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AN ANALYSIS OF THE DECISION OF THE FEDERAL HIGH COURT AFFIRMING THAT PRIVATE COMPANIES WITH TWO OR MORE SHAREHOLDERS/MEMBERS CAN TRANSITION TO SINGLE- SHAREHOLDER/MEMBER COMPANIES



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INTRODUCTION

In a recent decision of the Federal High Court (the “**FHC**”) delivered on 30th July 2024, the FHC held that a private company incorporated with two or more members pursuant to the provisions of the now repealed Companies and Allied Matters Act 1990 (the “**CAMA 1990**”) and prior to the enactment of the Companies and Allied Matters Act 2020 (as amended) (the “**CAMA 2020**”) can transition to a private company with one member pursuant to the provisions of the CAMA 2020. On the basis of this decision, the FHC declared as ultra vires, unlawful, and contrary to the provisions of the CAMA 2020, the refusal of the Corporate Affairs Commission (the “**CAC**”) to approve and accept, for filing, share transfer instruments pursuant to which Julius Berger Nigeria Plc (“**JBN**”)¹ would become a sole shareholder of Primetech Design and Engineering Nigeria Limited (“**Primetech**”)² (the “**Judgment**”). The FHC also held that JBN was entitled to become a sole shareholder of Primetech and directed the CAC to approve and accept for filing, the share transfer instrument pursuant to which JBN would become the sole shareholder of Primetech.

In this article, we analyse the Judgment, particularly the FHC’s interpretation of relevant provisions of the CAMA 2020 and the effect of the repealed CAMA 1990. In addition, we highlight some legal gaps in the Judgment and offer recommendations to address these gaps.

BACKGROUND TO THE DECISION OF THE FHC

Prior to the enactment of the CAMA 2020 and under the CAMA 1990, companies were required to have at least two shareholders or members. Specifically, section 18 of the CAMA 1990 provided that any two or more persons may form and incorporate a company by complying with the requirements of the CAMA 1990 in respect of the registration of such a company.

One of the most significant and widely embraced innovations introduced by the CAMA 2020 is the concept of the single-member private company. This is a departure from the previous legal framework under the CAMA 1990. Section 18(1) of the CAMA 2020 provides that from the commencement of the CAMA 2020, any two or more persons may form and incorporate a company by complying with the requirements of the CAMA 2020 in respect of the registration of the company. However, section 18(2) of the CAMA 2020 goes on to state that notwithstanding the provisions of section 18(1), one person may form and incorporate a private company by complying with the requirements of the CAMA 2020 in respect of private companies. The introduction of this provision has fundamentally transformed the landscape of Nigerian corporate law, providing an opportunity for sole proprietors to register a company and enjoy the benefits of limited liability without diluting their shareholding.

FACTS OF THE CASE

By a share transfer instrument dated 25th April 2022, Primetech’s second shareholder, Martin Brack, transferred all his shares in Primetech to JBN, thereby making JBN the sole shareholder of Primetech.

¹ The 2nd Plaintiff in the suit.

² The 1st Plaintiff in the suit.



The share transfer was approved by Primetech's Board of Directors. Primetech, thereafter, notified the CAC to enable the CAC to update its Company Registration Portal ("**CRP**") to reflect the share transfer and the fact that JBN had become the sole shareholder of Primetech. The CAC, however, refused to approve the share transfer instrument, relying on sections 18(1) and (2) and 571(c) of the CAMA 2020.

Section 18(1) and (2) of the CAMA 2020 provides:

- "(1) As from the commencement of this Act, any two or more persons may form and incorporate a company by complying with the requirements of this Act in respect of registration of the company.*
- "(2) Notwithstanding subsection (1), one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies."*

On the other hand, section 571(c) of the CAMA 2020 provides the grounds on which a company may be wound up by the court and states that one of those grounds is where "... *the number of members is reduced below two in the case of companies with more than one shareholder*".

The CAC's position, hinged on sections 18(1) and (2) and 571(c) of the CAMA 2020, was that Primetech was incorporated as a two-member company and that by virtue of the CAMA 2020, companies with two or more members cannot reduce their membership to less than two members. The CAC also submitted that the CAMA 2020 did not contemplate nor provide for the reduction of the membership of companies in existence before the enactment of the CAMA 2020 to a single shareholder, or the re-registration or conversion of such companies to a single member company.

Following the CAC's refusal to register the share transfer despite explanations and representations made on Primetech's behalf, Primetech and JBN commenced a suit³ seeking the determination of the following questions: (1) whether the CAC's position that section 18(2) of the CAMA 2020 only applies to private companies incorporated or registered after the CAMA 2020 to the exclusion of companies existing before the commencement date of CAMA 2020 is correct; (2) whether, upon a construction of sections 18(2), 22(1), 118, 869(1) and other related provisions of the CAMA 2020, the CAC can rely on section 571(c) of the CAMA to refuse to approve and accept, for filing, share transfer instruments pursuant to which JBN would become a sole shareholder of Primetech; and (3) whether, having regard to the combined provisions of sections 18(2), 22(1), 118, 869(1) and other related provisions of the CAMA 2020, the CAC can validly refuse to approve and accept, for filing, share transfer instruments pursuant to which JBN would become a sole shareholder of Primetech.

Primetech and JBN also asked that, upon the determination of the questions by the FHC, the FHC should grant following reliefs: (1) a declaration that the provision of section 18(2) of the CAMA 2020 applies to all private companies, whether incorporated before or after the commencement of the

³ In Suit No. FHC/ABJ/CS/665/2023: Primetech Design and Engineering Nigeria Limited & Another v. Corporate Affairs Commission.



CAMA 2020, (2) a declaration that upon a proper construction of section 18(2) of the CAMA 2020 and other relevant provisions of the CAMA 2020, JBN is entitled to be the sole shareholder/member of Primetech, (3) a declaration that the CAC's refusal to approve and accept for filing, share transfer instruments pursuant to which JBN would become a sole shareholder of Primetech is ultra vires, unlawful, and contrary to the provisions of the CAMA 2020, (4) an order directing the CAC to approve and accept for filing, share transfer instruments pursuant to which JBN would become a sole shareholder of Primetech, and (5) consequential order directing the CAC to update its records, including the CRP, to reflect JBN as the sole shareholder in the Primetech.

SUMMARY OF THE SUBMISSION OF THE PARTIES

Primetech and JBN argued that the CAMA 2020 now recognises and permits one person to form and incorporate a private company, a sharp departure from the pre-CAMA 2020 position requiring a company (whether private or public) to be formed by at least two persons. It was further submitted that having regard to the rationale for permitting the formation of a private company by one person, it was inconceivable that the legislature would, in one breath, create an opportunity for companies incorporated post-CAMA 2020 to have a single shareholder/member while also depriving other companies incorporated pre-CAMA 2020 – including Primetech – of the opportunity to do so simply because of the fact of their incorporation before the CAMA 2020 was enacted. It was further submitted that depriving companies incorporated prior to the CAMA 2020 from transitioning to single shareholder/member companies would result in the perpetuation of the mandatory requirement for private companies to have at least two members applicable under the repealed CAMA 1990 despite the legal effect of a repealed enactment, which is to render such an enactment dead and non-existent.

Primetech and JBN further argued that there were other provisions of the CAMA 2020 which, when read as a whole, would reveal that the legislature intended to have single shareholder/member private companies irrespective of when such companies were formed. Section 118⁴ of the CAMA 2020, which replaced section 93 of the CAMA 1990 was cited as an example. It was contended that the deliberate qualification of the companies to be affected by section 118 of the CAMA shows the intention of the legislature to exclude private companies from the mandatory requirement of having at least two members either at the point of formation/incorporation or in the course of carrying on business.

Finally, Primetech and JBN argued that the CAC's position that section 18(2) of the CAMA 2020 applied only to companies incorporated or registered under the CAMA 2020 to the exclusion of companies incorporated or registered prior to the enactment of the CAMA 2020 was untenable and unjustifiable.

⁴ Section 118 provides: "If a public company or a company limited by guarantee carries on business or its objects, without having at least two members and does so for more than six months, every director or officer of the company, during the time that it so carries on business with only one or no member, is liable jointly and severally with the company for the debts of the company contracted during that period."




The CAC, in response, argued that section 18(2) of the CAMA 2020 applied only to companies incorporated or registered under the CAMA 2020 to the exclusion of companies incorporated or registered prior to the enactment of the CAMA 2020 and that the section cannot have a retrospective effect. The CAC also argued that the retention of sections 18 and 408(c) of the CAMA 1990 in sections 18(1) and 571 (c) of the CAMA 2020, respectively, indicated a clear legislative intent which was that private companies formed with more than two shareholders cannot return to a single-member structure, regardless of whether they were incorporated prior to or after the enactment of the CAMA 2020. The CAC's overarching submission was that companies incorporated or registered before the CAMA 2020 was enacted or even after the CAMA 2020's enactment could not transition to single-member companies under the CAMA 2020. In essence, if a company were incorporated with more than two shareholders, it would never be able to reduce their number to less than two shareholders.

THE DECISION OF THE FHC

The FHC held that section 869(1) of the CAMA 2020 repealed the CAMA 1990 thus making the CAMA 2020 the current principal legislation that regulates the operations of all companies in Nigeria (whether incorporated prior to or after the CAMA 2020 came into force). Therefore, the provisions of the CAMA 1990 no longer apply to the operations of companies in Nigeria. The FHC noted the principle of law that when a statute is repealed, it ceases to exist and no longer forms part of the law of the land, although the new legislation could also have a saving provision for acts or things done under the repealed law. The FHC specifically noted that the CAMA 2020 has saving provisions contained in section 869(2) to (7). The FHC agreed with Primetech and JBN that, having regard to the rationale for the introduction and recognition of single shareholder/member companies, it is inconceivable that the legislature would, in one breath, create an opportunity for companies incorporated under the CAMA 2020 to have a single shareholder/member while also depriving other private companies like Primetech incorporated prior to the CAMA 2020 of the opportunity to do so simply because they were incorporated before the CAMA 2020 was enacted. This approach, the FHC held, would be discriminatory against companies incorporated under the CAMA 1990 and inconsistent with the reforms introduced by the CAMA 2020. Again, the FHC held, the position held by the CAC would mean that the mandatory requirement for private companies to have two or more shareholders under the repealed CAMA 1990, would still be perpetuated, yet the CAMA 1990 had been repealed by section 869(1) of the CAMA 2020. On this basis, and fuller details contained in the judgment of the FHC, the FHC answered all the questions brought before it for determination in favour of Primetech and JBN and granted the reliefs sought by Primetech and JBN. The FHC mandated the CAC to approve and accept, for filing, share transfer instruments pursuant to which JBN would become a sole shareholder of Primetech.

COMMENTS AND CONCLUSION

We agree with and commend the decision of the FHC that all private companies in Nigeria, whether incorporated pre-CAMA 2020 or post-CAMA 2020, may transition into single-member companies based on section 18(2) of the CAMA 2020. This settles the controversy created by the CAC's position that private companies incorporated prior to the CAMA 2020 cannot transition into single-member companies.



A contrary interpretation of the relevant provisions of the CAMA 2020 would have defeated the intent of the legislature in allowing single-member companies and the opportunity for companies incorporated prior to the CAMA 2020 to transition into single-member companies would have been lost.

There is, however, an important point that may be problematic if not addressed by a legislative amendment as quickly as possible. Section 571(c) of the CAMA 2020 provides that a company may be wound up by the court if the number of members is reduced below two in the case of companies with more than one shareholder. It is important to note that the CAC had relied on section 571(1) of the CAMA 2020 to support its position that all private companies in Nigeria, whether incorporated pre-CAMA 2020 or post-CAMA 2020, cannot transition into single-member companies. Primetech and JBN's response was that section 571(c) of the CAMA 2020 recognises that while some companies have more than one shareholder, there are other companies that have only one shareholder and that it was for this reason that the provision is limited to "...companies with more than one shareholder." The FHC agreed with this view.

While the implication of the decision of the FHC is that a company with two or more shareholders/members can transition to a single-member company, section 571(c) of the CAMA 2020 suggests that where the number of members of a company that has more than one shareholder is reduced below two, it would constitute a ground for winding up. This is contradictory and will, in our opinion, continue to cause problems for companies that intend to transition to single-member companies, unless it is amended. In our view, a better way to have dealt with section 571(c) in the drafting of that section would have been to limit the applicability of section 571(c) of the CAMA 2020 specifically to public companies and companies limited by guarantee and for it to read as follows: "A company may be wound up by the court if, in the case of a public company or a company limited by guarantee, the number of members is reduced below two." We would recommend that this should be considered as an important legislative amendment to be made to the CAMA 2020 to prevent any further impediments to the ability of Nigerian private companies to operate as single-member companies.

This publication has been authored by the General Corporate Advisory team of Udo Udoma & Belo-Osagie. For more information about our General Corporate Advisory offerings, please visit our website at www.uubo.org or email us at GECA@uubo.org.

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