

Removal of Directors not an ***Exclusive*** Remit of Shareholders

A REVIEW OF SECTION 288 OF CAMA VIS-À-VIS RELEVANT JUDICIAL DECISIONS

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Abstract

The removal of a director is popularly recognised as the exclusive preserve of a company's members in general meetings in line with the provision of section 288(1) of the Companies and Allied Matters Act, 2020 ("CAMA"). This view, though true, does not take cognisance of subsection (6) of section 288, which affords companies the right to provide under their articles of association or contracts of employment alternative means of removing a director otherwise than by section 288 of CAMA. The Supreme Court took this position in an earlier case of *Iwuchukwu v Nwizu*.¹ However, what is still unclear from that provision is the position of the executive directors, who are usually not appointed by the general meeting but by the board of directors through an employment contract.

In this article, members of our corporate secretarial team discuss how Nigerian Courts have treated the appointment and removal of executive directors pursuant to CAMA. The team analyses the provisions of section 288 of CAMA in the light of past and present judicial decisions, to justify the view that the removal of directors is not an exclusive remit of the shareholders as the directors may also be removed by the board of directors.



Keywords

The Board

Directors

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1.0 Introduction

CAMA defines a 'director' to include persons who occupy the position of a director by whatever name called.² It further includes persons by whose instructions and directions the directors of the company are accustomed to act.³

The first hack of the above definition is sufficient to incorporate all the various types of directors, such as executive, non-executive, and independent directors. The second hack refers to shadow directors who are not appointed but are capable of influencing the decisions of the board of directors. This paper focuses on the former since the latter cannot possibly be removed without an actual appointment or employment.

Generally, the mode of appointment of a director often determines the mode of removal. For instance, a Managing Director ("MD") or an executive director may be removed by the board of directors before the expiration of his tenure if he was engaged by the board through an employment contract. This aligns with the labour law principle that "He who has a right to hire, has the right to fire."⁴

Albeit, where the company's constitution or the shareholders' agreement vests the members in a general meeting with the powers to appoint executive directors or the MD through an employment contract after a resolution, the aforementioned general rule on the appointment of MDs will not hold sway.

Conversely, directors whose appointments are pursuant to CAMA (for instance, the appointment of first directors,⁵ the appointment of subsequent directors,⁶ the appointment of a director to fill a casual vacancy,⁷ the appointment of an independent director for public companies,⁸ the election of directors to replace those retiring,⁹ amongst others) are removable only in accordance with section 288 of CAMA.

However, the Courts have adopted a different approach to the logical conclusion regarding the removal of an MD and executive directors. The result of the Court's approach is that an MD who is removed ceases to be a director of the company. For this reason, the Supreme Court in *Yalaju-Amaye v AREC Ltd*¹⁰ described a managing director as just another director with extra responsibilities.¹¹

1 (1994) LPELR-1566(SC).

2 Section 868, CAMA 2020.

3 Ibid. See also section 270(1), CAMA 2020.

4 See the National Industrial Court's decision in *HAPSSA & Anor v Owena Motels Limited & Ors*, Appeal No.: NICN/ABJ/180/2017.

5 Section 272, CAMA 2020.

6 Section 273, CAMA 2020.

7 Section 274, CAMA 2020. This is notwithstanding that the appointment was made by a resolution passed by the Board since the law requires the shareholders to confirm the appointment at the next annual general meeting.

8 Section 275, CAMA 2020.

9 Section 238, CAMA 2020.

10 (1990) 4NWLR (Pt. 145) 422, 443.

11 This decision will also apply to executive directors since an MD is an executive director.

2.0 Removal of Directors Under the Companies and Allied Matters Act, 2020

Section 288(1) of CAMA empowers the members in a general meeting to remove a director of a company by ordinary resolution before the expiration of the tenure of the director. This power to remove a director is not affected by any provision in the articles of association or agreement entered by the company and the director sought to be removed.

Subsection (6) of section 288, CAMA is to the effect that the provision of section 288 shall not affect any power to remove directors of a company that exist elsewhere otherwise than by section 288. This provision has given rise to the concept of an “alternative removal scheme” which enables a company to use an alternative scheme to remove a director under its articles of association or an employment contract. Accordingly, where it is stated under the articles of association that the board has the power to remove a director by a resolution, such removal would be valid, provided that the procedure for the said removal was followed.

A notable statutory alternative removal scheme is contained in section 46(3) of CAMA, which provides that where the memorandum or articles of association empowers a person to appoint or remove a director of a company, such power is enforceable by the person. This is notwithstanding that the person with such power is not a member or officer of the company.

3.0 An Analysis of Directors’ Removal by the Board in Light of Judicial Decisions

The locus classicus for the removal of directors in Nigeria is the case of *Longe v FBN*.¹² In this case, subsequent to his suspension as a director, the claimant was removed from his position as the Managing Director/Chief Executive of the defendant without notice to him to attend the meeting of the Board where the decision to remove him was taken. The Supreme Court held that the claimant’s suspension did not amount to his removal as a director. Consequently, he was entitled to a notice of the meeting of the board at which the decision to remove him as a director was taken. It was held that the removal was invalid and the claimant was reinstated as the MD of the defendant.

The above decision is usually relied upon, erroneously, to support the provision of section 288(1) of CAMA that removal of directors is exercisable only by the members in general meeting. However, this view is flawed because the decision was actually based on the Board’s failure to give notice of the meeting to the claimant. The Court did not consider the power of the Board to remove a director. Therefore, the decision cannot be interpreted as prohibiting a Board from removing directors.

The case of *Iwuchukwu v Nwizu*,¹³ on the other hand, lends credence to the view that a removal scheme could exist independently of the one outlined under section 175 (1)-(5) of the Companies Act 1968 (analogous to section 288(1)-(5) of CAMA 2020).

¹² (2010) LPELR-1793(SC).

¹³ (1994) LPELR-1566(SC).

The Apex Court highlighted the existence of the power to remove a director from office than by a resolution at a general meeting as envisaged under section 175(1) of the Companies Act 1968. This was based on the interpretation of section 175(6) of the Companies Act 1968 (equivalent to section 288(6) of CAMA 2020). Although the removal of the appellant, in that case, was held to be invalid as there was no provision in the articles for a removal procedure different from that provided under the Companies Act 1968, it was acknowledged by the Court that the power and procedure for the removal of a director may be contained in the articles and such power could be conferred on the Board.¹⁴

Similarly, in *Yalaju-Amaye v AREC Ltd*,¹⁵ the claimant, who was an MD of the defendant, was removed as both an MD and an Executive Director of the defendant by an ordinary resolution passed in an extraordinary general meeting, wherein the members resolved to accept the claimant's resignation. The claimant denied making any oral resignation from the position of MD and director to the Board. The Supreme Court held that the claimant's removal as MD and director was invalid because the company failed to comply with the procedure laid down under section 262 of CAMA 1990 (an equivalent of section 288 of CAMA 2020). *Karibi-Whyte JSC* further stated that "...the power to appoint or remove a director (otherwise than the provision of CAMA)¹⁶ can only be exercised where there is an enabling provision in the articles and nothing more."

4.0 Exploring Alternative Schemes for Removal of Directors under the Company's Constitution and/or Shareholders' Agreement.

In employing an alternative scheme for the removal of a director, such a scheme may be inserted in the employment contract of the director. It could also be included in the company's articles of association at the point of incorporation or the articles of the company may be amended to provide for an alternative method of removing a director post-incorporation.¹⁷

The articles of association of a company form a contract between the company and its members and officers, and between the members and officers inter se.¹⁸ It also guides the internal management of the company's affairs and should include provisions necessary to aid the management of its affairs.¹⁹ Consequently, where a company decides to take advantage of section 288(6) of the CAMA by adopting an alternative removal scheme, such a scheme should be contained in the company's articles of association.

Additionally, a shareholders' agreement is an arrangement among the members of a company, describing how the company should be operated while outlining the rights and responsibilities of each shareholder. Although the shareholders' agreement is optional for companies where such an agreement is in place, it is necessary for the special procedure (if any) elected by the company to remove a director to be contained therein.

¹⁴ This is notwithstanding that Paragraph 13(a)-(c) of the Company's Articles of Association provided for means by which the office of the director may be vacated, which was wholly irrelevant in this case.

¹⁵ *Supra*.

¹⁶ The words in brackets were added.

¹⁷ Section 53(1) of CAMA 2020 provides that a company's articles may be amended by a special resolution.

¹⁸ Section 46(1) of CAMA 2020. See also Section 868 which includes directors in the definition of officers under the CAMA 2020.

¹⁹ Section 34(2) of CAMA 2020 which provides that the model articles prescribed can be modified by the Company.

This is more important where the alternative scheme created vests a shareholder or several shareholders with the power to remove a director without recourse to the general meeting.

For adequate and efficient corporate governance, the terms of an alternative removal scheme need to be contained in the contract of employment between the company and an executive director. While the position for removing directors under section 288(1) of CAMA applies to both executives and non-executive directors,²⁰ CAMA has provided companies with the leeway to depart from the default procedure for their removal. It is imperative that the procedure elected by the company be disclosed in the executive director's contract of employment to prevent future disputes.

In summary, while the alternative scheme created for a director's removal should be stated in the articles, CAMA does not restrict the manner such an alternative removal scheme may be made. Thus, an alternative removal scheme should ideally be included in the articles of association, shareholders' agreement, if any, and in contracts of employment of directors, where applicable.

5.0 Conclusion

A comprehensive reading of the entire section 288 of the CAMA reveals that the purport of subsection (6) is to mitigate the cumbersome procedure to be followed in the removal of a director. Thus, where an alternative removal scheme is provided, the need for a general meeting and other requirements stated under section 288(1) of CAMA may be dispensed with in favour of a less rigid procedure contained in the company's constitution, shareholders' agreement, or contract of employment of an executive director (as the case may be). In essence, what gives impetus for the board or any other officer of a company to have the power to remove a director of the company, other than the general meeting, is not the mode of appointing the director but the existence of an alternative removal scheme.

²⁰ *Yalaju-Amaye v AREC Ltd.* (Supra).

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