COMPANY LAW

THE MEANING, FORMATION, TYPES, CERTIFICATE OF INCORPORATION AND PROCEDURE FOR THE REGISTRATION OF A COMPANY

Firstly, **The Black's Law Dictionary** defines a company as an association of persons, created for the purpose of carrying on a commercial or industrial enterprise and having a legal personality distinct from that of its members. The underlying point in a company which distinguishes it from other forms of business organizations is the fact that it is vested with a corporate personality, in other words a company once formed is an artificial person in law distinct from the members constituting it, capable of suing and being sued, capable of buying and holding property like natural persons. Etc

PROCEDURES FOR THE REGISTRATION OF A COMPANY

Firstly by **section 1(1)&(8)(i) of the companies and allied matters act**,
There shall be established the corporate affairs commission, whose functions inter alia is the registration, regulation and supervision of the formation, incorporation, management, dissolution and winding up of companies. A person desirous of registering a company must take into consideration all that is necessary in the formation of a company, such as whether to form a public or private company, a limited or unlimited company, if limited whether by shares or by guarantee. He must also take into consideration the name of the company, and contents of the memorandum and articles of association of the proposed company. After this he must then file certain documents with the registrar general of the corporate affairs commission who after scrutinizing them and finding inorder and after receiving the proper fee will register the company and issue a certificate of incorporation.

The following step by step procedure is fundamental for the formation of a company;

1) Accreditation With The Corporate Affairs Commission;

Any person desirous of registering a company must first be accredited in the corporate affairs commission's website. only lawyers could before do so, but the window is open to all persons now.

2) Availability Check And Reservation Of Name;

Secondly he must check for what name to use, this is filed in **CAC FORM 1,** it is important so as to avoid instances of using a name already in existence and registered as another's company name, or using a name which is similar with another one in existence which is likely to deceive or cause confusion, or using a name which is prohibited or a name which is restricted without proper consent, the consequence thereof will be the rejection of such name.

3) Reservation Of Name;

A person must then ensure the reservation of the name intended to be used, after 60 days the reservation will usually elapse, but where it is utilized within the time frame, the name may be approved.

4) Complete The Pre-registration Form;

A person should then complete the pre-registration form by filling all the required fields online using the company registration portal. This includes;

i) providing two copies of the memorandum of association and articles of association

NOTE; while the articles of association provides for the internal regulations of the company, the memorandum which provides for the external regulation of the company by **section 36(1)&(2) of the CAMA** must be submitted alongside the application for registration and the application must state;

(a) the company's proposed name ;

(b) the registered office address and head office address if different from the registered office address ;

(c) whether the liability of the members of the company is to be limited and, if so, whether it is to be limited by shares or by guarantee ; and

(d) whether the company is to be a private or a public company.

ii) notice of the registered office of the company and the head office if different, to be filed in **CAC FORM 3**
iii) list and particulars of persons who have consented to be the first directors of the company, together with their consent, to be filed in **CAC FORM 7**
iv) two copies of statement of the authorized share capital signed by at least one director, to be filed in **CAC FORM 2**

5) any other document required by the commission to satisfy the requirements of any law that may make prescription relating to matters that may be associated with the formation of a company. Eg certificate of proficiency.

6) a statutory declaration in the prescribed form by a legal practitioner that the requirement of the act in relation to the registration of a company have been complied with, to be filed in **CAC FORM 4**

7) pay the filing fees with a credit or debit card on the company registration portal

8) pay the stamp duty fee online in the company registration portal

9) download and print electronic Certificate and certified extract of registration information already generated to your dashboard after approval.

INSTANCES WHERE THE COMMISSION MAY REFUSE TO REGISTER A COMPANY

By **section 41 of the CAMA**, upon the receipt of the documents, the commission must register the memorandum and articles of association unless in the opinion of the Commission;
a) they do not comply with the provisions of the CAMA.

On this ground therefore the decision of the court in **Kehinde v Registrar General C.A.C**, that the principal incorporation documents was the memorandum and that a company could still be registered where the articles of association were adverse to statute or policy of the Government, is no longer a good law.

b) the proposed business or object of the company or any of them are illegal; consistent with this is **section 18(3) of the CAMA** which provides that the right and capacity of a person to register a company does not extend to the formation of a company for an illegal purpose.

c) any of the subscribers to the memorandum of association is incompetent or disqualified under **section 20(1) of the CAMA**, which provides that an individual shall not join in the formation of a company if he is under the age of 18, is of unsound mind, is an undischarged bankrupt or disqualified under **section 281 & 283 of the CAMA** from being a director of a company. Although by **section 20(2) of the CAMA**, a person shall not be disqualified on grounds that he is under the age of 18 where two others not disqualified under that subsection have signed the memorandum.

d) there's non compliance with the requirement of any other law as to the registration and incorporation of a company.

e) the proposed name conflicts or is likely to conflict with an existing company, trademark or business name registered in Nigeria. In **Mustapha v Corporate Affairs Commission**, the court upheld the commission's refusal to register the company name Aguda investment Ng ltd since it tended to conflict with the already existing name Aguda ventures Ng ltd.

Further, where the proposed name is inconsistent with **section 852(1) of the CAMA**, the commission may also refuse registration. That is to say, that the proposed name is;
(a) is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except

where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires ;

(b) contains the words “Chamber of Commerce” unless it is a company limited by guarantee

(c) in the opinion of the Commission, is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy ;

(d) in the opinion of the Commission, would violate or conflict with any existing trademark or business name registered in Nigeria or body corporate formed under this Act unless the consent of the owner of the trade mark, business name or trustees of the body corporate has been obtained ;

(e) contains any word which, in the opinion of the Commission, is likely to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled ;

(f) is, in the opinion of the Commission, deceptive or objectionable in that it contains a reference or suggests association with any practice,institution, personage, foreign state or government, international organization or international brand or is otherwise unsuitable ; or

(g) is capable of undermining public peace and national security.

For instance, in **Corporate Affairs Commission v Ayedun**, the court upheld the Commission's refusal to register the name Credit registry ltd since it tended to mislead the public into believing the company was a public institution.

In **Ewing v Buttercup margarine co**, the plaintiff obtained an injunction restraining the defendant from carrying on with the name buttercup margarine co, since it tended to conflict with that of his company buttercup dairy co. Also in **Atlas cycles ltd v Atlas**

products ltd, an order of injunction was issued against the defendant company restraining them from using the name Atlas, since it was already in use by the plaintiff. However, according to the court in **DW. Boulay v DW. Boulay,** the mere similarity of a name will not in itself be a sufficient ground for an injunction, in the case of a company, registration will be refused only where there is likelihood of deception or confusion.

Also by section **852(2) of the CAMA**, the commission can refuse registration where without the consent of the commission, the proposed name is one containing words such as;

(a) "Federal", "National", "Regional", "State" ;

(b) "Government", or any other word which, in the opinion of the Commission suggests or is calculated to suggest that it enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government, or contains the word "Municipal" or "Chartered" or in the opinion of the Commission, suggests or is calculated to suggest, connection with any municipality or other local
authority ;

(c) contains the word "Cooperative" or its equivalent in any other language or any abbreviation; or of the words "Building Society" ; or

(d) contains the word "Group" or "Holding".

For instance, in **Amasike v Corporate Affairs Commission,** the court upheld the commission's refusal to register the name Institute of Corporate Governance since it tended to suggest that the company enjoyed some sort of government patronage. However by **section 41(2) of the CAMA**, a person aggrieved by the Commission's decision may give it notice requiring the commission to apply to the court for direction and the commission shall within 21 days of receiving such notice apply to the court for directions.

The refusal to apply to the court by the commission is usually answered with an application to the court for an order of mandamus, mandating the commission to do so. In **Lasisi v Registrar of companies,** the registrar was compelled by an order of mandamus to

register the name British Leyland international ltd, as no evidence was adduced to show it was neither prohibited nor flouted the immigration Act.

THE CERTIFICATE OF INCORPORATION

where the company passes all the necessary requirements, the memorandum and articles of association shall be registered and a Certificate of incorporation shall be issued which is a prima facie evidence that the provisions of the act has complied with in relation to the registration of a company.

By **section 41(5) of the CAMA**, upon registration of the memorandum and articles of association, the commission shall certify in its seal that;
(a) that the company is incorporated ;
(b) in the case of a limited company, that the liability of the members is limited by shares or by guarantee, or an unlimited company, that the liability of the members is unlimited, and
(c) that the company is a private or public company, as the case may be.

And By **section 41(6) of the CAMA**, the certificate of incorporation shall be prima facie evidence that all the requirements of this Act in respect of registration and matters precedent and incidental to it have been complied with and that the association is a company authorized to be registered and duly registered under the Act. According to the court in **Wilts & Bush ltd v Goodwill & Trust investment ltd,** once a Certificate of incorporation is issued to a company it becomes a body Corporate with perpetual succession. The court in **STB plc v Olusola**, also noted that a company upon incorporation becomes a legal person distinct from the members, who formed it and is capable of acquiring, holding and alienating property.

ON THE EFFECT OF INCORPORATION

By **section 42 of the CAMA,** As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other

persons as may become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, 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 as is mentioned in this Act. Furthermore by **section 27(6) of the CAMA**, the memorandum of an incorporated company shall be stamped as a deed. It therefore follows that the effect of incorporation by the aforementioned section is the vesting of a corporate personality on the company, having such powers exercisable by any registered company which includes power to hold land, perpetual succession, to sue and be sued in its own name etc, and a correlative liability on the part of the members to contribute to the assets of the company in the event of winding up.

ADVANTAGES(incidence) OF INCORPORATION

1) Perpetual Succession;

An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person, is unaffected by death or departure of any member and it remains the same entity, despite total change in the membership. Perpetual succession means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. According to the court in **Wilts & Bush ltd v Goodwill & Trust investment ltd,** once a Certificate of incorporation is issued to a company it becomes a body Corporate with perpetual succession.

2) Corporate personality;

A company incorporated under the Act is vested with a corporate personality, so it redundant bears its own name, acts under its name, has a seal of its own and its assets are separate and distinct from those of its members. It is a different 'person' from the members who compose it.

Therefore it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. The notorious case of **Salomon v Salomon ltd,** enunciated the principle that a company has a legal personality separate and independent from the identity of its shareholders. Hence, any rights, obligations or liabilities of a company are distinct from those of its shareholders. In the instant case, Salomon sold his boot and leather making company to Salomon ltd, a company incorporated and owned by him and his family members, The price for such transfer was paid to Salomon by way of shares, and debentures having a floating charge (security against debt) on the assets of the company. Later on when the company ran into liquidation, an attempt was made by the creditors of the company to hold Salomon personally responsible for the debts, since he owned most of the shares therein, they alleged that the company was a sham and was fundamentally an agent of Salomon, but the court held that his right of recovery secured through the floating charge against the debentures stood aprior to the claims of the unsecured creditors, moreover and most importantly, a company once incorporated is distinct from its shareholders, with its right and liabilities separate from those constituting it, thus Salomon could not be held personally liable for the liability of the company Salomon ltd, even if he held majority of the shares.

Also in **Lee v Lee air farming ltd**, Mr Lee incorporated a company and carried out his aerial top dressing business, he owned all the shares in the company and as well appointed himself the company's chief pilot, and also took out an insurance against liability to pay compensation under the workmen compensation act. Lee later died in an air crash and his wife sued to get compensation, the privy council reversing the trial court's decision held that the wife was entitled to the compensation, because Lee and his company Lee air farming ltd was not one and the same person.

3) <u>Artificial person;</u>

A Company is an artificial person created by law. It is not a human being but it acts through human beings. It is considered as a legal person which can enter into contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial

person since it is invisible, intangible, existing only in the contemplation of law. It is capable of enjoying rights and being subject to duties. In **Union bank of India v KIC & ors**, the question before the court was whether a company was entitled to sue as an indigent person under **order 33 rule 1 of the civil procedure code of India**, the court held in the affirmative as the provision stated only "persons" without limiting its application to natural persons.

4) Right To Own Property;

A company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed of. According to the court in **Narumal v John Deavin A.I.R,** a company has right to own properties distinct from its members, and no member may lay claim to the property of a company both at the time of its existence and its dissolution, infact no member of a company has insurable interest on the property of the company.

5) Limited Liability;

The privilege of limited liability for business debts is one of the principal advantages of incorporation of a company. The company, being a separate person, is the owner of its assets and bound by its liabilities. The liability of a member as shareholder, extends only to the outstanding shares left unpaid in the case of a company limited by shares, or to the extent of agreed contribution in the event of liquidation, in the case of a company limited by guarantee, However this does not apply to unlimited companies.

DISADVANTAGES OF INCORPORATION

1) Lack Of Insurable Interest;

Where a company is incorporated, and now has a separate legal personality, the person who sells his business to the company will have no insurable interest over the property.

2) Ultra Vires Doctrine;

The purport and operation of this doctrine limits the company's capacity to operate only within the nature of the business as stated in the object clause. Remember by **section 27(1)(c) of the CAMA,** a company must in its memorandum of association state the nature of business which it purports to carry out. The effect thereof is that the carrying out of any business other than that as stated in the memorandum upon registration, shall be ultra vires and invalid.

3) The Issue Of Taxation And Double Taxation;

A body corporate is subject to numerous taxes, such as education tax, value added tax, company income tax etc. The issue of double taxation is also a matter of concern, This means that the company's profits are taxed once at the corporate level, and then again when they are distributed to shareholders as dividends.

4) Difficulty In Raising Capital;

Corporations may have more difficulty raising capital than other types of businesses. This is usually because investors may be more hesitant to invest in a corporation, as they are not personally liable for the company's debts.

5) More regulations;

Corporations are subject to more regulations than other types of businesses, incorporating a company under the CAMA for instance, also implies the obligation to comply with sundry of laws relating to the operation of companies in Nigeria, This can make it more difficult to operate a corporation, and can also increase the cost of compliance.

RIGHT AND CAPACITY TO FORM A COMPANY

By **section 18(1) of the CAMA**, any two or more persons may form and incorporate a company by complying with the provisions of the Act in respect of registration of companies. By **section 18(2) of the CAMA**, notwithstanding subsection 1, one person may form and incorporate a private company by complying with the provisions of the act in respect of registration of private companies. The right and capacity to form a company By

section 18(3) of the CAMA do not extend to the incorporation of a company for an unlawful purpose. Furthermore, it must be noted that under the CAMA, a company may take part in the formation of another company provided it(the first company) is not a company in liquidation.

RESTRICTIONS ON THE CAPACITY TO FORM A COMPANY

By **section 20(1) of the CAMA**, an individual shall not join in the formation of a company if he is under the age of 18, is of unsound mind, is an undischarged bankrupt or disqualified under **section 281 & 283 of the CAMA** from being a director of a company. However, by **section 20(2) of the CAMA**, a person shall not be disqualified on grounds that he is under the age of 18 where two others not disqualified under that subsection have signed the memorandum.

RESTRICTION ON ASSOCIATIONS OR PARTNERSHIPS EXCEEDING 20 PERSONS

By section **19(1) of the CAMA,** no association or partnership exceeding 20 persons shall be formed for the purpose of carrying on any business for profit or gain, except unless it is registered as a company under this Act or is formed in pursuance of other enactments in force in Nigeria. But by **section 19(2) of the CAMA,** the effect of subsection 1 shall not apply to cooperative societies, legal practitioners and accountants.

ON THE RIGHT AND CAPACITY OF FOREIGNERS TO FORM A COMPANY IN NIGERIA

By **section 78(1) of the CAMA**, subject to the power of exemption provided under **section 80 of the CAMA,** every foreign company who before or after commencement of the act was incorporated outside and Nigeria and having the intention of carrying on business in Nigeria must take all necessary steps to be incorporated as a separate entity in Nigeria, but until so incorporated, the foreign company shall not carry on business in Nigeria or

exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

The effect of **section 78 of the CAMA,** is to bring the local subsidiaries of foreign companies within the regulatory ambit of the commission. According to the court in **Watamal Singapore ltd v Olofin & co ltd,** The section does not deal with the question of the legal personality of the company, thus a foreign company may still sue and be sued in Nigeria. Although **OD.Michael** argues it is necessary in some circumstances for the foreign company to still comply with specific provisions of other laws, especially where it applies like a condition precedent. For instance by **section 2(1)(b) of the copyright act**, a qualified person who may bring an action, includes a body corporate, incorporated by or under the laws of Nigeria. Thus only companies incorporated by or under the law of Nigeria can bring an action for the infringement of copyright. For instance in **Island records v Pandum technical sales and services**, an action for infringement of copyright was dismissed by the court on the ground that six of the nine plaintiffs were companies incorporated in the USA and UK respectively.

TYPES OF COMPANIES

Companies may broadly be categorized in terms of a public or private company. Or in terms of company limited(by either shares or guarantee) or companies unlimited.

From this classifications we therefore have the following;

- Private company ltd by shares
- Private company ltd guarantee
- Public company ltd by shares
- Public company ltd by guarantee
- Private unlimited company and
- Public unlimited company.

COMPARING PRIVATE AND PUBLIC COMPANIES

Characteristics Of A Private Company

By **section 22 of the CAMA,**

1) a private company is defined as one which is stated in its memorandum of association to be a private company.

2) Subject to the provisions of the articles, a private company may restrict the transfer of its shares

3) the company shall not, without the consent of all its members, sell assets having a value of more than 50% of the total value of the company's assets

4) a member shall not sell that member's shares in the company to a non-member, without first offering those shares to existing members.

5) a member, or a group of members acting together, shall not sell or agree to sell more than 50% of the shares in the company to a person who is not then a member, unless that non-member has offered to buy all the existing members' interests on the same terms.

6) The total number of members of a private company shall not exceed 50,

7) Where two or more persons hold one or more shares in a company jointly, they shall, for the purpose of section 22(3), be treated as a single member.

8) A private company shall not, unless authorized by law, invite the public to subscribe for any share or debenture of the company ; or deposit money for fixed periods or payable at call, whether or not bearing interest.

9) The minimum issued share capital of a private company must not be less than 100,000 naira.

ON THE RESTRICTIONS OF TRANSFER OF SHARES

In **Okoya v Santili**, the court held that shares were in the nature of personal properties, as such are transferable only in the manner provided by the articles of association of a company. The law is that the transfer of shares may be restricted in a private company by

the articles of association, and where that is the case, any purported transfer will be invalid. In **Berry & Stewart v Tottenham Hotspur FC ltd,** Mr berry and co were involved in the transfer of shares within the company, the directors on finding out opposed it, in action the court upheld their opposition as it was within their powers in the articles of association.

ON THE TRANSFER OF SHARES TO NON MEMBERS

Generally a member of a private company cannot offer shares to outsiders unless he has first offered it to existing members. The law is that a member of a private company may offer or transfer his shares to outsiders without the directors refusing such transfer, only where all the existing members of the company had failed to take up the shares. In **Ocean coal co ltd v Powell steam ltd**, the plaintiff had first with the consent of the board of directors offer his 175000 shares of 2£ to other members, but they couldn't take it. The court held that in such circumstances he could transfer the shares to outsiders.

Characteristics Of A Public Company

1) by **section 24 of the CAMA,** a public company is any company other than a private company stated in its memorandum of association to be a public company.
2) the shares and debentures of some public company can be dealt in on the stock exchange
3) a public company can offer its shares to the public
4) the minimum issued share capital of a public company is 2,000,000 naira
5) there's no limit to the membership of a public company
6) the secretary of a public company must be a legal practitioner, a chartered accountant or a chartered secretary.
7) a public company must hold a statutory meeting within six months of incorporation
8) There is no limitation of membership in terms of share acquisition and disposal.

COMPARING LIMITED AND UNLIMITED COMPANIES

A company limited, could be a company limited by shares or by guarantee. By **section 21(a) of the CAMA**, a company limited by shares is a company having the liability of its members limited by the memorandum of association to the amount, if any, unpaid on the shares respectively held by them. While By **section 21(b) of the CAMA,** a company limited by guarantee is a company having the liability of its members limited by the memorandum of association to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up. Whereas an unlimited company by **section 21(c) of CAMA** is a company not having any limit on the liability of its members.

Similarities Of A Company Limited By Shares And Company Limited By Guarantee;

A company limited by shares and a company limited by guarantee have two features in common and they are;
1) Limited liability and
2) Legal personality

The Major Distinctions Between A Company Limited By Shares And A Company Limited By Guarantee;

1) The liability of members of a company limited by shares may be implemented at any time during the active existence of the company as well as during the winding up, but in a company limited by guarantee the liability will be Implemented only after the commencement of winding up of the company.

2) by **section 26(3) of the CAMA,** a company limited by guarantee cannot be incorporated with the object of carrying on business for the purpose of making profit for distribution to members, but a company limited by shares may be incorporated for profit.

3) by **section 26(4) of the CAMA,** in order to register a company limited by guarantee the authority of the attorney general of the federation is required.

4) by **section 26(12) of the CAMA**, The total liability of a member of a company limited by guarantee to contribute to the assets of the company in the event of its being wound up shall not at any time be less than N 100,000. But in the case of a company limited by shares, the members liability is limited to the amount of shares left unpaid taken by each subscriber.

5) by **section 26(13) of the CAMA**, the articles of association of a company limited by guarantee may provide that the members be removed or retire from the membership of the company by a special resolution duly filed with CAC, but a member of a company limited by shares cannot be removed from the membership of a company.

6) in the case of a company limited by guarantee, by **section 38(1) of CAMA**, a statement of guarantee containing such information as is necessary to identify the subscribers and how much they undertakes to contribute to the assets of the company in the event of winding up of the company, must be submitted. whereas what is required to be submitted in the case of a company limited by shares is a statement of the initial issued shared capital.

CLASSIFICATION OF COMPANIES ACCORDING TO SIZE

A company may also be classified according to size, ie.

- Small company
- Holding company
- Subsidiary company
- Wholly owned subsidiary company
- Group of companies and
- Consortium of companies.

REGULATION OF COMPANY MATTERS

The principal law regulating company matters is the **Companies And Allied Matters Act 2020**. The act makes provisions for;

a) Establishment and functions of Corporate Affairs Commission under Part A.

b) Incorporation of companies and incidental matters under Part B.

c) the limited liability partnership under Part C.

d) the limited partnership under Part D.

e) business names and registrations, under Part E.

f) incorporated trustees under Part F.

g) Establishment of Administrative proceedings committee(General) Part G.

FUNCTIONS OF THE CORPORATE AFFAIRS COMMISSION

Section 8 of CAMA provides for the functions of the commission as follows;

a) to administer this Act, including the registration, regulation and supervision of;

i) the formation, incorporation, management, striking off and winding up of companies.

ii) business names, management and removal of names from the register, and

iii) the formation, incorporation, management and dissolution of incorporated trustees;

b) establish and maintain a company's registry and office in each state of the federation suitably and adequately equipped to perform its functions under this Act or any other law.

c) arrange or conduct an investigation into the affairs of any company, incorporated trustees or business names where the interest of shareholders, members, partners or public so demands.

d) ensure compliance by companies, business names and incorporated trustees with the provisions of this Act and such other regulations as may be made by the commission;

e) perform such other functions as may be specified in this Act or any other law; and

f) undertake such other activities as are necessary or expedient to give full effect to the provisions of the Act.

THE CORPORATE AFFAIRS COMMISSION AND PRE ACTION NOTICE

By **section 17(1) of CAMA**, A suit shall not be commenced against the Commission before the expiration of 30 days after a written notice of intention to commence the suit is served upon the Commission by the intended plaintiff or his agent.

By **section 17(2) of CAMA,** The notice referred to in subsection 1 shall clearly state the—
(a) cause of action ;
(b) particulars of the claim ;
(c) name and place of abode of the intending plaintiff ; and
(d) relief sought.

PROMOTERS AND PRE-INCORPORATION CONTRACT

According to **Chris Nwigwe**, promotion activities are integral parts of a company formation, practically all corporate organizations are brought about by a set of people who arrange their formation. Companies are not formed in vacuum, they are conceptualized at first, a set of people take necessary steps to seek for directors by way of personality shopping, analyze the possible nature of business of the company, obtain permits, package incorporation documents and finally help the company commence business, wherein after they stop upon incorporation of the company. The totality of the deliberate activities and procedures is what the promotion of a company is.

WHO EXACTLY IS A PROMOTER

By **section 85 of the CAMA,** Any person who undertakes to take part in forming a company with reference to a given project and set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, is deemed a promoter of the company; Provided that a person acting in a professional capacity for persons engaged in procuring the formation of the company shall not be deemed to be a promoter.

According to the court in **Twycross v Grant,** they framed the scheme, they not only provisionally formed the company, but were also to end its creators, they found and qualified the directors, prepared the prospectus, paid for its printing , and advertised the undertaking before the whole world. It therefore follows that for a person to be regarded as a promoter he must have knowingly done some willful act, expressly or impliedly in furtherance of the formation of the company. In **Spicer Keith ltd v Mansell,** a person who purchased a property expressly as a trustee for an intended company was held to be a

promoter. Although it is generally agreed that the act of promotion is precedent to the formation of a company, it is also possible for a person to be a promoter of a company already formed, this is usually the case where a person assists in the procuring of capital for the company to pay promotion expenses.

A PERSON ACTING IN A PROFESSIONAL CAPACITY IS NOT A PROMOTER

The effect of the **proviso to section 85 of the CAMA** is that a person acting in a professional capacity for persons engaged to procure the formation of a company shall not be deemed to be a promoter. Thus, while a person who instructs a solicitor to prepare a memorandum and articles of association and register a company for him, is a promoter of the company, the solicitor himself is not a promoter because he acts in a professional capacity and is paid by his client "the promoter" for such services. In **Re Great Wheal Polyglot ltd,** the court noted inter alia that the solicitor who drafts the memorandum and articles of association in line with the promoters instruction, and the accountant who values the assets of a business are only giving expert assistance to the promoter, and will be paid for their services, they are not promoters. However, according to the court in **Bagnall v Carlton,** where the solicitor or accountant does more, such as helping the client to obtain director for the company, he will be regarded as a promoter.

The same principle applies to companies, because it is possible for an existing company to be a promoter of another new company, if the former merely acts in professional capacity, such as providing valuers and preparing figures on behalf of a promoter and is paid by the promoter, it cannot be said to be a promoter, but if the existing company does more than that, then it dresses itself with the apparel of being a promoter of the new company.

WHETHER OR NOT A PERSON IS A PROMOTER OF A COMPANY IS A QUESTION OF FACT

The court will usually look at the circumstances of each case to determine whether a person is a promoter of a company or not. In **Gluckstein v Barnes,** the court held that a

person who bought a property for his own use but later formed a company for the purpose of acquiring the property became the promoter of the company only when he took steps to form the company. The court in **Emma silver Mining co v Lewis,** also held that a person who took no active part in the formation of a company nor raised capital for it but left others to form the company on the understanding that he will profit from the formation was a promoter.

CAN A PROMOTER BE REGARDED AS A TRUSTEE OF THE COMPANY

According to the court in **Garba v Sheba international ltd,** a promoter is neither a trustee or an agent of the company, but he occupies a fiduciary position to the company.

ON WHEN EXACTLY WILL A PERSON BE REGARDED AS A PROMOTER

There is no hard and fast rule as to when a person becomes a promoter of a company, all that is required is that he begins to take part in the forming of a company or in setting it going, from that moment he could be regarded as a promoter. Or in the case of a company already formed at that point he undertakes to raise capital for the company.

ON DUTIES AND LIABILITIES OF A PROMOTER

By **section 86(1) of the CAMA,** a promoter stands in a fiduciary relationship with the company, and must observe utmost good faith in any transaction with or on behalf of the company, and shall compensate the company for any loss suffered by reason of his failure to do so. By **section 86(2) of the CAMA**, the promoter is bound to account for any profit made by the use of any information or property which it was in the circumstance his duty as a fiduciary to acquire on behalf of the company. In **Jubilee Cotton Mills v Lewis**, it was held that a promoter who had received by way of secret rewards for promoting a company, allotment of shares before a statement in lieu of prospectus, was bound to account for profit made from the resale of the shares. In **Erlanger v New phosphate co,** it was held that there was no full disclosure of the material facts and the company could

rescind from the contract when the promoter and his syndicate bought a land containing valuable mines of phosphate at 55,000 pounds and made a contract via a nominee with the company to buy it at the rate of 110,000 pounds. He was thus held liable for failing to disclose the profit he was making.

The decision of the court above is consistent with the observation of the court in **Glassier v Rolls,** where it was held that a promoter vendor cannot evade liability to disclose by using a nominee to sell to the company. However, following from the decision of the court in **Lagunas nitrate co v Lagunas nitrate syndicate**, if a syndicate being joint owners of a property sells the property to a company formed by them, and being sole shareholders in such company, they shall not be liable for any profit made by them arising from such sale.

ON CONTRACTS BETWEEN A PROMOTER AND THE COMPANY

By **section 86(3) of the CAMA** , Any transaction between a promoter and the company may be rescinded by the company unless, after full disclosure of all material facts known to the promoter, such transaction shall have been entered into or ratified on behalf of the company by —
(a) the company's board of directors independent of the promoter ;
(b) all the members of the company ; or
(c) the company at a general meeting at which neither the promoter nor the holders of any share in which he is beneficially interested shall vote on the resolution to enter into or ratify that transaction.

Remember in **Erlanger v New phosphate co**, it was held that there was no full disclosure of the material facts and the company could rescind from the contract when the promoter and his syndicate bought a land containing valuable mines of phosphate at 55,000 pounds and made a contract via a nominee with the company to buy it at the rate of 110,000 pounds. Furthermore by **section 86(4) of the CAMA**, there's no limitation period to when a company may bring an action against a promoter to enforce any rights , although the

court may if it deems it equitable to do so, with regards to the circumstances of the case including lapse of time, relieve the promoter either in whole or part of liability.

REMEDIES FOR BREACH OF DUTY

1) Damages;

a company may sue the promoter for breach of his fiduciary duties and claim damages. As seen in **Re Leeds and Hanley theaters of varieties ltd**.

2) Rescission;

The company may rescind from the contract and recover the purchase money where the promoter sold his own property to the company. As seen in **Erlanger v New Phosphate co**.

3) Account For Profit;

The promoter may be compelled by the company to account for any profit he made. in **Gluckstein v Barnes**. A syndicate purchased a property for 140,000 dollars, but sold it to the company to be formed which they were promoting, for 180,000 dollars, they only disclosed half of the profits but the company found out via a public issue of shares that profit in excess of that disclosed were made by them. They were held to account.

ON REMUNERATION OF PROMOTERS

According to the court in **Garba v Sheba Ng ltd,** as it has always been the case, a promoter has no right against the company for payment of services rendered before the incorporation of the company and that a promise to pay him by the company is not binding and is not enforceable against the company because the consideration is a past consideration. Same principle was observed by the court in **English and colonial produce co.** However, by section **96(1) of the CAMA**, a promoter may only recover from the company what he has paid in preliminary expenses if the company ratifies any contract to that effect after being incorporated. Further, a promoter can also be remunerated indirectly, by offering him fully paid up shares via the instrument of founder shares. Or by

offering him deferred shares of which he may pay at any time for the original amount whether or not the value increases.

PRE-INCORPORATION CONTRACTS

Generally, a pre-incorporation contract is a contract that is entered into by usually a promoter on behalf of a company that does not yet exist. The promoter is personally liable on the contract, but the company can ratify the contract and assume liability after it is formed.

Examples of pre-incorporation contracts are;

1) Director's Service Contract;
A director's service contract is a contract between a company and a director that sets out the terms of the director's employment. It is similar to an employment contract for an employee, but it also includes provisions specific to directors, such as their duties and responsibilities, their compensation, and their termination rights.

2) Contract For Payment Of Promoter's Expenses;
A contract for payment of promoter's expenses is a document between a promoter and a company that outlines the terms and conditions under which the company will reimburse the promoter for expenses incurred in promoting the company before it was incorporated.

3) Contract To Take Over A Business;
A contract to take over a business, also known as a business transfer agreement, is a legal document that outlines the terms of the sale of a business from one party (the seller) to another party (the buyer). The agreement typically includes details such as the purchase price, the assets and liabilities being transferred, the payment terms, and the closing date.

It may also include provisions for things like warranties,indemnification, and non-competition.

4) Contract To Purchase A Property;

A contract to purchase a property, also known as a purchase and sale agreement (PSA), is a legally binding document between a buyer and seller that outlines the terms of a real estate transaction. It includes the purchase price, closing date, financing terms, and any contingencies that must be met before the sale can go through.

5) Joint Venture Agreement;

A joint venture agreement is a contract between two or more parties that agree to pool their resources and expertise to undertake a specific business project. It typically specifies the purpose of the joint venture, the contributions of each party, the management structure, and the division of profits and losses.

6) Shareholders agreement;

It is a contract between the shareholders of a company that sets out the terms and conditions of their relationship.

7) Contract For Conversion Of Partnership Into Incorporated Company;

This is a legal document that outlines the terms and conditions of the conversion.

THE COMMON LAW POSITION

At common law, pre-incorporation contracts were frowned at and given no legal validity. The law was that a company not yet incorporated had no legal capacity to contract and no one including a promoter could contract for it as an agent. All the company could do upon incorporation was to make a fresh contract on the same terms as the pre-incorporation contract.

According to the court in **Howard v Patent Ivory manufacturing company**, the so called pre-incorporation contracts by promoters and agents of a company are not contracts binding on a company, for the company had then not been in existence, and there cannot be in law an effectual ratification by the company of a contract which was made when it was not in existence. In **Kelner v Baxter,** the promoter bought some wine in the name of a company yet to be formed, when the company was subsequently formed it ran into liquidation without ratifying the contract, the court held the agent to be personally liable. In **Newborn ltd v Sensolid Great Britain ltd,** the proposed directors of a company yet to be formed, bought some wine on behalf of the company, personally signed and took delivery of it, the court held them personally liable as they contracted on behalf of a company not yet in existence. In **Caligara v Giovanni sartori**, the court held a promoter personally liable to pay for a loan he took in the company's name prior to its formation. In **Emmanuel v Chief Tarka**, a lease agreement executed on behalf of a company yet to be incorporated was held to be void. Also in **Okafor v Ezenwa,** the court held that an owner of a proposed company who collected money from a third party as a payment for shares did so as both the principal and promoter, thus was personally liable Thereon.

THE MODERN POSITION

The modern position as regards the legal consequence of pre-incorporation contracts now follows the effect of the relevant statutory provision. For instance in Nigeria, By **section 96(1) of the CAMA**, any contract purporting to be entered into by the company or any person on behalf of a company prior to its formation may be ratified by the company when it is formed, and thereupon the company shall become bound by or entitled to the benefits thereof as if it had been in existence at the date of such contract and had been a party thereto. But by **section 96(2) of the CAMA,** prior to ratification by the company the person who purported to act in the name or on behalf of the company shall in the absence of an express agreement to the contrary be personally bound by the contract and be entitled to the benefit thereof.

ON THE EFFECT OF RATIFICATION

The court in **S.G.F v S.G.B ltd,** held that by virtue of **section 96(1) of the CAMA**, it is now possible for pre-incorporation contracts to be ratified by a company after its incorporation and thereby making the company bound by it and entitled to the benefit thereof. And it must be noted that **Section 869(2) of the CAMA** makes the ratification by a company to have effect as if it was made under the 2020 CAMA, even if it was made before the Act. Therefore ratification of pre-incorporation contracts need not be after the coming into force of the CAMA 2020, it equally preserves ratifications done before the act.

WHERE PRE-INCORPORATION CONTRACTS ARE INSERTED INTO THE OBJECT CLAUSE OF THE MEMORANDUM

According to the court in **Edokpolo v Sem Edo wires ltd,** the list of objects in a memorandum are certainly not things the company must execute, the inclusion of the terms of the pre-incorporation contract in the memorandum of association of a company is an indication of a strong desire that the proposed company after incorporation should execute the terms of the agreement so included.

ON WHEN EXACTLY A PRE-INCORPORATION WILL BE BINDING ON A COMPANY

The court in **Garba v KIC ltd**, stated that a company can become bound by an incorporation contract, only when there's evidence of ratification by the company upon its formation. But it must be noted that despite the above provisions, a promoter can still escape liability by way of novation, that is after incorporation, the company and the third party can substitute the original pre-incorporation contract with a new contract on similar terms. This enables the company to dispense with the need of holding a meeting to ratify the pre-incorporation contract.

BUSINESS ORGANIZATIONS

The carrying out of businesses is the lifewire and blood of the economy, but business organizations differ, a person desirous of undertaking a commercial enterprise, may choose to be a sole proprietor and register his business name, or form a company, or enter into partnership with others. Thus, strictly speaking, business Organizations in Nigeria are divided into companies, statutory Corporation, limited liability partnership, limited partnership, and sole proprietorship. Different rules and procedures apply to these categories of businesses and differing legal consequences follow upon their coming to life.

SOLE PROPRIETORSHIP

Firstly, **Patterson** and **Plowman** notes that a sole proprietorship is a form of business whose management and ownership is vested in one person. The **Black's Law Dictionary** defines a sole proprietorship as "a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. In essence, a sole proprietor is a sole trader, it is a one man business wherein the owner undertakes a business in his own name and his own right, he bears both the capital of funding the business and the risks involved in running the business.

The sole proprietor has no limit in his liability in the business, the business is as good as him, there is neither perpetual succession nor corporate existence vested on a sole proprietorship, thus a sole trader is one and the same person with his business. As regards the question of continuity, in **Vernon v Schuster,** the plaintiff claimed against the son of a deceased sole trader who continued the business of his father, alleging that the deceased was in breach of their contract and thus the son should be liable having continued the sole proprietorship of his father, under the same name, "Diversey Heating". The supreme court of Illinois held against the plaintiff noting that a sole proprietorship had no legal personality, as such the debts and liabilities of the sole proprietor with which she contracted with died with that sole trader and same cannot be imposed on the son who is a

different sole trader notwithstanding the use of same name. Also in, **MIG investment inc v Marsala**, a sole trader who bought the assets of a partnership business and started his own business as a sole proprietor was held not liable for the debts and liabilities attached to the defunct partnership business.

FACTORS NECESSITATING THE CHOICE OF A SOLE PROPRIETORSHIP BUSINESS

1) Simplicity Of Registration;

A sole proprietorship may be chosen as choice of business due to how simple and flexible the registration process is, unlike companies where burdensome paperworks is filed, the same is not so for sole proprietorship. All a person has to do is to register his or her business name, and this can be done even at the commission's zonal offices. to simplify registration processes, **section 811 of the CAMA,** purports that in every state of the federation there shall be a register office for business names where a register shall be kept in the prescribed form for the entering of such matters as required by the Act.

2) Non Complicated Decision Making Process;

The procedures involved for decision making in other business organizations like companies are often rigid and long, the offices and capacities of the board of directors, general meeting, and the implication of special resolutions etc are of material factor and may end up stagnating decision making process, but this is not so in a sole proprietorship as it is a one man business.

3) The Need For Single Taxation;

A sole proprietor unlike a company is not subject to double taxation, he does not pay both the corporate income tax and personal income tax, he only pays the latter, as the law sees him as being inseparable from his business. Thus he enjoys tax advantages.

4) The Need To Accumulate Profit Solely;

Unlike a company wherein profits are collectively shared by way of dividends, A sole proprietor is a sole trader, he manages the affairs of the business and as such is entitled to all profit realized from the business. This realization of profit gives him a strong incentive to succeed. Aside from this, he also enjoys the pride of ownership and the credit of solving the day to day problems of the business activity.

5) Cessation And Death;

A person may also opt for sole proprietorship where he desires that his death should bring an end to the sole proprietorship business. This throws light on the fact that a sole proprietorship entails easy dissolution, as no rigid legal formalities need to be met, all that is necessary in the event of the death of a sole proprietor is that his legal representative files a notice of the cessation of business to the registrar, 3 months after the cessation of the business.

6) Sphere And Extent Of Operation;

Where a business requires basically a local market for operation, less capital, less risk and more of personal services such as tailoring, photography, hair cutting etc. A sole proprietorship is ideal.

7 Flexibility And Efficiency;

The management of sole proprietorship requires less formal Administration, changes in the business may be adopted at any time. Eg the address of the business can easily be changed without any formal procedure or waste of time. All that is required is to notify the registrar in writing.

REGISTRATION OF NAMES FOR SOLE PROPRIETORSHIP BUSINESS

Ordinarily, there is no legal obligation on sole proprietors to register their business names except when necessary as provided by the Act. And it is relevant to note that a business name may be registered by an individual sole proprietor, a firm(Partnership) or company, as

the case may be. This is so because the carrying on of business is not limited to individual persons.

by **section 814(1)(a)(b) &(c) of the CAMA**, every individual, firm or corporation having a place of business in Nigeria and carrying on business under a business name shall be registered in the manner provided in this part if;
a)in the case of an individual it does not consist of his true surname, without any addition other than his true forenames or initials thereof.
b) in the case of a firm, it does not consist of the true surnames of all the partners, without any addition other than the true forename of the individual partners or the initials thereof
c) in the case of a corporation, whether or not registered under this Act, it does not consist of its corporate name without any addition.

But by **section 814(2) of the CAMA,** registration will not be necessary where the additional name is merely to indicate that the business is carried on in succession to a former owner, or where two or more individual partners have the same surname, and an additional "s" is placed at the end of that surname or Where the business is carried out by a receiver or manager appointed by the court. Putting this into context, With respect to individuals For example, if Mr Gabriel Okoye is running a boutique business with the name Okoye stores or Gabriel stores, or G.O stores, there is no obligation on him to register it. Because the business name consists of his true surname, or his true forename or initials. But where he comes up with a name like Gabby stores or Zayna stores. He is required to register the name under the Act.

REGISTRABLE NAMES

Not all business names are registrable, some are prohibited by the Act while others may only be registered with the consent of the Commission. By **section 852(1) of the CAMA,** No company, limited liability partnership, limited partnership,business name or incorporated trustee shall be registered under this Act by a name or trademark which—

(a) is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires ;

(b) contains the words “Chamber of Commerce” unless it is a company limited by guarantee

(c) in the opinion of the Commission, is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy ;

(d) in the opinion of the Commission, would violate or conflict with any existing trademark or business name registered in Nigeria or body corporate formed under this Act unless the consent of the owner of the trade mark, business name or trustees of the body corporate has been obtained ;

(e) contains any word which, in the opinion of the Commission, is likely
to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled ;

(f) is, in the opinion of the Commission, deceptive or objectionable in that it contains a reference or suggests association with any practice,institution, personage, foreign state or government, international organization or international brand or is otherwise unsuitable ; or

(g) is capable of undermining public peace and national security.

In **Mustapha v Corporate affairs commission**, the court upheld the refusal of the commission to register the name Aguda investment Ng ltd, since it was likely to conflict with the already registered name Aguda ventures Ng ltd. In **Ewing v Buttercup margarine co**, the plaintiff obtained an injunction restraining the defendant from carrying on with the name buttercup margarine co, since it tended to conflict with that of his,

"buttercup dairy co." In **Niger chemist v Nigeria chemist**, an order of injunction was issued against the defendant from using the name Nigeria chemist since it tended to conflict with the already registered name Niger chemist. Although **section 852 of the CAMA** is silent on the right of appeal of a person whose business name has been rejected by the commission, the community reading of **section 851&852 of the CAMA** shows that a person may appeal to the administrative committee having the responsibilities inter alia of resolving disputes arising from the Act, from whence an appeal may lie to the federal high court.

RESTRICTED NAMES

By **section 852(2) of the CAMA,** Except with the consent of the Commission, no company, limited liability partnership, limited partnership, business name or incorporated trustees shall be registered by a name which—
(a) includes the word “Federal”, “National”, “Regional”, “State” ;

(b) “Government”, or any other word which, in the opinion of the Commission suggests or is calculated to suggest that it enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government, or contains the word “Municipal” or “Chartered” or in the opinion of the Commission, suggests or is calculated to suggest, connection with any municipality or other local authority ;

(c) contains the word “Cooperative” or its equivalent in any other language or any abbreviation; or of the words “Building Society” ; or

(d) contains the word “Group” or “Holding”.

Furthermore by **section 852(4) of the CAMA,** the registration of a business name will be refused where irrefutable evidence is shown that the business name has been involved in fraudulent trade malpractices, either in local or international trade. It must be noted that

the above provision arguably does not seek to disqualify an ex-convict of fraud from carrying on a business as a sole proprietor, it applies to the particular business name itself.

CAPACITY TO REGISTER A BUSINESS NAME

The registration of a business name under the Act can generally be done by any person provided he is carrying on a business in Nigeria. However, in the case of an infant, **section 815 (6) of the CAMA**, makes it mandatory that his signature to the statement in writing referred to in section 815(1) of the CAMA must be countersigned by a magistrate, legal practitioner or a police officer above the rank of assistant superintendent.

But **section 852(3) of the CAMA** have been argued, presents some sort of difficulty, because the section purports that an individual shall not be registered under part D or E where the statement furnished shows he is under the age of 18 unless same shows two other individuals up to the age of 18.

This difficulty arises from the fact that both **section 815(6)** and **section 852(3)** fall under the same part of the **CAMA.** An analogous reading of **section 796 of the CAMA** into the present difficulty even worsens the case, as the section made no reference to any statement, as such it appears contradictory with section 852(3) of the CAMA.

So what exactly was the intention of the draftsman, was it to completely prohibit an infant from registering a business name or from registering it only when two others up to the age of 18 are co owners?

It is submitted that the above questions be answered in the negative, Because the seeming difficulty arises rather from a lacuna in the Act, the proper section in the issue of infant capacity to register a business name remains **section 815(6) of the CAMA,** being very much clear and unambiguous than **section 852(3) of the CAMA**, therefore as long as the infant's signature is counter signed he may register a business name.

Lastly, there is no express provision under **Part E of the CAMA** which prohibits persons of unsound mind or an undischarged bankrupt from registering a business name as a sole proprietor, although in practice the same may be refused by the registrar.

TIME WITHIN WHICH TO REGISTER A SOLE PROPRIETORSHIP

Section 815(1) of the CAMA purports that an individual being a sole proprietor must within 28 days after commencement of the business register same of which registration is required, by furnishing to the registrar a statement in writing in the prescribed form containing the following;

- the business name;
- the general nature of the business;
- the full postal address of the principal place of business;
- the full postal address of every other place of business;
- the present forenames and surnames, any former forenames or surnames,
- the nationality and, if that nationality is not the nationality of origin, the nationality of origin,
- the age, the sex,
- the usual residence and any other business occupation of the individual;
- the date of commencement of the business, whether before or after the coming into operation of this Act,

The effect of the above provision as argued by a learned author is that a person may even commence a business without registering it but he is required to register the same within 28 days after commencement of business.

But one critical question has been what exactly does it mean to commence business?, this question is important because **section 815(1) of the CAMA** leaves it at the discretion of the sole proprietor to determine when exactly he commenced the business, this creates a loophole as people may doctor the commencement time of their businesses so as not to be

held liable for non compliance. Whereas **Section 868(1) of the CAMA** defines a business to include trade, industry, and profession and any occupation carried on for profit.

There is indeed not enough decided cases to ascertain when exactly a person commences business, but from the decision of the court in **Day distributors v Allserve Inc**, which is not really consistent with the section in issue but is instructive, we're certain that the distribution of a new product does not imply the commencement of a new business. Furthermore, the supreme court in **Citec international Estate ltd v Edicomisa,** defined carrying on business to mean, to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation, it also means to hold out oneself out to others as engaged in the selling of goods or services. It therefore should follow that once a sole trader Initiates a particular business as a continuous operation or permanent occupation such act will amount to commencing business.

PROCEDURE FOR REGISTRATION OF SOLE PROPRIETORSHIP

The requirements for the registration of a business name by a sole proprietor can be gleaned from the provisions of **section 815 of the CAMA.** But the writer believes it is necessary the sole proprietor is firstly settled whether the name is mandatorily required to be registered, secondly whether the name he intends to use is a registrable, that is to say, it is not prohibited or restricted, where it is the latter, he should seek the Commission's consent first.

After all these preliminary considerations, the further requirement is simply the submission of a statement in writing signed by the sole Proprietor to the Registrar at the registry in the State in which the principal place of business of the sole proprietor is situated. This is usually after the business name has been approved for registration. The statement referred to in section 815 must be personally signed by the sole proprietor and must contain the following particulars:

- the business name;

- the general nature of the business;
- the full postal address of the principal place of business;
- the postal address of any other place of business,
- the sole proprietor's present forenames and surname,
- the sole proprietor's former forenames or surnames;
- the nationality of origin, age, sex,
- usual residence and any other business occupation of the individual;
- and the date of commencement of the business.

The said statement is to be submitted to the Registrar within 28 days after the sole proprietor commences the business for which registration is sought. In practice, all that the sole proprietor needs to do is to collect and fill the form for Application to register Business. Additionally the sole proprietor is also required to submit to the Registrar, copies of his passport photographs which are to be certified in a manner required by the Registrar. The purpose of the requirement of passport photographs is to enable contact tracing in the event of fraud. The procedures are summarized under **Article 54 of the company regulations**, providing as follows;

(1) Form for approval of name;

(ii) duly completed business name application form;

(iii) two passport-sized photographs of the sole proprietor;

(iv) payment of filing fees; and

(v) payment of fees for CTC of certificate for display at each disclosed branch office.

Once the sole proprietor complies with the above requirements, the Registrar shall cause the business name to be entered in the register and a certificate of registration shall be issued to the sole proprietor.

THE LEGAL CONSEQUENCES OF DOING BUSINESS AS A SOLE PROPRIETOR WITHOUT REGISTRATION UNDER THE CAMA

1) Non-compliance with registration defeats the act;

By **section 8(1)(b) of the CAMA,** the commission has the function of administering the Act which includes the registration, regulation and supervision of business names, management and removal of names from the register. Therefore the regulatory function of the Commission is overreached where such a business name is not registered.

2) Illegality;

The business name not registered becomes an illegal enterprise in the eyes of the law. Infact by **section 863(1) of the CAMA,** the carrying of business names under a business name not registered is prohibited in Nigeria.

3) Liability For Criminal Prosecution;

Non compliance with registration under the act is a sufficient ground for Criminal prosecution to follow.

4) Payment Of Fine;

Section 863(2) of the CAMA envisages a fine of 200 naira for any person convicted for the offense of carrying on business in Nigeria with an unregistered name. The said fine shall be computed by multiplying the 200 naira by the number of days during which the default continues.

5) Status Of An Ex Convict;

The person or firm or company convicted for non compliance will usually henceforth be regarded in the commercial world as an ex convict, and that have some legal disabilities especially from the stigma attached.

6) Forced Compelled Registration;

A person convicted aside from the payment of fine shall also be compelled by the court via an order mandating compulsory registration of the business name.

7) No Protection Against Adverse Use of Business Name By Others;

A legal right cannot arise from an illegal cause, thus a person whose business name is not registered cannot for instance maintain an action in passing off or whatsoever against another.

8) Unenforceability Of The Contractual Rights;

Non registration also attracts the legal consequence that the trader cannot enforce any contractual right arising from a transaction undertaken under such unregistered business name. **Citec international estate ltd v Edicomisa,** the supreme court refused to enforce a contract entered into by the respondent because the business name was not registered in line with the provisions of the CAMA.

PARTNERSHIP

Partnership in Nigeria is categorized as; general partnership, regulated by the **Partnership Act of 1890**, and the **Partnership Laws** of various states, the limited partnership and the limited liability partnership both regulated by the **companies and allied matters Act**. By **section 1(1) of the Partnership Act of 1890**, a partnership is defined to mean a relation subsisting between two or more persons carrying on business in common to make profit. The three ingredients inherent in this definition are as follows;

i) There Must Be At Least Two Or More Persons Who Come Together, thus one person cannot be a partner, a partnership must be dualistic or more. But it must not exceed 20 persons. Although **section 19(1) of the CAMA** purports that no partnership exceeding 20 persons may carry on business to make profit except if it is registered as a company under the Act or as required by some other enactment. **Section 19(2)(b) of the CAMA** exempts legal practitioners, accountants and cooperative societies from the effect of subsection 1, therefore they may form a partnership exceeding 20 persons for profit.

ii) To Carry On The Business in Common ;

Both or more parties involved in the partnership must own the business, The word business by **section 868 of the CAMA** has been defined to include trade, industry, and profession and any occupation carried on for profit. Whereas the supreme court in **Citec international Estate ltd v Edicomisa**, defined carrying on business to mean, to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation, it also means to hold out oneself out to others as engaged in the selling of goods or services.

iii) <u>For Profit;</u>

The business in question must be carried on for profit, According to the court in **Re spanish prospecting co ltd,** profit means the net profit, that is the difference between the gross returns and the out of goings of the business, which is the total sales revenue less the cost of the goods sold and additional expenses. In **Re fisher & sons**, the executors of the will of a deceased business owner was held not to have come together to carry on business for profit, but rather to discharge their statutory duties as executors, thus they could not be called partners.

COMPARING PARTNERSHIPS WITH A COMPANY

1) with the exception of limited liability partnerships, a partnership unlike a company, generally lacks Corporate existence and thus is one and the same with its members. In **Saddler v Whiteman**, The court held that a partnership has no separate existence from its membership, and the partners carry on business as both the agents and principals of each other within the scope of the partnership business.

2) while a company is mandated to be registered under the CAMA, a partnership although may be registered, need not be registered as a matter of compulsion. In other words the registration of a partnership is not compulsory.

3) With the exception of limited liability partnership, a partnership has no perpetual succession, nor is it an artificial person in law capable of holding property, suing and being sued in its own name.

4) With the exception of limited liability partnerships, the partner's liability in a general partnership is unlimited, which is unlike a company where the Liability of its members could be limited either to the extent of shares left unpaid or the amount they agreed to contribute. In the US case of **Harralson v Campbell** the court held that the execution of the judgment debt by way of seizure and sequestration of the personal effects of the general partners and the Partnership property was valid and enforceable.

5) Unlike a company, a floating charge cannot be created over a partnership property because it is jointly owned, and cannot accommodate severance between the partners.

TERMS OF A PARTNERSHIP AGREEMENT

A partnership agreement is a legal contract which contains the terms and conditions that governs the way the partnership will be operated between parties involved in starting a partnership structured business for the avoidance of any conflict between the partners. The law can presume there is an existence of a partnership once the essential elements of a partnership are present in the partnership agreement

Parties may not mandatorily register their partnership but they must have an agreement to that effect. It could be oral or in writing, although it is advisable for it to be in writing. And same being in writing could be by deed and certain terms must be clearly spelt out. They are as follows;

1) Name of the partnership; (i.e. the name contained in the certificate of registration issued by the Corporate Affairs Commission must be stated in the partnership agreement.

2) Parties; The full names and descriptions of all parties involved in the partnership must be stated.

3) Nature Of Business;
The general and specific nature of the business intended to be carried out must as well be stated in the agreement.

4) Addresses;
The Place of business of the partnership and branches, if any must be stated.

5) Commencement;
The time of commencement of the partnership must be stated.

6) Remuneration of partners:
By **Section 23(vi) of the Partnership Law of Lagos state**, the law presumes that partners are not entitled to any form of remuneration for acting in a partnership business. Therefore, if the partners intend that remuneration should be paid, specific instructions must be taken to include an express clause to that effect.

7) Expulsion Clause;
It must be stated in the agreement that certain acts or omissions are grounds for expulsion.

8) Admission Of New Partners;
A provision must be provided wherein the procedures of admitting new partners is stated. A partner cannot bring in another new partner without the consent of others and following due procedures.

9) Dissolution Clause;
It must be stated in the agreement when the partnership will be dissolved, and what acts exactly might induce dissolution of the partnership, such as death of either partner.

10) Arbitration clause;

An arbitration clause for ease of settling disputes may also be inserted in the partnership agreement, so that when a dispute arises, recourse must first be made to an arbitral panel before the traditional courts.

11) Bank Account;

The bankers of the partnership firm must also be stated in the partnership agreement.

12) Capital and capital contribution;

Because the law presumes equal contribution in a partnership, it is necessary if the partners desires otherwise to state it in the partnership agreement, eg, that person X contributed 50,000 whilst person Y contributed 100,000.

LIMITED PARTNERSHIP

By **Section 795(1)-(4) of the CAMA**, a limited partnership may be formed subject to the manner provided by the act, it must not consist of more than 20 persons, it shall consist of one or more persons called general partners who shall be liable for all debts and obligations of the firm, and others called limited partners who upon entry shall contribute or agree to contribute to the capital or property of the firm and shall not be liable to the debts and obligations of the firm beyond the amount so contributed or agreed to be contributed.

A LIMITED PARTNER IS BOUND BY HIS CONTRIBUTION

By **section 795(5) of the CAMA**, unless otherwise agreed in writing by the partners, a limited partner shall not during the continuance of the partnership, draw or receive back any part of his contribution and if he does so he shall be liable to the debts and obligations of the firm to the extent he has drawn or received back.

ON WHO MAYBE A PARTNER IN A LIMITED PARTNERSHIP

By **section 796(1) of the CAMA,** an individual or body corporate may be a partner in a limited partnership provided the said individual is not a person of unsound mind so found by the court to be of unsound mind or an undischarged bankrupt.

A limited partnership carrying on business must be registered under the CAMA and also comply with all the legal provisions regarding its operation. Unlike a general partnership, a limited partnership is not dissolved by the death or bankruptcy of a limited partner, and lunacy of a limited partner is not a ground for the dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realized. And where the limited partnership fails to comply with the requirements of registration, the law is that it is reduced to a general partnership and every limited partner shall be a general partner.

LIMITED LIABILITY PARTNERSHIP

By **section 746 of the CAMA,** a limited liability partnership is a body corporate, formed and incorporated under this act and it's a legal entity separate from the partners. It has perpetual succession and any change in its partners does not affect the existence, rights or liabilities of the limited liability partnership.

WHO MAY BE A PARTNER IN A LIMITED LIABILITY PARTNERSHIP

By **section 747 of the CAMA**, any individual or body corporate may be a partner in a limited liability partnership, provided that the individual is not of unsound mind and so found by a court to be of unsound mind or an undischarged bankrupt.

WHERE NUMBER OF PARTNERS IS REDUCED TO BELOW 2

By **section 748 of the CAMA,** every limited liability partnership must have at least two partners. And if at any time the number of partners is reduced to below two, the only partner being aware of such a fact who carries on the business of the partnership for a

period of six months shall be personally liable for the debts and obligations of the limited liability partnership incurred during such period.

DESIGNATED PARTNERS AND THEIR ROLES UNDER THE CAMA

By **section 749 of the CAMA**, every limited liability partnership must have at least two designated partners who are individuals and at least one resident in Nigeria. If all the partners are bodies corporate or a mix of individuals and bodies corporate, at least two individuals who are partners of the limited liability partnership or nominees of the bodies corporate, act as designated partners. By **section 750 of the CAMA**, a designated partner is responsible for all acts, matters, and things that are required to be done by the limited liability partnership, in compliance with the Act. They are also liable for all penalties imposed on the limited liability partnership for any contravention of the Act.

THE INCORPORATION OF A LIMITED LIABILITY PARTNERSHIP

By **section 753 of the CAMA**, to incorporate a limited liability partnership, two or more persons carrying on business for profit may subscribe their name to an Incorporation document which must be filed with the commission.

The Incorporation document must state;
a) the name of the limited liability partnership
b) the proposed business
c) the address of the registered office
d) name and address of the partners
e) name and address of persons who are to be designated partners
f) other information concerning the proposed limited liability partnership as the commission may prescribe.

By **section 754 of the CAMA,** the commission shall within 14 days register the incorporated documents and give a certificate to that effect, which must be signed by the commission and authenticated by its official seal.

The certificate must state;
a) the name of the limited liability partnership
b) the registration number
c) date of registration
d) that the limited liability partnership has been Incorporated as a limited liability partnership. And
The certificate shall be prima facie evidence that the limited liability partnership is incorporated by the name specified in it.

ON THE EFFECT OF REGISTRATION

By **section 756 of the CAMA,** upon registration, a limited liability partnership may sue and be sued in its name, acquire, own, hold or dispose of property whether movable or immovable, tangible or intangible, may have a common seal and enjoy other benefits of a body corporate.

CESSATION OF A LIMITED LIABILITY PARTNERSHIP

By **section 763(1) of the CAMA**, a person may cease to be a partner of a limited liability partnership either by agreement with other partners, or by a notice in writing of at least 30 days to the other partners of his intention to resign as partner.

Also by **section 763(2) of the CAMA,** a person ceases to be a partner in a limited liability partnership upon; His death or the dissolution of the limited liability partnership, where he is declared to be of unsound by a competent court, or if he has applied to be declared an undischarged bankrupt.

As regards former partners, by **section 763(3) of the CAMA,** a former partner of a limited liability partnership is deemed to remain a partner in relation to any person dealing with the limited liability partnership, unless; Such other persons has notice that he has ceased to be a partner or notice of his cessation has been delivered to the commission.

Lastly, by **section 763(5) of the CAMA**, a person who retires or ceases to be a member is in the Absence of an agreement to the contrary, entitled to an amount equal to his contribution to the limited liability partnership.

LIABILITY OF PARTNERS IN A LIMITED LIABILITY PARTNERSHIP

The law is that a partner is an agent of the limited liability partnership and not of other partners. By **section 765 of the CAMA,** a partner of a limited liability partnership is for the purpose of business of the limited liability partnership an agent of the limited liability partnership but not of other partners.

Where a person acts without authority of the limited liability partnership, the limited liability partnership cannot be liable. By **section 766 of the CAMA**, the limited liability partnership cannot be liable for the acts of a partner done without its authority but will be liable for acts done with its authority.

The limited liability partnership is not bound by any thing done by a partner in dealing with a person if he in fact had no Authority to Act, the other person knows he has no Authority, does not know or believe him to be a partner of the limited liability partnership. But a limited liability partnership will be liable for an act of a partner done with its authority.

Further, an obligation of the limited liability partnership whether arising in contract or otherwise is solely the obligation of the limited liability partnership, and the Liabilities shall be met out from the property of the limited liability partnership.

Thus by **Section 767 of the CAMA**, a partner is not liable directly or indirectly for the obligation of the limited liability partnership solely by reason of being a partner of the limited liability partnership. And lastly, a partner shall be personally liable for his own wrongful act or omission and not of other partners.

ON HOLDING OUT AS A PARTNER

By **section 768(1) of the CAMA**, a partner who by words spoken or written or by conduct, represents himself or permits himself to be represented by another as a partner of a limited liability partnership, is liable to any person who on the faith of such representation gives credit to the limited liability partnership, and where the limited liability partnership has received the credit it shall be liable to the extent of the credit received or any financial benefit derived thereon. The supreme court of Vermont noted in **Griffin v Buffum**, that the ground for making the partnership liable is because the property having been obtained was for their joint benefit and to enable them make profit to which they received.

WHEN LIABILITY BECOMES UNLIMITED

By **section 769(1) of the CAMA,** the liability of partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts and liabilities of the limited liability partnership, and the limited liability partnership shall be so liable to the same extent unless it shown the fraudulent act was done without its knowledge or Authority.

By **section 769(2) of the CAMA**, the carrying on of business in such a manner as to defraud is an offense and is punishable with a term of imprisonment which may extend to two years or a fine as the court deems fit or both.

Further by **section 769(3) of the CAMA,** the persons who suffered from such fraud are entitled to be compensated personally by the limited liability partnership or the partners or

designated partners who committed the act, but the limited liability partnership shall not be liable if any such partner or designated partner acted fraudulently without its knowledge. In **Re Winthrop & Weinstine LLP**, the court applied the doctrine of lifting the veil of incorporation and held the partners personally liable for their fraudulent conducts as they had used the limited liability partnership to shield their personal assets from liability.

WINDING UP OF A LIMITED LIABILITY PARTNERSHIP

By **section 789 of the CAMA** The winding-up of a limited liability partnership may be either voluntary or by the Court and limited liability partnership, so wound up may be dissolved.

GROUNDS UPON WHICH THE COURT MAY WIND UP A LIMITED LIABILITY PARTNERSHIP

By **section 790 of the CAMA,** A limited liability partnership may be wound up by the Court if—

(a) all the partners decide that the limited liability partnership be so wound up by the Court

(b) for a period of more than six months, the number of partners of the limited liability partnership falls below two

(c) the limited liability partnership is unable to pay its debts

(d) the limited liability partnership has acted against the interests of the sovereignty and integrity of Nigeria or against her security or public order

(e) the limited liability partnership has made a default in filing with the Commission, the Statement of Account and Solvency or annual return for any 10 consecutive financial years, or

(f) the Court is of the opinion that it is just and equitable that the limited liability partnership be wound up.

SIMILARITIES AND DIFFERENCES BETWEEN A LIMITED PARTNERSHIP AND A LIMITED LIABILITY PARTNERSHIP

Firstly, By **section 746 of the CAMA**, a limited liability partnership is a body corporate, formed and incorporated under this act and it's a legal entity separate from the partners. It has perpetual succession and any change in its partners does not affect the existence, rights or liabilities of the limited liability partnership.

Also by **Section 795(1)-(4) of the CAMA**, a limited partnership is a form of partnership which may be formed subject to the manner provided by the act, which must not consist of more than 20 persons, which shall consist of one or more persons called general partners who shall be liable for all debts and obligations of the firm, and others called limited partners who upon entry shall contribute or agree to contribute to the capital or property of the firm and shall not be liable to the debts and obligations of the firm beyond the amount so contributed or agreed to be contributed.

In Terms Of Its Similarities, it therefore follows that;
1) Both are regulated by the principal legislation in Nigeria related to carrying on business, being the **Companies and allied matters Act, in part C** and **part D** respectively.

2) both are partnerships and the members therein enjoy the benefits accruable to partners, as they pay only personal income tax as opposed to Company income tax paid by companies, thereby not being subject to the double taxation rule.

3) by the combined reading of **section 797** and **section 754 of the CAMA**, both must be registered under the companies and allied matters Act

4) by the combined reading of **section 795** and **section 748 of the CAMA**, both must have at least two partners.

5) by the combined reading of **section 796(1)** and **sections 747 of the CAMA**, any person or body Corporate may be partners in both types of partnership, except for persons of unsound mind and undischarged bankrupt.

In Terms Of Its Differences;

1) while the effect of the registration of a limited liability partnership under **section 756 of the CAMA**, purports its corporate existence, having the power to sue and be sued, to own, acquire and dispose of property, tangible or intangible, real or movable. A limited partnership has no corporate existence

2) while by **section 763(5) of the CAMA**, a person who retires or ceases to be a member of a limited liability partnership is in the absence of an agreement to the contrary, entitled to an amount equal to his contribution to the limited liability partnership. A partner in a limited partnership is not entitled to the same.

3) while the commission of fraud by a limited partnership reduces it to the status of a general partnership, the Commission of fraud by a limited liability partnership does not ipso facto reduce it to a general partnership, but by **section 769(1) of the CAMA,** the liabilities of its members to the debts and liabilities of the limited liability partnership shall be unlimited while the limited liability partnership shall be liable to the same extent only where it authorized the act or had knowledge of it.

4) while the maximum for a limited partnership is 20 persons, a limited liability partnership has no limit.

5) while in a limited liability partnership, by **section 749 of the CAMA**, we have designated partners who shall be responsible for anything, act or matter required to be done by the limited liability partnership in compliance with the Act, in a limited partnership, by **section**

795 of the CAMA, we have general partners who are responsible for the day to day activities of the partnership and shall be responsible for the debts and obligations of the limited partnership.

6) while a limited liability partnership may by **section 789 of the CAMA**, be wound up either by a voluntary agreement of the members or by the court. A limited partnership may be wound up by the court on the orders of the general partner.

7) while the liability in a limited liability partnership is limited the liability in a limited partnership is unlimited except in relation to the limited partners who by **section 795 of the CAMA**, shall be liable only to the extent which they have contributed or agreed to contribute to the capital and properties of the limited partnership in the event of liquidation.

GENERAL DUTIES AND RIGHTS OF PARTNERS

Partners owe themselves a duty to observe utmost good faith, this is so because the partnership contract is a contract Uberrimae Fidei. in **Law v Law,** the court held that in a transaction between partners whereby one partner offers to buy the shares of another in the partnership business, there is a duty imposed on the party, who between the two, knows more about partnership account than the other, to disclose all facts material to the transaction which may affect the decision of the ignorant party to decide whether or not to go ahead with the transaction. Partners are also bound to render true accounts and full information of all things affecting the partnership, to any partner or his legal representative. Closely linked with this duty is the duty of accountability of partners for private profits. In **Bentley v Craven**, one of the partners was given the task of selling sugar, instead of selling from the partnership stock he sold from his own stock and hid it from the accounts. In action the court held him liable.

A partner has a duty on him not to defraud other partners. In **Power v Power**, the trial court held liable a partner who converted the proportionate share profit of the other

partner after a business transaction. The fiduciary duty of a partner has even been held to subsist not just during the continuance of the partnership but even upon its dissolution, eg in **Thompson trustees in bankruptcy v Heaton,** wherein one of the partners went behind after dissolution of the partnership and bought the reversion of the leasehold property. The court held that he held same in constructive Trust as his fiduciary duties extended even beyond dissolution. Conversely, a partner has diverse rights, this includes, the right of access to the business book, right to take part in the conduct of the business, right to be consulted, right of remuneration in certain circumstances, right to share in profits and the right to be indemnified provided the loss was caused to him in the course of carrying on the business. Eg in **Roberts v Atterton,** a partner after trespassing to a disputed boundary was asked to pay compensation, which he paid and later sought to be indemnified by his firm, but the court held against him as the trespass was not done in the course of carrying on the partnership business.

THE ORGANS AND LIABILITY OF A COMPANY

Although the law is that a company by the effect of registration under **section 42 of the CAMA**, is an artificial person in law and thus has perpetual succession and corporate existence distinct from that of its members, however, the company cannot act on its own without the instrumentality of natural persons. It is natural persons who will on behalf of the company buy land, hold land and dispose of same in the name of the company, sue and be sued in the name of the company etc, The company even if it's recognised in law as a person, is only but an abstraction in reality. This brings us to the question of the organs of a company, via which the company acts. A company has primary organs and they consists mainly of;

a) the members in the general meeting,

b) the board of directors. And

c) other officers and agents of the company who act with the authority of the board or members of the general meeting.

By **section 87(1) of the CAMA**, A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors. As regards the division of powers, It must be noted that the division of the powers in the general meeting and board of directors must be determined in the articles of association. By **section 87(2) of the CAMA,** Subject to the provisions of this Act, the respective powers of themembers in general meeting and the board of directors shall be determined by the company's articles of association.

The members in the general meeting usually take decisions via ordinary or special resolutions. But majorly the board of directors are the eyes and brain of the company. They are the main persons that manage the business of the company. Aside from the articles of

association, **section 87(3) of the CAMA** also purports that the management powers of the company are vested in the board of directors. In essence, it is the primary responsibility of the the board of directors to manage the business of the company, it is them that have the power to sue and be sued in the name of the company, they buy, hold and dispose of land in the name of the company, And may do other necessary acts not expressly mentioned in the articles or Act in furtherance of the objectives of the company. In **AVOP PLC v AG Enugu State**, where the state government being a minority shareholder in the company became infuriated by its operation, constituted a panel to investigate the runnings of the company and subsequently appointed a person to take over the management of the company, the court held that such an act by the state government was ultra vires its powers as a minority shareholder and inconsistent with the provisions of the articles of association of the company and particularly **section 87(3) of the CAMA** which vest the management powers of the company in the board of directors.

The law is that the board of directors enjoy a significant degree of independence from the members of the general meeting and so long as they carry out their responsibilities in good faith, the general meeting cannot interfere. By **section 87(4) of the CAMA**, unless the articles otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, is not bound to obey the directions or instructions of the members in general meeting provided that the directors acted in good faith and with due diligence.

ON WHERE THE MEMBERS OF THE GENERAL MEETING MAY INTERFERE WITH THE FUNCTIONS OF THE BOARD OF DIRECTORS

Ordinarily we know that by **section 87(3) of the CAMA**, the management powers of the company are vested on the board of directors. And by **section 87(4) of the CAMA**, provided they act in good faith, the members of the general meeting cannot interfere. However there are exceptions; by **section 87(5) of the CAMA**, Notwithstanding the provisions of subsection (3), the members in
general meeting may—

(a) act in any matter if the members of the board of directors are disqualified or unable to act because of a deadlock on the board or otherwise ;
(b) institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so ;
(c) ratify or confirm any action taken by the board of directors ; or
(d) make recommendations to the board of directors regarding action to be taken by the board.

According to **Dr Onyeka**, the effect of **section 87(5)(b) of the CAMA** is analogous to the proper claimant principle, which purports that it is the company itself that can sue when it is wronged and not any other member of the company. And if this principle is sustained, the company will usually act through its directors whose management powers of the company are vested. but what if it is the directors who have committed a wrong or breach against the company, obviously they will not like to institute an action against themselves, therefore in that case, the members of the general meeting may by **section 87(5)(b) of the CAMA**, institute the action on behalf of the company.

LIABILITY OF THE COMPANY IN THE ACT OF ITS PRIMARY ORGANS

By **section 89 of the CAMA**, the company itself is civilly and criminally liable to the same extent as if it was a natural person for the acts of the members in the general meeting, the board of directors or a managing director while carrying on in the usual way the acts of the company.

The effect of the above provision According to **Dr Onyeka**, is that when the members of the general meeting, or the board of directors do anything wrong, the aggrieved person must sue the company itself not the directors or members of the general meeting personally. This is so because they act as the primary organs of the company and whatever they do is deemed to have been done by the company itself. But as regards other officers or servants of the company, they are personally liable unless their acts were authorized.

However, by the **proviso to section 89 of the CAMA**;

a) The company shall not be civilly liable to any person where such person had actual knowledge that the board of directors, members of the general meeting or managing director had no power to act, or had acted in an irregular manner, or having regard to his Position and relationship with the company, he ought to have known of the absence of such power or their irregularity.

(b) if in fact a business is being carried on by the company, the company
shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's memorandum.

Specifically speaking on the civil liability of a company, **section 90(3) of the CAMA**, preserves the common law principle of vicarious liability provided the servants were acting within the scope of employment. For instance in **Idiagbonya v Dumez Ng ltd**, the defendant company was held vicariously liable when the employee driver drove negligently and injured the claimant. But on the criminal liability of a company, the law is that the company shall be liable for the acts of its human agents, where they put forward any fraudulent document to an innocent member of the public with intent to deceive, provided the company had knowledge through its human agents or such knowledge could be imputed to the body Corporate. Following from the decision of the court in **DPP v Kent**, the law is that knowledge and intention must be imputed on the company. And the ingredients must be complete before the company can be criminally liable.

ARTICLES OF ASSOCIATION

The articles of association is one of the two fundamental constitutional documents of a company. It is a rule book regulating the internal management of a company, it defines the rights, duties and powers of the officers of the company and its members, it contains such matters as the appointment of directors, their powers and removal, the secretary, the voting rights of different classes of shareholders, transfer of shares, payment of dividends and the appointment of auditor amongst others. By **section 32 of the CAMA,** a company must have articles of association prescribing its regulations, and unless it is a company to which a model article applies under section 34 it shall have its articles registered. And articles of association registered by a company must be;

a) contained in a single document, and

b) divided in paragraphs, numbered consecutively.

ON THE INTERPRETATION OF ARTICLES

According to the court in **Holmes v Keys,** the articles of association of the company should be regarded as a business document and should be construed so as to give effect to business efficacy. whereas in **BSS co ltd v Ocborough**, it was noted that the court will not imply any terms into the articles other than those which are needed to give effect to the language of the articles for questions of business efficacy or otherwise. Lastly in **Towcester Racecourse ltd v Racecourse Association ltd,** it was held that the court will give the words used in the articles of association their ordinary meaning, derived from the context in which they appear.

ON THE RELATIONS BETWEEN THE ARTICLES AND MEMORANDUM OF ASSOCIATION

The law is trite as stated by the court in **The Liquidator of Humbold redwood co ltd v Coasts,** that the memorandum of association is the dominant instrument of the company and the articles are subordinate and controlled by it. Although in **Ashbury v Watson,** the court held that the articles cannot modify or alter the contents of the memorandum except as provided by the Act. It is relevant to note that the articles can still in appropriate circumstances shed light to the memorandum. For instance in **Re South Durham Brewery Co,** The memorandum of a company was not clear as to the classes of shares to be issued by a company but the articles made clear the doubt by giving the power to the company to issue shares of different classes.

ON THE LEGAL EFFECT OF ARTICLES OF ASSOCIATION

The articles of association creates a contractual relationship amongst the company, its members and officers, and between the members and officers themselves. By **section 46(1) of the CAMA**, the articles and memorandum of association shall have the effect of a deed between the company, its members and officers and between the members and officers themselves whereby they agree to observe and perform its provisions, as altered in so far as it relates to the company, members and officers. A clear and strong case in relation to the contractual effect of an article is traceable to the decision of the court in **Oakbank oil co v Crum,** where Lord Selborne stated to the effect, that parties must be taken to have been acquainted and understood the terms of the contract in the articles of association and to be bound by the consequences thereof. Thus in **Citec International Estate Ltd v Francis and ors**, the company had in a manner inconsistent with its articles held board meetings wherein they wrongly removed the 1st -4th respondents, suspended them and withheld their salaries without notice to them as required by the articles. The court held against the company. But in **UOO Ng ltd v Okafor, clause 8(d)** in the articles of association provided that one edozie Okafor be appointed the director for life. After some irregularities on his part he was removed by the general meeting. In action for reinstatement, the court held that the CAMA under **sections 281 & 288** only recognises the position of director for life who can still be removed by members at the annual general

meeting. As such his removal was valid notwitstanding the provisions of the articles of association.

Following from **section 46 of the CAMA**, the following are deducible;
1) the memorandum and articles constitute a contract between a company and its members, Accordingly each member in his capacity as a member is bound by the provision of the articles. In **Hickman v Kent or Romney marsh sheep breeders association,** clause 49 in the articles of association provided that disputes must first go to the Arbitration panel before litigation, when his sheep was refused registration, Hickman sued but the court held against him as he was bound by the articles to use arbitration first.

2) the company is also bound by the articles, thus members may sue to enforce their rights. In **Johnson v Lyttle Iron agency,** the articles provided for procedures for the forfeiture of shares, but the company irregularly forfeited the shares of the shareholder "Mr Johnson", in action the court held against the company as it failed to comply with the terms stated in the articles for forfeiture of shares. Also in **Woods v Odessa waterworks Co**, the articles provided for payment of dividend by cash, but the majority purported to enable the company by way of resolution to pay dividend by way of debentures issued to shareholders to the amount of dividend they were entitled to, the court held against the company. Lastly, in **Pender v Lushington**, the shareholder's right to vote was contained in the articles of association, but the chairman of the company refused his vote, in action it was held that the shareholder was entitled to have his vote recorded.

3) it also constitutes a contract between the Members interse to observe; thus one member can sue another if that other fails to observe a provision in the memorandum or articles, there is no need to call upon the company to sue. In **Rayfield v Hands,** the articles of a private limited company provided that any member intending to transfer his shares to another must inform the directors who shall take the shares at a fair value, the plaintiff informed the director as required by the articles but the latter refused to take up the shares, in action it was held that the directors were bound to take up the shares at a fair value as provided in the articles.

4) officers of the company having been included under **section 46 of the CAMA**, therefore implies that they can now sue the company to enforce the rights conferred on them in their capacity as officers by the articles. It is relevant to note that this was not the position of the law, as it was clearly a settled law that rights conferred on a member other than in a capacity of a member was of no contractual effect. The case often cited in support of this old rule is the case of **Eley v Positive Life Assurance co,** wherein the articles stated that he shall be the solicitor of the company, when they ceased to employ him he sued for breach of contract, but the court held that his action must fail, as the right was conferred on him in a capacity other than that of a member. But it must be noted that if the facts in **Eley's case** repeated itself today, the officer would be entitled to his rights, as **Section 46 Of The CAMA** clearly captures the contractual effect which the articles of a company creates in relation to the company and its officers.

However the contractual relationship created under **section 46 of the CAMA** cannot and should not be taken to extend to third parties, as by the rules of privity, third parties are excluded from such contractual effect. Thus a third party cannot sue to enforce any right granted to him by the articles of a company. An example of such third parties that readily comes to mind are promoters who in law are treated as out and out outsiders from the company, although this is without prejudice to the fact that a promoter can still be a member of the company when he buys or is offered shares upon incorporation. Therefore a provision in the articles stating that a company would pay preliminary expenses incurred by the promoters is regarded only as an undertaking to the member. It does not give a right to the promoter to recover from the company. In **Re National Male coach ltd,** it was that the mere fact that a promoter pays the registration fee and ad valorem stamp duty on the registration of a company does not ipso facto entitle him with the right to recover it from the company.

ALTERATION OF ARTICLES

By **section 53(1) of the CAMA,** subject to the provisions of the Act, and other conditions and provisions contained in the memorandum, a company may by special resolution, alter or add to its articles including the modifications or deletions of the provisions stated in section 27(1)(a) to (d) of the Act. And by **section 258 of the CAMA**, a resolution is an ordinary resolution when it has been passed by a simple majority of votes cast by members of the company as, being entitled to do so, vote in person or by proxy at a general meeting. Whereas a resolution is a special resolution, where it has been passed by at least three fourth of votes cast by members of a company, as, vote in person or by proxy at a general meeting of which 21 days' notice has been issued to that effect.

RESTRICTIONS ON ALTERATION

The alteration of articles of company being wide is subject to diverse limitations;
1) firstly by **section 54 of the CAMA,** Articles or memorandum of a company cannot be altered, so as to impose a higher liability on the members to;
a) take or subscribe for more shares than he held on the date he became a member
b) increase his liability to contribute to the share capital of the company or
c) pay money by any other means to the company.

2) the articles of a company cannot be altered to include an illegal purpose

3) a deliberate reading of **section 53 of the CAMA**, purports that the alteration of the articles is subject to the conditions in the memorandum and the Act, and in the event of respective conflicts, the Act or memorandum as the case maybe shall prevail over the articles. In **Re Peveril Gold Mines ltd,** a provision in the articles of association purported to limit the statutory right of members of a company to petition for the winding up of a company, as provided under the companies act of 1862, the court held same to be void and of no effect.

4) the articles of a company cannot be altered except it is bonafide in the interest of the company as a whole. Once this condition is satisfied, it doesn't matter that the alteration had a retrospective effect. And it is for the members of the company to determine whether the alteration was in the interest of the company as a whole, if yes, the court cannot interfere. In **Breene v Ardene,** the articles of association provided that members could not transfer shares to non members so long as a member was willing to buy same at a fair value, the majority shareholders wishing to transfer their shares to non members secured the alteration of the articles to allow such transfer, it was held that the alteration was bonafide and it was immaterial the minority shareholders lost their right of pre-emption(the right to purchase a thing before it is offered to others). Also in **Shuttleworth v Cox brothers**, where co directors requested the plaintiff director who have had some irregularities in his account to resign, after inserting a seventh clause in the articles which required a director to resign where co directors so requested , the court held that same was for the interest of the company as a whole and was not tainted with bad faith.

5) the court will not give effect to any alteration that is discriminatory or amounts to the expropriation of an individual shareholder's right. In **Brown v British Abrasive will co ltd,** the company was in need of capital and the majority shareholders agreed to provide it if they could buy up the remaining shares of minority shareholders, the articles was then altered to that effect. In action the court held against the alteration. But in contrast, the court held otherwise in **Sidebottom v Kershaw leese**, where the directors of a company altered the articles to give powers to the directors to expropriate the shares of any shareholder who competed with the company's business, the plaintiff competitor sued that the alteration was invalid but the court held against him.

EXCEPTIONS TO THE LIMITATION OF ALTERATION OF ARTICLES

However, while diverse limitations exist against a company in altering its articles, it must be noted that a company is not precluded from altering its articles for the purpose of introducing that which ought to have been in the original articles, provided the alteration

shall be bonafide for the interest of the company as a whole. In **Andrews v Gas Meter co,** it was held to be valid where the company on the basis of this rule altered its article so as to authorize the issuing of presence shares ranking in priority over existing shares. Further, a company cannot be prevented by injunction to exercise the right of altering its articles, because it is a right derived from statute. This right of altering the articles shall be exercised even when same amounts to a breach of contract. At worst, the victim could sue for breach of contract and claim damages. In **Shirlaw v southern foundries ltd** the plaintiff shirlaw was employed and appointed as the managing director in the defendant company, the articles of association however provided that he also be part of the board of directors, and was to remain so for a period of 10 years. Later on, another company acquired majority shares in the company, altered the articles and removed Shirlaw as a director before the expiration of 10 years, in action the court held that since his appointment as the managing director was to subsist for ten years, his consequent removal was wrongful and he was therefore entitled to damages.

THE DOCTRINE OF CONSTRUCTIVE NOTICE AND INDOOR MANAGEMENT

Firstly, the **Black's law dictionary** defines a notice to mean information, that is the knowledge of the existence of a state of fact. Notice may be actual or constructive, the former are those which expressly or directly come to the knowledge of a person. Whereas the court in **Lloyds v Bank**, defined constructive notice to mean that notice which a person ought to have known if he acted reasonably and diligently. It is also a notice implied by the operation of law. According to **Matthew Anushiem (ph.D),** Some matters require the giving of actual notice while others require the giving of constructive notice. For instance, in mortgage transactions, there is a requirement that before the mortgagee sells the mortgaged property, apart from actual notice there should be notice of that sale published in a national daily. Because the publication in the national daily gives constructive notice to the world. In the context of company law, the memorandum and articles of association being the incorporation documents of a company, once registered and deposited with the commission, are public documents open and accessible to everyone,

THE COMMON LAW POSITION

At common law, there is a presumption of a constructive notice on everyone dealing with the company that he has knowledge of the contents thereof. According to the court in **Griffith v Paget**, the person is regarded not only as having read those documents but also as having understood them according to their proper meaning. This acts as a protection in favour of the company so that an outsider who contracts with the company will not plead ignorance so as to evade the consequences where it attaches. In **Mahony v East Holyford Mining co,** the articles provided that before a bill of exchange could be effective, it must be signed by two directors, it was held that the plaintiff must see that it is so signed otherwise he cannot claim under it. In the leading case of **Kotla V. v**

Rammurthy, the articles provided that all instruments for it to be valid must be signed by the managing director, secretary and a working director. The mortgage bond in question was signed by only two of the three persons, the court held the plaintiff could not claim under it. Further, in **Re Jon Beauforte London ltd**, the company's object clause provided for the manufacturing of dresses but it was producing veneered panels, when it became insolvent, the creditor sued, but the court held against him as he ought to have known the company has for long been acting ultravires.

STATUTORY INTERVENTION

Owing to the harshness of common law, statute intervened and abolished the doctrine of Constructive notice. For instance, By **section 92 of the CAMA**, except as mentioned in **section 223** regarding particulars of charges in the register, a person is not deemed to have knowledge of the contents of the memorandum or articles of association of a company, or any other particulars or documents or the contents thereof merely because such documents are registered by the commission, or are available for inspection at the office of the company. The effect thereof is that while the doctrine of Constructive notice no longer applies with respect to the memorandum and articles of association and other documents or particulars of the company deposited with the commission, however the doctrine continues to apply as regards particulars of charges in the register.

And by the effect of **section 223 of the CAMA,** the commission shall keep a register of charges in respect of each company, showing certain information material to such charge, such as;

i) the amount secured by the charge,

ii) the persons entitled to the charge and

iii) a notice in the case of a floating charge, of the existence of it and prohibiting the granting of further charges ranking in priority to or in pari passu with the floating charge.

According to **Matthew Anushiem (ph.D)**, the essence of the combined reading of **section 92 and section 223 of the CAMA**, is to show the fact that the Act is trying not to

derogate but to comply with the property law codes and principles as regards constructive notice. Another mitigation of the harshness of common law is seen in the doctrine of indoor management, infact this operates to protect outsiders from the company. Following from the decision of the court in **Royal British bank v Turqund,** it was established that while persons dealing with the company are presumed to have read and understood the public documents of the company being the memo and articles, they are not required to do more, they need not inquire into the indoor management of the company and may assume that all has been done regularly. This is in line with the maxim, *Omnia Praesumuntur rite Esse Acta.* According to the court in **Official Liquidator Manasube & co v C.O.P**, while the lenders to a company ought to acquaint themselves with the articles and Memorandum of that company, they need not embark upon an investigation of the propriety, legality or regularity of the directors act. Thus In **Royal British Bank v Turquand**(supra), an action was brought for the return of money borrowed by the company. The company argued that it was not required to pay back the money because the manager who negotiated the loan should have been authorized by a resolution of the general meeting to borrow but he had no such authorization. And following from the doctrine of constructive notice the bank was deemed to know this. The Court held that the public documents only revealed that a resolution was required, not whether the resolution had been passed. The bank had no knowledge the resolution had not been passed and thus it did not appear on the face of the public documents that the borrowing was invalid.

In fact, **section 93 of the CAMA**, specifically provides for the presumption of regularity, thus a person dealing with a company may make the following presumptions;

a) that the company's memorandum and articles have been duly complied with.

b) every person described in the particulars filed with the commission such as the directors, managing director, secretary etc have been duly appointed or have power to so act...

c) that the secretary or any officer having the power to issue documents or certified copies of documents on behalf of the company, has authority to warrant its genuineness.

d) that a document has been duly sealed by the company if it bears what purports to be the seal of the company signed by two persons who can be assumed to be the director and

secretary of the company. However, the presumptions will not apply where the person dealing with the company had actual knowledge of the contrary or having regard to his position or relationship with the company, ought to have known the contrary…

MEMORANDUM OF ASSOCIATION

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world. The court in **Ladejobi v Odutola holding,** held to the effect that the memorandum of association is the repository of the company's object and constitution. According to the court in **Welton v Saffery**, The memorandum is the more fundamental of the two documents, it is the one to which the original parties forming the company will subscribe their names to, and in the event of conflict between it and the articles of association, it must prevail. No wonder the court in **Ashbury v Watson**, noted that the articles of association cannot by any stretch of imagination alter or modify the contents of the memorandum of association except as provided by the Act.

According to **Chris Nwigwe**, The memorandum of association ideally defines and regulates the company's status and powers, it enables shareholders and outsiders who deal with the company to know what business it is permitted to undertake and the limit of such business, what capital the company has and what its relation is with outsiders generally'.' Its importance cannot be underestimated because it regulates the external affairs of the company. Thus persons who intend to deal with the company must look to it in order to discover the name of the company, its registered office, its capital base, objects, status (whether public or private), restrictions on the powers of the company (if any) and the limitation of liability or otherwise of its members.

REQUIREMENTS/ CONTENTS OF MEMORANDUM OF ASSOCIATION

By **section 27(1) of the CAMA**, the memorandum of association of a company shall state the following;

a) the name of the company

b) that the registered office of the company shall be situate in Nigeria

c) the nature of the business which the company is authorized to carry on, or if the company is not formed for the purpose of carrying on business, the nature of the object(s) for which it is established

d) the restriction, if any on the powers of the company

e) that the company is a private or public company

f) that the liability of the members is limited either by shares, guarantee or is unlimited as the case may be.

By **section 27(3) of the CAMA,** where a subscriber holds in whole or part any shares subscribed by him in trust for another, he shall disclose that fact and the name of the beneficiary in the memorandum of association.

ANALYZING THE CONTENTS OF A MEMORANDUM

a)Name Clause;

By **section 27(1)(a) of the CAMA,** the memorandum of association of a company shall state the name of the company. A company being an artificial person must be identified by its own name, this aids in distinguishing the company from others. By **section 29 of the CAMA**, The name of a private company limited by shares shall end with the word, "Limited".

The name of a public company limited by shares shall end with the words, "Public Limited Company".

The name of a company limited by guarantee shall end with the words, "Limited by Guarantee".

The name of an unlimited company shall end with the word, "Unlimited".

A company may use the abbreviations, "Ltd", "PLC" "Ltd/Gte" and "Ultd" for the words, "Limited", "Public Limited Company", "Limited by Guarantee" and "Unlimited" respectively in the name of the company.

REGULATION OF CHOICE OF NAMES

Not all names are permitted under the Act, the use of names by companies and other business organizations is regulated under the companies and allied matters Act. A person desirous of forming a company must make sure the name of his company does not fall within the prohibited or restricted names under the Act.

PROHIBITED NAMES

By **section 852(1) of the CAMA**, No company, limited liability partnership, limited partnership, business name or incorporated trustee shall be registered under this Act by a name or trademark which—

(a) is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires ;

(b) contains the words “Chamber of Commerce” unless it is a company limited by guarantee

(c) in the opinion of the Commission, is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy ;

(d) in the opinion of the Commission, would violate or conflict with any existing trademark or business name registered in Nigeria or body corporate formed under this Act unless the consent of the owner of the trade mark, business name or trustees of the body corporate has been obtained ;

(e) contains any word which, in the opinion of the Commission, is likely

to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled ;

(f) is, in the opinion of the Commission, deceptive or objectionable in that it contains a reference or suggests association with any practice,institution, personage, foreign state or government, international organization or international brand or is otherwise unsuitable ; or

(g) is capable of undermining public peace and national security.

In **Mustapha v Corporate affairs commission**, the court upheld the refusal of the commission to register the name Aguda investment Ng ltd, since it was likely to conflict with the already registered name Aguda ventures Ng ltd. in **Corporate Affairs Commission v Ayedun,** the court upheld the Commission's refusal to register the name Credit registry ltd since it tended to mislead the public into believing the company was a public institution. Also In **Ewing v Buttercup margarine co,** the plaintiff obtained an injunction restraining the defendant from carrying on with the name buttercup margarine co, since it tended to conflict with that of his company buttercup dairy co. Lastly, in **Atlas cycles ltd v Atlas products ltd,** an order of injunction was issued against the defendant company restraining them from using the trade name Atlas, since it was already in use by the plaintiff. However, according to the court in **DW. Boulay v DW. Boulay**, the mere similarity of a name will not in itself be a sufficient ground for an injunction, in the case of a company, registration will be refused only where there is likelihood of deception or confusion.

RESTRICTED NAMES

By **section 852(2) of the CAMA**, Except with the consent of the Commission, no company, limited liability partnership, limited partnership, business name or incorporated trustees shall be registered by a name which—

(a) includes the word “Federal”, “National”, “Regional”, “State” ;

(b) “Government”, or any other word which, in the opinion of the Commission suggests or is calculated to suggest that it enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government, or contains the word “Municipal” or “Chartered” or in the opinion of the Commission, suggests or is calculated to suggest, connection with any municipality or other local authority ;

(c) contains the word “Cooperative” or its equivalent in any other language or any abbreviation; or of the words “Building Society” ; or

(d) contains the word “Group” or “Holding”.
In **Amasike v Registrar general C.A.C**, the upheld the Commission's refusal to register a company with the name institute/bureau of Corporate governance, as the name tended to suggest some sort of government patronage.

DUTY TO SEEK A NO OBJECTION TO REGISTRATION OF NAME

It must be noted that the commission may by regulation require that an applicant for approval of a restricted name, should under **section 853 of the CAMA,** seek the view of a specified Government department or other body, and the applicant must request whether the specified department or body has any objection to the proposed name. Where the application is made by a company, a limited liability partnership, business name or incorporated trustees, the application must include a statement that such request has been made and be accompanied by a copy of any response received.

AVAILABILITY AND RESERVATION OF NAME

This is usually necessary where the company is in the stage of its formation, the commission may reserve a name for sixty days. By **section 31 of the CAMA,** the commission after receiving an application delivered to it in hardcopy or through electronic

means, and on payment of prescribed fee, shall reserve a name pending registration of a company or change a name by a company upon confirmation of the availability of such name. And the reservation is usually valid for a period not exceeding sixty days as the commission deems fit, and during such period of reservation, no other company can be registered under the reserved name or under any which in the opinion of the commission resembles the reserved name.

But the commission has power at any time before a certificate of incorporation is issued to withdraw or cancel a reserved name if it discovers that such name is identical with that by which a company in existence is already registered, or so nearly resembles it as to be likely to deceive. The commission may also withdraw or cancel approval for reservation of name where it is discovered that the approval was fraudulently, unlawfully or improperly procured.

b) Registered Office Clause;

By **section 27(1)(b) of the CAMA**, the memorandum must state that the registered office of the company shall be situated in Nigeria. By **section 36(2)(b) of the CAMA,** Every company must have a registered office, notice of which must have been delivered to the commission prior to the incorporation of the company. where a company desires to change its address, by **section 728(2) of the CAMA,** notice of any change in the address of the registered or head office of the company must be given within 14 days of the change to the commission, but postal box address or a private mailbag address shall not be accepted by the commission as the registered or head office.

ON THE PURPOSE AND IMPORTANCE OF THE REGISTERED OFFICE CLAUSE

It must be noted that the registered office is the company's official address, it provides the place where legal documents, notices and other written communications can be served. Thus any breach of service or improper service means there was no service at all, and where there was no service at all, then the court cannot assume Jurisdiction over such a matter against the company. In **International bank for west Africa v Fola**, the court

restated the position of the law that a court process shall be served on a company in the manner provided by the rules of court and any other document may be served on a company by leaving it at or sending it by post to the registered office or head office of the company.

BOOKS TO BE KEPT AT THE REGISTERED OFFICE

The CAMA requires certain statutory books to be kept at the registered office. These include the following-

- The register of members."
- The Index of members.
- Register of director's shareholding."
- Register of directors and secretaries"
- Register of charges
- Instrument creating a charge."
- Minutes books.
- Accounting records."
- Register debenture holders.
- Register of substantial interest in shares"

c) Business Or Object Clause

By **section 27(1)(c) of the CAMA**, The memorandum must state the nature of the business which the company is authorized to carry on, or if the company is not formed for the purpose of carrying on business, the nature of the object(s) for which it is established. This clause is very important so as to determine the capacity of the company, by setting up the company's purposes and the nature of business it will pursue.

THE OBJECT CLAUSE AND THE DOCTRINE OF ULTRA VIRES

At common law, a company is required To carry on businesses and pursue objects as provided in its memorandum, This rule was aimed at protecting investors in the company

as well as the company's creditors. Where a company enters a transaction outside the ambit of its memorandum, then under the common law that transaction will be Ultra Vires and of no effect. This is consistent with **section 44(1) of the CAMA,** which provides that a company shall not carry on any business expressly prohibited by its memorandum, and shall not exceed the powers conferred upon it by the memorandum and the Act.

In **Ashbury Railway co v Ritchie,** the company was formed for the purpose of making and selling railway wagons and plants, when it was contracted to build a railway, it subcontracted Ritchie, whose employment was later terminated and he sued. But the court held that Ritchie had no claim since the company in the first place acted outside of its memorandum, as it went to start building railways, rather than limiting itself to the sale of railway wagons only. Due to the restraint placed on companies, by the object clause which was intended to protect investors, companies devised insidious means by way of generally worded drafting which enabled them to evade the effect of the ultra vires doctrine; instead of setting out the objects clearly and precisely, the practise grew to stating also every conceivable business which the company might remotely wish to undertake in the future. The effect of this According to the court in **Attorney General v Great Eastern Railway Company,** was that the object clause became very long, verbose and contained many kinds of objects and powers with the consequent disadvantages.

Take for instance in **Bell House Ltd v City Wall Properties,** the object clause of the company provided for the power to carry on any business which in the opinion of the directors would be beneficial to the general business of the company. The court upheld it. Also in **Cotman v Brougham,** while the object clause enabled the company to carry on any kind of conceivable business, it also stated that every clause therein was to be construed as substantive and not limited by the other, the effect being that all were independent and could not be restricted by another. The court also gave effect to it. However, the court later developed two devices to check the excesses of generally worded object clauses intended to evade the effect of the ultra vires doctrine. They are;

i) <u>The Main Object Rule Of Construction</u>;

By this rule the ejusdem generis canon of interpretation was applied, Thus where the main business or object of a company is stated first, every other series of wife powers were interpreted as being exercisable only for the attainment of the main object. For instance in **Re introduction ltd,** the main object of the company was providing services for overseas visitors, other clauses provided for the carrying on of any other business which in the opinion of the directors would be beneficial to the main business of the company, but pig breeding was not expressly mentioned. At some point later, the company ventured exclusively into pig breeding and sought to borrow money for it, the court held it was ultra vires. Also in **Continental chemist ltd v Ifeakandu,** the main object of the company was to import, export and sell drugs, but other clauses provided it could carry on any business which in the opinion of its directors would increase their profit. They later contracted to train the defendant as a doctor to have him work in the company, when he left the services of the company he was sued for breach of contract, but the court held against the company as it was running a hospital business which it had no powers to do so.

ii) Substratum Rule;

Under this rule, if the main object of the company fails, the whole substratum is said to have disappeared and the company may be wound up. For instance in **Re German date coffee co,** the main object of the company was to work a German patent for manufacturing of coffee from dates, the German patent was not granted and the company instead purchased a Swedish patent and resumed business, on petition for winding up by some shareholders, the court held that the substratum of the company had failed and it was not possible to attain its object. However an exception to this rule is the fact that even if the whole substratum has disappeared, the activities of the company would not be ultra vires provided it is covered by some clauses in the memorandum. Eg in **Re Kitson & co ltd**, the objects of the company provided for the acquisition of a business and the carrying on of the business of general engineering, the subsequent disposal of the business acquired was held not to amount to failure of the substratum as to be grounds for winding up of the company, so long as the business of general engineering was covered by some clauses in the memorandum.

THE RULE IN FOSS V HARBOTTLE AND ITS LEGAL CONSEQUENCES

Although on the effect of registration under **section 42 of CAMA**, a company itself independent of its members is usually regarded by law as an artificial person, capable of owning property, having perpetual succession, capable of suing and being sued in its own name, etc. however the company by virtue of **section 87(1) of the CAMA**, still acts through natural persons, and the highest in the echelon of such persons are the board of directors, who function as the hand and legs of the company through which the company orchestrates its activities.

It is thus possible that the activities of the board of directors or persons having controlling shares in a company may sometimes be ultra vires and negatively affect the interest of the minority shareholders, in such instances it might be critical to ask what is the position of the law. The writer is not really interested, strictly speaking with the rule in **Foss v harbottle** itself, because the rule purports that it is the company itself being an artificial person in law via its organs (directors and members at the general meeting) and not any of its shareholders that can sue against any wrong done to it.

In the instant case, Mr Foss and Torton being shareholders brought an action against the directors of a company for mismanagement and negligence in running the affairs of the company, claiming fraud perpetrated by the latter against the company, it was held that they had no locus to sue as it was the company itself who had such claim.

However the writer is interested in the exception created by this rule, which is the fact that minority shareholders may still maintain an action against the majority shareholders or directors of a company where they do an ultra vires act, and same perpetrates fraud on the minority.

The court per Agu JSC in **Yalaju-Amaye v A.R.E.C Ng ltd**, noted that notwitstanding the rule in Foss v harbottle, shareholders will be allowed to maintain an action where the rule is purported to be used as an engine of fraud. Thus in **Citec International Estate Ltd v**

Francis & ors, the court held that the respondent shareholders could bring an action to declare ultra vires the said act of the board of directors, wherein they were suspended, removed and had their salaries stopped without notice as required by the articles. in **Brown v Bristish Abrasive will co**, wherein the articles was altered so as to allow the majority shareholders forcibly buy up the shares of the minority, in exchange to fund the capital of the company. The minority sued and the court held the Act to be ultra vires Also in **Cooks v Deek,** three directors of a company obtained a contract in their own names to the exclusion of the company, with their 75% shares holding, they secured a resolution as against the votes of the minorities, that the company had no interest in the contract. It was held that the minority shareholders in such a case could bring an action that the act was Ultra vires.

This is consistent with **section 44(2) of the CAMA,** which purports that breach of subsection 1 relating to the business or object clause of a company, may be asserted in any proceedings brought under section 344 to 358 of the CAMA or under subsection 4 of this section. Although by **section 44(3) of the CAMA**, the act, transfer or conveyance done by a company shall not be invalid by reason of the fact that it was not done in furtherance of any authorized business of the company or that the company was otherwise exceeding its object or powers. It is relevant to note that by **section 44(4) of the CAMA**, the court may on the application of any member of the company or any person holding a debenture secured by a floating charge or by his trustee prohibit by injunction the doing of any act, transfer or conveyance which is in breach of subsection 1.

Implicit in these sections the writer believes is the protection of the interest of minorities, even if the majority will always find a means to have its way.

Further, it is relevant to note that **section 344 of the CAMA** purports that a member of a company may bring an action personally or in a representative capacity to enforce a right due to them, and he or they shall be entitled to damages for the breach or declaration or injunction to restrain the company or directors from doing an act, and any erring director in breach of such right shall be personally liable.

Whereas **section 354 of the CAMA** purports that an application for relief may be made by a member of the company that the affairs of the company has been or is being conducted in a manner that is unfairly prejudicial or oppressive, or unfairly discriminatory against or in disregard of the interest of some members of the company. Or that an act or omission or resolution or proposed resolution of a class of members, was, is or is being unfairly prejudicial, or oppressive, or unfairly discriminatory against or in disregard of the interest of some members of the company. Where the petition is well founded, the court may by **section 355 of the CAMA**, inter alia order that the company be wound up, or an investigation be conducted by the commission, or regulate the affairs of the conduct of the company in three future. Etc

d) Restriction Of Power Clause

By **section 27(1)(d) of the CAMA**, The memorandum of association must also contain the restrictions, if any, on the powers of the company. This provision is important because a company upon incorporation has all the powers of a natural person of full capacity." By **section 43(1) of the CAMA**, except to the extent that the company's memorandum or any enactment provides, every company shall for the furtherance of its business or objects, have all the powers of a natural person of full capacity.

According to the court in **Wilts & Bush ltd v Goodwill & Trust investment ltd**, once a Certificate of incorporation is issued to a company it becomes a body Corporate with perpetual succession. The court in **STB plc v Olusola**, also noted that the company upon incorporation becomes a legal person distinct from the members, who formed it and is capable of acquiring, holding and alienating property. Therefore, if the company wishes to restrict its powers, say to make donations to political parties for instance, it must do so expressly in its memorandum of association.

e) The Status Clause;

By **section 27(1)(e) of the CAMA**, the memorandum of association shall also state the status of the company, that is whether it is a private or public company as the case may be.

f) The Limited Liability clause;

By **section 27(1)(f) of the CAMA,** the memorandum of association shall also state that the liability of its members is limited by shares, by guarantee or unlimited as the case may be.

g) The Capital Clause;

This applies to only companies with shares. By **section 27(2) of the CAMA**, if the company has a share capital, the memorandum must state the amount of the minimum issued share capital which must not be less than 100,000 in the case of a private company or, 2,000,000 in the case of a public company, with the shares divided in equal amounts, and each subscriber must write opposite his name the amount of shares he takes.

h) Association Clause

The Memorandum ends with an association clause. For a company limited by shares or an unlimited company; the form of the association clause is as follows:- "*We the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names*".

For a company limited by guarantee, the clause ends at the word "association" since there are no shares to take. Following this is a tabular form showing the names, addresses and the number of shares to be taken or the amount of undertaking by each of the subscribers.

i) Guarantee Clause;

By **section 27(4)(a)&(b) of the CAMA**, the memorandum of a company limited by guarantee must state the income and property of the company shall be applied solely to the promotion of its object, and no portion thereof shall be paid directly or indirectly to the members of the company except as permitted by the CAMA; And each member undertakes to contribute to the assets of the company in the event of liquidation, while he is a member

or one year after he ceases to be a member... such amount as may be required which shall not be less than 100,000.

j) Attestation Clause;

By **section 27(5)&(6) of the CAMA**, the memorandum shall be stamped as a deed, and signed by each subscriber in the presence of at least one witness who must attest to it.

SUBSCRIPTION OF A MEMORANDUM

The memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signature, but a person's name may be subscribed by an agent." By **section 27(3) of the CAMA**, where a subscriber holds in whole or part any shares subscribed by him in trust for another, he shall disclose that fact and the name of the beneficiary in the memorandum of association. The subscribers may all be nominees of the same person who may be virtually the owner of the business, the others having only a nominal interest. Each subscriber must write opposite to his name the number of shares he takes. A legal person may be a subscriber provided he or it is not prohibited under **Section 20 of the CAMA**

ALTERATION OF A MEMORANDUM

Firstly, by **section 49(1) of the CAMA,** the conditions contained in the memorandum of association cannot be altered except in the manner, cases and extent provided in the act.
The alteration of the memorandum may be in respect of the name of the company or in respect of the business or object of the company.

MODE OF ALTERATION OF THE MEMORANDUM

In respect of the name of the company, By **section 50(1) of the CAMA**, The name of the company shall not be altered except with the consent of the Commission in accordance with section 30.

Section 30(1) of the CAMA, purports that where a company is inadvertently registered under a name identical with an existing company or so nearly resembling it as to be likely to deceive, it may, with the approval of the Commission, change its name within six weeks.

In the same vein, **section 30(3) of the CAMA**, purports that a company may by special resolution, change its name with the written approval of the Commission, but no approval is required where all that is intended is to substitute "Public Limited Company" for "Limited" or vice versa or on a conversion from a public to a private company or vice versa.

Again, **section 30(4) of the CAMA**, purports that the Commission may want a company to change its name if its name conflicts with an existing trademark or business name registered in Nigeria before the registration of the company and the consent of the owner of the trademark or business name was not obtained.

Lastly, where a company changes its name, the commission shall enter the new name in the register and shall issue a certificate of incorporation altered to meet the circumstances of the case. In respect of the business or object clause, By **section 50(2) of the CAMA**, the business of the company or its object may be altered and added to in accordance with section 51.

section 51(1) of the CAMA, purports that the business or object of a company may be altered by a special resolution at a meeting after notice in writing has been duly issued to all members. Provided that where an application is made to the court for the cancellation of the alteration, it shall not have effect, except in so far as it is confirmed by the court.

section 51(2) of the CAMA, purports that holders of fifteen percent in nominal value of the company's issued share capital or holders of debentures shall make application for cancellation of resolution to the Federal High Court within twenty-eight days of the passing of the resolution. However, if the company is not limited by shares, not less than fifteen percent of the company's members or holders of not less than fifteen percent of the

company's debentures can object to alterations of the company's objects." And any member who voted in favour or consented to the resolution cannot apply for cancellation.

Section 51(7) Of The CAMA purports that upon the passing of a resolution to alter the objects or business of a company, an application must thereafter be made to the court for its confirmation, and the company shall in respect of the application give notice to the commission, and shall deliver to the commission within 15 days from the date of its making;
(i) a certified true copy of the order, in the case of refusal to confirm the resolution, and
(ii) a certified true copy of the order, in the case of confirmation of the resolution together with a printed copy of the memorandum as altered...

Section 51(8) of the CAMA purports that, where the Commission is satisfied, a printed copy of the memorandum as altered by the resolution shall be delivered to it, and if is not satisfied, it shall give notice in writing to that effect to the company and an appeal from its decision shall thereafter lie to the Court at the suit of any person aggrieved and such appeal shall be made within 21 days after the company had received the notice of rejection from the Commission or within such extended time as the Court may allow.

NOTE; The sections above may be summarized as follows, the memorandum as regards the business or object clause of a company may be altered at a meeting by a special resolution, members or debenture holders as the case may be, may apply for the alteration to be canceled. Even after the resolution has been successfully passed for its alteration, same shall have no effect until confirmed by the court via an application filed for that purpose, the company shall also give notice of same to the commission whether it was confirmed or not, if confirmed by the court, the commission may still refuse and an appeal may lie to the court against the decision of the commission.

PROSPECTUS

Firstly, by **section 315 of the investment and securities Act,** a prospectus is any written or electronic information, notice, advertisement, or other forms of invitation offering to the public for subscription or purchase, any shares, debentures, or other approved and recognised securities of a company and other issues or scheme. In essence, the issuing of prospectus is the means by which companies invite the public to subscribe for shares, debentures and other recognised securities of the company. The prospectus is like a document in a written or electronic form, stating all necessary information concerning the company vis-a-vis the security to be purchased.

TYPES OF PROSPECTUS

1) Abridged prospectus;

An abridged prospectus is a summarized version of a prospectus containing the key requirements of a prospectus. It is usually used now because the full version of prospectus contains many documents and is bulky. By **Rule 289 Securities and exchange commission rules**, An abridged prospectus filed as part of a registration statement in accordance with this rule shall be deemed to be a prospectus for the purpose of the Act, if it meets the requirements of the Commission under this rule; Provided that at the time the registration statement is filed, an application has been made to a recognized securities exchange for the securities to be listed;

(2) Where it is not intended to list the securities on a recognized securities exchange, an application shall be made to the Commission for approval to use a statement in lieu of prospectus for the offering in compliance with the Fourth Schedule to the Act and the rules and regulations of the Commission

CONTENTS OF AN ABRIDGED PROSPECTUS

By **Rule 290(1) securities and exchange commission**, An abridged prospectus shall contain information, the substance of which is contained in the prospectus and or registration statement and shall also contain the following statements and information;

"A copy of this abridged prospectus with the documents specified herein has been registered by the Securities and Exchange Commission (S.E.C.). This abridged prospectus issued under the provisions of the Act, contains particulars in compliance with the requirements of the Commission and the listing requirements of the relevant exchange for the purpose of giving information to the public with regard to the shares of the company.

The directors of the company collectively and individually accept full responsibility for the accuracy of the information given and confirm having made all reasonable enquiries, that to the best of their knowledge and belief, there are no facts, the omission of which would make any statement herein misleading or untrue";

(a) the dates of opening and closing of the offer;
(b) indebtedness of the company;
(c) history and business of the company;
(d) parties to the issue;
(e) purpose of the offer;
(f) summary of financial information;
(g) claims and litigations.
(h) material contracts;
(i) procedure for application and allotment (state if there would be preferential allotment);
(j) collecting agents and receiving banker;
(k) application form;
(l) any other information required by the Commission from time to time.

By **Rule 289(2) securities and exchange commission Rules**, All information contained in an abridged prospectus may be expressed in such condensed or summarized form as may be appropriate in the light of the circumstances under which it is to be used.

2) Deemed prospectus;

This means any document, though not titled prospectus, for all intents and purposes, contains the basic requirements of a prospectus, used in an offer for sale to the public of companies' securities. Such documents are deemed to be a prospectus issued by the company and must comply with all the prescriptions for a prospectus

3)Statement in Lieu of Prospectus;

This is a statement delivered to the Commission in place of a prospectus in certain circumstances;

a) Where a public company that intends to allot shares to the public has not issued a prospectus, or

b) It has issued a prospectus but has not allotted the shares.

Where a statement in lieu of prospectus is issued, the company shall at least 3 days before the first allotment of the shares deliver to SEC for registration, the statement in lieu of prospectus signed by every person who is named in it as a director or a proposed director of the company or by his agent authorized in writing. Statement in lieu of prospectus shall be in the form and contain the particulars set out in part 1 of the 4th schedule to the Investments and Securities Act.

INVITATION TO THE PUBLIC TO BE ACCOMPANIED WITH PROSPECTUS

By **section 71 of the investment and securities Act**, it is unlawful to issue any form of application for securities in a public company which is offered to the public, unless the form is issued with a prospectus, and such prospectus must be approved and registered by the Securities and exchange commission. According to **Bahdmus**, to come within the meaning of a prospectus, the invitation must be to the public and it must be for subscription or purchase of securities. By securities we mean tradable financial assets such as shares. And subscription or purchase has been held in **Government stock and other securities investment co ltd v Christopher**, to mean taking or agreeing to take shares for cash.

By **section 69(1) of the investment and securities Act,** an invitation shall be deemed to be invitation to the public if it is an offer or invitation to make an offer which is;
(a) published, advertised or disseminated by newspaper, broadcasting, cinematograph or any other means whatsoever;
(b) made to or circulated among any persons whether selected as members or as debenture holders of the company concerned or as clients of the persons making or circulating the invitation or in any other manner;
(c) made to anyone or more persons upon the terms that the person or persons to whom it is made may renounce or assign the benefit of the offer or invitation or
any of the securities to be obtained under it in favour of any other person or persons;
(d) made to any one or more persons to acquire any securities dealt in by a
securities exchange or capital trade point or in respect of which the invitation states that an application has been or shall be made for permission to deal in those securities on a securities exchange or capital trade point.

It therefore follows that an offer made to the shareholders of two companies who are alone entitled to accept it and cannot renounce it in favour of another, is not an invitation to the public. Although where they could renounce in favour of another it would be treated as an invitation to the public. Further, in **Sherwell v C.I.M.S**, it was held that an offer by a promoter of a company to his friends and relations cannot be treated as an invitation to the public. But in **Re South of England natural Gas co,** the distribution of thousands of copies of a prospectus for the members of certain gas companies was held to be an offer to the public.

CONTENTS OF A PROSPECTUS

By **Rule 288 securities and exchange commission rules,** Every prospectus shall contain the information required by the Third schedule to the Act, and shall in addition state the following information as applicable to the relevant securities.

a) the front cover shall state the name of the issuer, the issuing house(s), their respective Corporate Affairs Commission registration certificate (R.C.) numbers, the type of offer, amount/number of shares being offered, the price and amount payable
in full on application;

(b) a detailed table of contents in the forepart of the Prospectus showing the subject matter of the various sections or subsections of the Prospectus and the page number on which each such section or subsection begins;

c) a summary of the offer stating the amount/number of shares on offer, the offer price, purpose of the offer, minimum application and multiples thereafter, tenor, coupon redemption and other terms,; whether or not the offer is underwritten and if there would be any preferential allotment and summary financials;

(d) the offer stating the requirements of rules 287 (2) and (3), the times of opening and closing of the offer, the share capital of the company showing the authorized share capital, issued and fully paid share capital and the indebtedness of the company, including details of any bridging loan if any;

(e) names and addresses of the directors and the other parties to the issue;

(f) the Chairman's letter/statement which should disclose the history and business of the company, directors, management and staff, purpose of the offer, financial summary, prospect and future developments of the company, and any other material information;

(g) five (5) year audited historical financial information comprising accounting policies, balance sheets, profit and loss accounts, cash flow and notes to the accounts: Provided that where the company has existed for less than five (5) years, audited historical financial information for the number of years in existence or an audited statement of affairs for a new company;

(h) letter from the reporting accountants reviewing the audited accounts for the period.

(i) rating report (for debt issue);

(j) statutory and general information stating date of incorporation, registration number and share capital history of the company, the principal shareholders, shareholding structure, directors' interests, subsidiaries and associated companies, extract from the Articles of Association and or the trust deed(as appropriate), claims and litigations, material contracts, consents, documents available for inspection, underwriting and any other material information;

(k)procedure for application and allotment;

(l)collecting agents;

(m)the receiving bank;

(n) application form;

(o) a revised forecast in the event of oversubscription and absorption of 15% of the offer shall be disclosed in the offer document.

(p) any other information required by the Commission from time to time.

(2) Caveat on risk factor

The Prospectus shall contain in the front or inside cover page the following statement to be highlighted in bold letters "Investing in this offer involves risks. For information concerning certain risk factors which should be considered by prospective investors, see "risk factors" commencing on the relevant page hereof.

3) Risk factors. Risk factors peculiar to the issuer shall be stated prospectus including the following risks:

a) Risk associated with the business activities of the entity e-g market risk, interest risk, credit risk, exchange risk, etc;

b) sectoral risks risks associated with the sector eg. energy sector risk;

c) political risks, i.e risks associated with the political climate,

d) currency risk; and

e) environmental risk Measures, if any, taken to address or mitigate the identified risk factors shall be stated.

4) Definitions and corporate directory The Prospectus shall contain:-

a) a glossary of abbreviations and technical terms to guide investors on definitions and explanations of abbreviations and terms, especially for companies engaged in technical activities;

b) addresses and telephone numbers of the issuers 'branch/regional office, head/management office, e-mail, website and registrar's office;

names of all exchanges where the company's shares are listed or are to be listed.

5) Description of group structure

Where the issuer is a group, the issuer shall disclose, in the summary page of the prospectus, information about the group including a description of group structure and a diagrammatic illustration.

6) Expected time-frame for completion of project/gestation period The issuer shall state in the prospectus the expected period to complete the project(s) for which funds were obtained and also disclose the gestation period of the project(s).

7) Information on the company;

The prospectus shall disclose the following information about the company: a) availability of raw materials, i.e. where the company derives or will derive its raw materials from;

b) quality control procedures or quality management programme in place.

8) Information on shareholders/directors/key management staff, The Prospectus shall provide a statement as to whether or not any shareholder, director or key management personnel and, where applicable, its key technical personnel, are or have been involved in any of the following (whether in or outside Nigeria):

a) a petition under any bankruptcy or insolvency laws filed (and not struck-out) against such person or any partnership in which he was a partner or any company of which he was a. director or key personnel; or

b) a conviction in a criminal proceeding or is named subject of
pending criminal proceedings relating to fraud or dishonesty;" or

c) the subject of any order, judgment or ruling of any court of competent jurisdiction or regulatory body relating to fraud or dishonesty, restraining him from acting as an investment adviser, dealer in securities, director or employee of a financial institution and engaging in any type of business practice or activity.

9) Related party transactions/conflicts of interest The issuer shall disclose in the prospectus:-

a) i)any existing and potential related-party transactions and conflict of interest in relation to the company and its related parties, together with steps taken to resolve such conflicts of interest.

ii) in the nature and extent of the related-party transactions and conflict of interest situations;

iii) declaration of an expert on existing and potential interests/conflicts of interest in any capacity (if any) vis-à- vis the company/group;

b) "experts" means experts as defined in the Act; and

c) "related party" shall bear the same meaning as related company as defined in the Act.

10) Directors' interest;
The issuer shall disclose in the prospectus:-
a) information and details of amounts or benefits paid or intended to be paid or given to any promoter within the two years preceding the date of the prospectus;

b) the full particulars of the nature and extent of any interest, whether direct or indirect of any director and major shareholder in the promotion of, or in any material assets within the two years preceding the date of the prospectus, acquired or disposed of by or leased to the company or any subsidiary company or are proposed to be acquired or disposed of by or leased to the company or any subsidiary company. Such particulars shall include the following:

i) the consideration passing to or from the company or any subsidiary company; and ii. brief particulars of all transactions relating to any such material assets which have taken place within the two years preceding the date of the prospectus or an appropriate negative statement.

11) Mergers or take-over The prospectus shall contain a statement as to whether or not any of the following has occurred during the preceding financial year and or the current financial year.

a) merger or takeover offers by third parties in respect of the company's securities, and

b) Merger or takeover offers by the company in respect of another company's securities; c) if the foregoing statement is in the affirmative, the prospectus shall state the price of the offer and the outcome thereof.

12) Illustration;
If the prospectus contains photographs or illustrations of properties or assets, which do not belong to the issuer, the photographs or illustrations shall be accompanied by a

statement to the effect that the properties or assets depicted do not belong to the company.

13) Financial information-segmental reporting;
In the case of an issuer which is a group of companies, the prospectus shall contain a detailed analysis of the group over the past five (5) years or number of years in existence (as applicable), preceding the date of the prospectus including: segmental reporting of revenue and operating profits by subsidiary/associated company (where applicable), products/ services and markets/geographical location.

14) Accountants' report
Purchase of any Business If the proceeds or any part of the proceeds of the issue of the securities is to be utilized directly or indirectly for the purchase of any business…

Other contents of a prospectus under **sub Rule 15 to sub Rule 22 of Rule 288 of the security and exchange commission rules** includes; Property schedule land and buildings, financial and non financial disclosure requirements, confirmation of the going concern status, corporate governance compliance, pledge of assets, capacity utilization, research and development, and disclosure of developments or events occurring after submission of prospectus but before closing the offer.

REGISTRATION OF PROSPECTUS

The Prospectus must be registered with the Securities and exchange commission before publication". The securities and exchange commission shall not register a prospectus unless it is satisfied that".
a) It is signed and dated in accordance with the legal requirements.
b) It has endorsed on it or attached to it any specified documents.
c) The prospectus complies with the legal requirements of investment and securities Act.

REFUSAL OF THE SECURITIES AND EXCHANGE COMMISSION TO REGISTER A PROSPECTUS

Where the Securities and exchange commission refuses to register a prospectus on the ground that it fails to comply with the requirements of investment and securities Act, an aggrieved person may appeal to the Investments and Securities Tribunal within 21 days of the notification of the refusal by Securities and exchange commission.

SANCTIONS FOR MISLEADING INFORMATION

omissions or misstatements in prospectus or non-compliance with statutory provisions, may attract criminal or civil liability. The basis of the liability can be punitive, deterrence, or compensatory. With the ultimate aim of ensuring transparency and equity in the market for company securities.

CIVIL LIABILITY

By **section 85(1) of the investment and securities Act,** where a prospectus invites persons to subscribe for shares in a company, all who subscribe for shares or debentures are entitled to compensation for the loss or damage they may have sustained by reason of any untrue statement or misstatement included in it. Persons liable to pay compensation include:

a) any director of the company at the time of the issue of the prospectus;

b) any person who consented to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;

c) any employee of the company who participated in or facilitated the production of the prospectus; and

d) the issuing house and its principal officers.

In **Edgington v Fitzmaurice**, the plaintiff was fraudulently induced to lend money to a company in order to pay off its outstanding debts, thinking it was actually intended for the expansion and development of the company's trade. In action, the court held the company liable. But in **Derek v Peek**, the defendant company had alleged in their prospectus that they had authority to run tramways by horsepower or if consent was obtained from the board of trade as already expected, with steam power. Relying on this the plaintiff bought shares from the company and when consequently the board refused consent, the company was wound up, and the company was sued for deceit and fraud, the court held that the company directors were not fraudulent but honestly believed the statement to be true at the material time.

By **section 85(4) of the investment and securities Act**, certain persons listed under section 85(2) of the Act are relieved from civil liability if they can prove that:

a) having consented to become a director of the company, he withdrew his consent in writing before the issue of the prospectus, and that it was issued without his authority or consent;

b) the prospectus was issued without his knowledge or consent, and that on being aware of its issue, he immediately gave reasonable public notice that it was issued without his knowledge or consent;

c) after the issue of the prospectus and before allotment, he, on becoming aware of any untrue statement or misstatement in it withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason of his withdrawal, or
d) as regards every untrue statement or misstatement:
i) not purporting to be made on the authority of an expert or of an official public document or statement, he had reasonable ground to believe and did up to the time of the allotment of the shares, as the case may be, believe that the statement was true;

ii) purporting to be statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report of valuation and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it and that person had given the consent required by **section 77 of the investment and securities act**, to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration; and

iii) purporting to be a statement made by an official person or contained in what purports to be a copy of or an extract from an official public document, it was a correct and fair representation of the statement or copy of or an extract from the document.

CRIMINAL LIABILITY

Criminal liability may result for non-compliance with statutory provisions and for misstatements of a specific character.

a) Under **section 71(4) of the investment and securities Act**, issuance of a form of application for securities unaccompanied by full prospectus is an offense punishable on conviction with a fine of N100, 000.00.

b) **Section 77(2) of the investment and securities Act**, makes it unlawful to issue a prospectus containing the statement of an expert unless he has given his consent and has not, before the delivery of the prospectus for registration, withdrawn it and the prospectus itself says so. The company and every person who is knowingly a party to its issue are liable on conviction to a fine of N100, 000.00 or a term of imprisonment of not less than three years or to both such fine and imprisonment.

c) **Section 80(6) of the investment and securities act**, criminalizes breach of the registration provisions. If a person issues a prospectus without delivering a copy to the Commission for registration or without attaching or endorsing on it the required reports and documents, the company and every person who is knowingly a party to the issue of the

prospectus, shall be jointly and severally liable to a penalty of not less than N25, 000.00 in the case of a company, and not less than N5, 000.00 in the case of other persons for every day from the date of issue of the prospectus until a copy of it is so delivered with the required documents endorsed on it or attached to it.

d) If a statement in a prospectus or statements in lieu of a prospectus contain a misstatement and untrue statement, any person who authorized its issue shall be liable on conviction to a term of imprisonment and or fine. A statement in a prospectus shall be deemed to be untrue, if it is misleading in the form and context in which it is included. A statement shall be deemed to be included in a prospectus if it is contained in the prospectus or in any report or memorandum appearing on the face of it or is by reference incorporated or issued with it

EXEMPTION OF EXPERTS FROM LIABILITIES

Experts are exempted from civil and criminal liabilities for misstatements not attributable to the experts in the course of packaging the prospectus. The effect of **sections 85(3) of investment and securities Act,** together with **section 86(2) of the investment and securities act**, shows that experts who merely consent for the purpose of registering the prospectus is not deemed to have authorized the publication of the prospectus, and as such are exempted from compensatory liabilities, except in respect of an untrue statement or misstatement made by them as experts.

PROCEDURAL STEPS FOR THE ISSUANCE AND PUBLICATION OF PROSPECTUS

1. Prepare a draft prospectus and submit to an issuing house, which in turn will submit the same to the Nigerian Stock Exchange. If it is an initial public offer, obtain the approval of the Draft Prospectus from NSE. Where it is an already listed company, obtain a Certificate of Exemption from the Nigerian stock exchange.

2. Thereafter, the issuing house will submit the approved draft prospectus together with the Application for Registration of the securities to the securities exchange commission who will comment on the Draft Prospectus and return it to the Issuing House for the necessary inputs.

3. Obtain the consent of Experts (such as accountants and solicitors) who made reports or statements in the prospectus.

4. Print the final copy of the prospectus as approved by SEC, and
have it signed by every person named in it as a director.

5. Submit the printed Prospectus to SEC for registration.

6. Send the approved and registered prospectus to the Nigerian stock exchange and the corporate affairs commission for record purposes.

7. Publish the prospectus inviting the public to invest in the securities of the company.

PUBLICATION ADVISORY CLAUSE

RULE 284(11) Securities and exchange commission Rules, provides the advisory clause that shall be stated as a footnote in the print and electronic media advertisement.