivate secretaries to be more committed and loyal to the company, the board and the shareholders in general. This is premised on the fact that his job is more secured, and his advice and opinion are respected.

In the alternative, if CAMA is to retain Section 296 that deals with the removal of secretaries, then it should be amended to include a provision similar to Section 262 (6) so as to provide for compensation or damages for secretaries when they are removed from office. Our reason for this recommendation is that the combined effect of Sections 262 and 266 of CAMA regarding the removal of directors is more potent and protective than Section 296 that provides for the removal of secretaries of public companies.

Conclusion

So far, we have been able to historically trace the various stages of the evolution of the status of a company secretary. It started as a mere servant under the common law and graduated to the status of an officer of a company under the statute. The implication of this is that his employment is unarguably clothed with statutory flavour.

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55 Section 257 of CAMA listed those that are disqualified from being directors.

A company secretary's employment is not that of a master-servant relationship as it used to be under the common law. However, in spite of this seeming rise in status, the reality is that secretaries of public companies are still treated as servants of the board. To retain their job, their loyalty is still heavily tilted towards the board as against the company's overall interest. This should not be so. Hence, we have argued in this paper that the secretary of a public company should be accorded enhanced status like that of a company's director since they are both officers of the company.

The secretary of a public company should not just be officers on the face of the statute, whereas, in reality, they are not more than servants. On the authority of *Longe versus First Bank Plc*, which we have extensively relied on in this article, the time has come for the relevant agencies and parastatals, including regulatory bodies and, most especially, corporate boards to accord the status of director to the secretary of a public company. It is only by so doing that the onerous and diverse tasks bestowed on him can be effectively discharged to the overall benefits of the company and its numerous stakeholders.