An Overview of the Procedure for Changing the Status of a Company in Nigeria

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Abstract

This article examines the procedure for changing the status of companies in Nigeria as provided for by the Companies and Allied Matters Act, (CAMA). The paper analysed the statutory provisions on the issue and notes that CAMA does not prescribe any prohibition as to the number of times a private company may convert to a public company and vice versa unlike in the case of change in the liability of the members. The paper further attempts to explain the procedure as regards the conversion of status under Nigerian law by giving explanations as to the real intention of the legislature and making suggestions which may help in updating the law in accordance with modern realities, placing emphasis on how to improve the lot of minority shareholders when a company is converting from a public company to a private company.

1. Introduction

As from the date of incorporation mentioned in the Certificate of Incorporation, the subscribers to the memorandum of association and all such persons as may, from time to time become members of the company become a body corporate by the name contained in the memorandum of association and become capable of exercising all the functions of an incorporated company such as holding land, having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up.[1]

A company is however allowed to re-register after incorporation in order to change its status or the liability of its members in any of the following ways under the Companies and Allied Matters Act (CAMA), they include:

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1 Companies and Allied Matters Act, (CAMA), Cap.C20, Laws of the Federation of Nigeria, (LFN) 2004, s. 37.

from a private company to a public company[2] and vice versa;[3]

from a company limited by shares to an unlimited company[4] and vice versa;[5]

The change of status which is the scope of this article is however concerned with re-registering a private company as a public company and vice versa.

If a private company desires to increase its capital base to raise money from the public by inviting them to subscribe for its shares instead of obtaining loans from the Banks, it would have to convert to a public company in order to conform to the dictates of the law.[6] The size of the business of a company, business exigencies or business climate, mergers and acquisitions, desire for prestige, the size of its membership of a company[7] can also necessitate its conversion from a private company to a public company.

On the other hand, a public company may desire to convert a private company in order to be entitled to the privileges and exemptions conferred by the law on the latter.[8] A private company offers its members particularly majority shareholders opportunity to exercise enormous control over it without undue intervention by the law and is particularly very convenient where members have close filial relationship. A private company can hold its general meetings and board meetings by written resolutions.[9] The company secretary of a private company need not be a legal practitioner, a chartered secretary or a chartered accountant.[10] A single resolution can be used to appoint more than one director of a private company. A private company need not give notice of intention to hold its general meeting in a newspaper. Apart from foreign investments, the securities of a

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2 *Ibid,* s. 50.
3 *Ibid,* s. 53.
4 *Ibid,* s. 51.
5 *Ibid,* s. 52.
6 *Ibid,* s. 22(5).
7 *Ibid,* s. 22(3).
8 *Ibid,* s. 23(1).
9 *Ibid,* s. 237.
10 *Ibid,* s. 295.

private company is not subject to the regulations of the Securities and Exchange Commission.

In attempting to do an overview of the procedure for changing the status of a company under Nigerian law it shall be necessary to consider the relevant provisions of CAMA stipulating the procedure for such change. Attempt would also be made to evaluate the requirements.

2. Re- Registration from Private Company to Public Company

By virtue of section 50 (1) of CAMA only a private company having share capital is allowed to re-register as a public company under the Act. This automatically shuts out private companies limited by guarantee since they do not possess any share capital,[11] leaving private companies limited by shares and private unlimited companies.

Furthermore section 50 (7) of CAMA provides that: "company shall not be re-registered under this section if it has previously been re-registered as an unlimited company."

This means that a company which was registered at incorporation as a company limited by shares which has now been re-registered as an unlimited company would not be allowed to re-register again to become a public company. This appears to give the impression that while a company registered as unlimited at the time of incorporation would be allowed to re-register as a public company, a company that is unlimited by virtue of re-registration is prohibited from becoming a public company.

In other jurisdictions every unlimited company is required to first become limited by shares before re-registering as a public company because limited liability is one of the essential elements of a public company. However in practical terms all the company needs to do is to add to the special resolution changing the status of the company to a public company and effect the necessary changes to its articles.[12]

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11 *Ibid,* s. 26 (2).

12 P.L. Davies, Gower & Davies: Principles of Modern Company Law, (8th ed.) (London: Sweet & Maxwell, 2008), pp. 98-99.

The prohibitions prescribed under this section appear to be somewhat clumsy and ambiguous. There is need for clarity on the part of the legislature. The approach of the United Kingdom (UK) Company's Act 2006 is recommended and should be adopted. The said UK Act in section 90 (1) and (4) read together provide:

> A private company (whether limited or unlimited) may be registered as a public company limited by shares if-
> …
> If the company is unlimited it must make such changes in its articles as are necessary in connection with its becoming a company limited by shares.

The above provisions no doubt leave no room for conjectures as to the true intention of the Legislature. The UK Act requires that a company desiring to re-register as a public company must pass a special resolution and alter its memorandum and articles to that effect. The application to the Commission for re-registration must be accompanied by other documents apart from the special resolution and the altered memorandum and articles of association of the company as follows-

- A copy of a written statement by the directors and secretary certified on oath stating that the paid up share capital of the company at the date of application is not less than 25% of the authorized share capital of the company[13]
- A copy of the balance sheet of the company as at the date of the resolution or the preceding 6 months whichever is later
- Statutory declaration by a director and secretary of the company to the effect that the special resolution required has been passed and that the company's net assets are not less than the aggregate of the paid up share capital of the company and its undistributable reserves.
- A copy of any prospectus or statement in lieu prospectus delivered within the preceding 12 months to the Securities and Exchange Commission.

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13 CAMA, s. 27(2) (b).

In practice there are other documents required such as the company's certificate of incorporation since the company would be issued another certificate of incorporation as evidence of re-registration[14]. The applicant is also required to conduct a fresh check and availability of name[15] since the name of the company as stated in the memorandum and articles of association would be altered to reflect that the company is now a public company.[16] The alteration of the name to effect re-registration as a public company is however not considered to be a change of name.[17] The minimum authorised share capital of a public company is N500,000[18], the conversion of a private company to a public company may necessitate increasing the share capital[19] of the company to meet the requirement of the law.

It is observable that the Commission is interested in knowing the financial standing of the company going by the requirement of section 50(3) (a)- (d) above which requires the company's balance sheet and other evidence of the assets of the company.

Perhaps this is an attempt by the law to protect innocent members of the public who would become shareholders in the company and accords with the principle of corporate law which demands that public companies should be subject to more regulations and disclosure requirement when compared with private companies.[20]

It is remarkable however that a public company is not required to have any of the requirements mentioned above at the time of incorporation.

Public companies at formation are not required to have 25% of their authorized share capital as paid up. The law only requires that all

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14 *Ibid,* s. 50 (4) (c).
15 *Ibid,* s. 32.
16 *Ibid,* s. 29 (2).
17 *Ibid,* s. 31(3).
18 *Ibid,* s. 27(2) (a).
19 *Ibid,* s. 102.
20 *Ibid,* s. 23(1).

companies whether private or public to issue at least 25% of its authorized share capital at any point in time.[21]

In practice it is more common for a company to be formed as a private company and then be converted to a public company when they need to raise capital from the public, thus making the observation that the above mentioned requirements are not required at formation somewhat academic. It appears that section 50(3) (a) - (e) were drafted with the intention that public companies would only be formed by conversion otherwise it would not have made mention of 'Prospectus'[22] which can only arise when a company needs to raise money from the public through the Stock Exchange.

In the UK a public company would in practice not be allowed to commence trading if it has not met the requirements similar to section 50 (3) (a)- (d), even though the Companies Act only requires that a public company which has not met the requirements would not be in a position to make distribution to its members.[23]

3. Re- Registration of Public Companies as Private[24]

The application for re-registration under this section must be supported by a special resolution and a printed copy of the memorandum and articles of association altered to reflect the company's proposed status as a private company.

One distinguishing feature of this type of re-registration is the minority protection offered to holders of not less than 5% of the company's issued share capital or 5% of the company's members who have not consented or voted in favour of the special resolution to apply to the Federal High Court to cancel the special resolution within 28 days of its being passed.

The company must therefore wait till the expiration of the 28 days allowed for any objection to the court before filing any application at the Commission. Where any application is made to the

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21 Sections 27 (2) (b) and s. 103(a) of CAMA. Public companies are however required to have at least N500, 000 as share capital as opposed to private companies who need to have N10, 000 at the least.

22 *Ibid,* s. 50 (3) (e).

23 Davies, note 12, pp. 98-99. See also, Companies Act 2006, UK, s. 831.

24 CAMA, s. 53.

court, the company can only file an application for re-registration at the Commission within 15 days of the court's order. Where the court cancels the special resolution the company should submit a printed copy of the special resolution and a copy of the court's order to the Commission. In the situation whereby the court confirms the resolution, the memorandum and articles of association of the company in addition to the special resolution and the court order would be required to effect the re-registration.

The Commission shall thereafter issue the company a certificate of incorporation as private. On the issue of the certificate the company shall become a private company and the alterations as set out in the memorandum and articles of association shall take effect accordingly.[25]The company is therefore expected to have forwarded its former certificate of incorporation and conducted a check for Availability and Reservation of Name.

The above provision describes the procedure for a voluntary conversion of a company from a public company to a private company. However a public company can be forced to compulsorily convert to a private company in the process of reduction of its Share capital. The court in practice authorise this to be done expeditiously without recourse to the detailed procedure stated above. In particular the application to the court by dissenting minorities would not be applicable since it is a compulsory conversion.[26] Compulsory conversion does not seem to exist in Nigerian law because all that is required by the court in the process of reduction of share capital that the share capital does not fall below the authorized minimum share capital[27].

4. Minority Protection

Public companies consists of amorphous number of persons with little or no close filial relationship whose main pre- occupation is to raise capital from members of the public in furtherance of their business

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25 *Ibid.,* s. 50 (9).

26 Davies, note 12, pp. 100-101. See also, Companies Act 2006, UK, ss. 650-651.

27 *Ibid.,* s. 108 (1) (b).

interests. The possibility of wanting to become a private company which typically exists between people who have close relationships apart from business interests appear somewhat remote and unusual.
A decision to become a private company has several consequences on the company and its members.

A private company is not allowed to have more than 50 members, this means that a public company wishing to become private is under obligation to reduce its membership and this would mean that some members would have to give up their membership in the company.

Private companies are subject to restrictions in the transfer of their shares unlike public companies. Apart from a few exceptions private companies are usually smaller in their sphere of operation when compared with public companies. This is buttressed by the fact that public companies have access to public capital unlike private companies who must depend on the resources of individual members and probably loans from creditors. Public companies are subject to enormous regulations and disclosure requirements under the law aimed at ensuring more transparency, integrity and accountability in public interests. However in private companies the rules are sometimes relaxed to allow privacy.

Given the above considerations the powers given to minority shareholders to forestall the decision of the majority of the members of the company appears well accorded. The general rule in corporate law is that majority carries the vote, however in certain circumstances such as fraud, illegality or in the interest of justice the wishes of the minority is allowed to prevail. It would be in the interest of justice to allow the minorities to bring an action in this case albeit requiring 5% of the minority shares or members which is different from the usual minority rights which does not require shareholding or membership.[28]

The Act does not prescribe any criteria or guideline upon which the special resolution objected to by the minorities may be confirmed or cancelled by the court. However the most common complaints made by minority shareholders against those who are in control of the company range from exclusion from management to bad

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28 *Ibid.,* ss. 300, 303, 310, which require a minority to bring an action.

management. In the case of conversion from a public company to a private company however the minority shareholders are likely to be worried about freedom to transfer their shares and even worse the non existence of a market for their shares.

In a private company there is no freedom of transfer of shares. The directors in their absolute discretion may refuse the transfer even though it must be necessary *bona fide* in the interest of the company[29]. A refusal might be made to preserve family control or protect the business from a competitor and the courts might be reluctant to interfere even though the motives might appear to be improper. The worse scenario is the fact that in most cases the shares of a private company are not tradable except at a discount.[30]

It is the suggestion of this paper that the minority shareholders apart from going to court to apply to cancel the resolution should press for certain measures to be put in place by the company in order to protect their interests.[31]

The pre-emption rights on transfer in the articles of the company may be altered as follows[32]-

> The company shall not allot any new or unissued shares unless the same are offered in the first instance to all the shareholders or to all the share holders of the class or classes being issued in proportion as nearly as may be to their existing holdings.
>
> Provided always that a shareholder who wishes to transfer his shares must offer it to existing shareholders as aforesaid and no discount shall be considered in determining the price at which the shares shall be transferred.
>
> Provided further always that the directors cannot refuse to register a transfer of shares to an outsider if the existing shareholders refuse to purchase the shares.

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29 *Ibid.,* schedule 1 Part 11.

30 J. Cadman, *Shareholders' Agreements* (4th ed.) (London: Sweet & Maxwell, 2004), p.190.

31 *Ibid*., pp. 199-200.

32 *Ibid.*

Secondly in order to enhance the marketability of the shares of the minorities the following provisions can be made in the articles of association.[33]

1. The directors may be restricted from approving the transfer of a controlling interest in the company to an outsider without first procuring to the outsider to make an offer for the shares of the minority on the same terms.
2. Impose an obligation on the company that upon any purchase of its own shares the shareholders would be given an opportunity provide for the shareholders be given a pro rata opportunity to sell their shares.

Another way to enhance the marketability of shares held in a private company is to subscribe for shares which are redeemable at the option of the shareholder. This might not be available for the minority shareholder at this stage.

The Court is empowered under section 53(5) to make all such orders or give such directions as it may think expedient in the circumstances, apart from cancelling or confirming the resolution. It is suggested that the court taking a clue from section 312 (c) & (d) CAMA may direct as follows-

-for the purchase of the shares of minority shareholders by other members of the company.[34]

- for the purchase of shares of the minority shareholders by the company and the reduction accordingly of the company's capital[35].

The court can also take a clue from the provisions of the Investment and Securities Act which prescribe that in the case of a take over of a company dissenting shareholders holding 10% of the shareholding of the company be paid a fair value of their shares after valuation.[36]

Thus the court should not only make an order that the minority shareholders shares be bought but also that the shares be bought at a fair value.

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33 *Ibid.*

34 CAMA, s. 312(c).

35 *Ibid.*, s. 312 (d).

36 Investment and Security Act (ISA) Laws of the Federation of Nigeria, (LFN) 2004, ss. 146- 147.

5. **Conclusion**

This paper notes that CAMA does not prescribe any prohibition as to the number of times a private company may convert to a public company and vice versa unlike in the case of change in the liability of the members i.e. conversion from a limited company to an unlimited company and vice versa.[37]

A company is therefore given unlimited freedom to change its status from time to time as it desired. However since liability refers to the members there are restrictions, perhaps because limitation of liability of members remains the fulcrum of modern company law.

This paper has attempted to explain the procedure as regards the conversion of status under Nigerian law by giving explanations as to the real intention of the legislature and making suggestions which may help in updating the law in accordance with modern realities. Particularly emphasis has been made on how to improve the lot of minority shareholders when a company is converting from a public company to a private company.

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37 CAMA, ss. 51(2) and 52(2).