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Pre-incorporation contracts under CAMA 2020: A comparative study of Nigeria, Ghana, South Africa, and the UK

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Abstract
The article examined the legal status of a pre-incorporation contract under the extant Nigerian Companies and Allied Matters Act 2020, with a view to ascertaining the extent to which a company is bound by agreements and contracts entered into prior to the formation of the company. In particular, the article examined the provision of Section 96 of the Companies and Allied Matters Act 2020, which deals in pre-incorporation contracts. By way of comparative analysis, the article examined similar provisions of pre-incorporation contracts under the Ghana Company's Act, South Africa Company' Act as well as United Kingdom Company's Act. The study employed indept content analysis. It was found that while the provision under the Nigerian Companies and Allied Matters Act and it appears to be open-ended in terms of the period/ratification of pre-incorporation contracts. The Ghanaian, South Africa and United Kingdom positions are quite different in that, recognition of pre-incorporation contracts must be done within a given time after which the company would no longer be entitled to rectification or be bound by the pre-incorporation contracts. It was also recommended in this article that a further amendment of the provisions of the Nigerian Companies and Allied Matters Act is imperative to provide a time frame within which the company can rectify pre-incorporation contracts upon coming into existence. Retaining the extant provision under the Companies and Allied Matters Act where it is found that rectification is open-ended in terms of the time frame, could give room to manipulation, as an incorporated company is not supposing to be talking about pre-incorporation contracts after a certain duration of time.

Keywords: Companies and Allied Matters Act, pre-incorporation contracts, comparative analysis, legal status, provision of Section 96

Introduction

Before the formation of a contract, promoters who took part in the preparation of the company's formation may enter into certain agreements and contracts in pursuance of the company's object. The question that should be asked is whether these contracts should be regarded as contracts of the company upon the company coming into being or whether the promoters or those who took part in the formation of the company should take responsibility for the pre-incorporation contracts. This article examines the extent to which pre-incorporation contracts are treated under the extant Companies and Allied Matters Act (CAMA 2020), and to ascertain whether the provision needs to be further amended given the backdrop of the comparative analysis of similar provisions on pre incorporation contract under the Ghana Company Act 2013, and The South African Companies Act 2008, This article notes that while both Ghana and South Africa Companies Act made provision for the time frame within which to ratify pre incorporation contract, the extant provision of section 96 of the Companies and Allied Matters Act 2020, makes the issue of timeframe open ended.

Conceptual Framework

Contract

Alobo (2016) [5] in his book, Modern Nigerian Law of Contract, page 1, defined contract as an agreement in which one party makes an undertaking or promises to the other, with the intention of committing the other party to a legally binding understanding. It is all about an agreement which the law will recognise as legally binding and enforceable between parties, which sets the obligations and remedies in the event of non-performance or in the event of breach by one party.

The law of contract is therefore seen or defined as a set of rules governing the relationship, content, and validity of an agreement between two or more persons in diverse areas of contracting. For an agreement or a contract to be valid in the eyes of the law, certain elements must be present: offer and acceptance, intention to enter into a legal relation, consideration, capacity, and free consent. In the case of Robinet Nig Ltd v Shell Nig Gas Ltd [2023] LPELR-22144 (CA). The Court of Appeal stated:

A contract is an agreement between two or more persons creating obligations that are enforceable or otherwise recognisable at law. More importantly, and quite aptly so, parties must reach a consensus ad idem for the contract to be regarded as binding and enforceable. In other words, two or more minds must meet at the same point, event or incident. When they say different things at different times, they are not ad idem and no valid contract is formed. The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract.'

Similarly, the Supreme Court of Nigeria in the case of King (Nig) Ltd v B.H (Nig) Ltd [2011] 5NWLR (Part 1239) 95 defines contract as:

a legally binding agreement between two or more persons by which rights are acquired by one party in return for acts or forbearances on the part of the other. In effect, a contract is a bilateral affair that needs the ad idem of the parties.

A contract must have essential elements that constitute a binding agreement between two or more persons. The

Supreme Court of Nigeria underscored this approach when it stated in the case of Bilante Intl Ltd v NDIC [2011] 6 (Pt 1) NJSC 69 @ 71 as follows:

An agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. To constitute a binding contract between parties, there must be a meeting of the mind, often referred to as *consensus ad idem*. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by him, which is accepted by the offeree, giving rise to a binding contract. The offer matures to a contract where the offeree signifies an unequivocal intention to accept the offer.'

Also, in the case of A.G Rivers v A.G Akwa Ibom [2011] 3 NJSC 1 @13, the Supreme Court stated:

Once parties enter into an agreement voluntarily and there is nothing to show that the agreement was obtained by fraud, mistake, deception, or misrepresentation, the parties are to be bound by the terms freely entered into. Consequently, a party no longer satisfied with the terms of the agreement cannot resile or jettison the agreement. This is the doctrine of sanctity of agreement, which is illustrated by the Latin maxim "Pacta Sunt Servanda", which means agreements are to be observed and honoured. That is to say, parties are to be held bound by their agreements.

Pre-Incorporation Contract

Alobo (2016) [5] further defined, on page 128 of his book on Modern Nigerian Law of Contract, pre-incorporation contracts as contracts entered into by any person on behalf of a company prior to its incorporation. It includes all agreements made in preparation or prior to the formation of a company with the clear intention of becoming the contracts of the company, and the company would be bound by them when eventually formed. They include promotion agreements, preliminary agreements, pre-incorporation agreements, formation agreements, shareholders' agreements, and memorandum of agreements.

As stated by Wigwe (2022) [6] in Introduction to Company Law & Practice with Companies and Allied Matters Act 2020, pages 128-129, under the common law, a company is not bound by a contract entered into before its formation. The legal implication of this is that the promoters are personally liable or bound by such contracts and may take benefits of such contracts entered into before the company's formation. This position was backed up in the case of Kelmer v Baxter (1878) 8CH. D. 388, where a company was about to be formed to buy over a hotel, and before its formation, the promoters entered into a contract purporting to be on behalf of the company yet to be formed for the purchase of some quantity of wine. When the company was formed, the wines were delivered and consumed, but before the company could make payment, it went into liquidation and became moribund. It was held that the company was not bound by the contract entered into before its formation.

In the case of Newborne v Sensolid (Great Britain) Ltd (1954) 1 QB 45, when a company was about to be formed, the plaintiff intended to sell wine to the company, but under the contract, the plaintiff agreed to sell to the proposed directors of the company. The proposed directors intended to buy the wine on behalf of the company, but as it was not in existence when the contract was made, or the goods were delivered, they personally took delivery. It was held that since the company, which was the principal, was not in existence as at the time the directors contracted to take delivery of the wine, having received it themselves, the directors must pay for it. Lord Goddard CJ stated that:

It seems to me a very long way from saying that every time a prospective company, not yet in existence, purports to contract, everybody who signs for the company makes himself personally liable.

Pre-Incorporation Contract Under the Nigerian Companies and Allied Matters Act 2020

Due to the rigidity of the legal status of pre-incorporation contracts under the common law, there has been a modification under the extant Section 96(1) of the Nigerian Companies and Allied Matters Act 2020. The implication of this is that, upon incorporation, a company can ratify contracts entered into before its formation as if the company were in existence when the contract was entered into and thus a party to the contract ab initio. The effect of it is that the company would become bound by such a pre-incorporation contract and also take advantage of the contract. However, if the company fails to ratify the contract as it were, section 96(2) of the Companies and Allied Matters Act 2020 comes into play, which has the intendment that the persons who were involved in such pre-incorporation contracts shall take benefit of the contract personally and shall be bound by the consequences as well.

In the case of Societe Generale Bank (Nig) Ltd v Societe Generale Favouriser (1997) 4 NWLR (Pt 497) 8, the Supreme Court of Nigeria had the opportunity to make a pronouncement on pre-incorporation contracts by reviewing the common law position when it stated, 'all that has changed in this country for section 96(1) of the Companies and Allied Matters Act 2020, makes it possible for pre-incorporation contracts to be ratified by a company after its ratification and thereby becoming bound by it'.

It is submitted that the Supreme Court of Nigeria has acknowledged the fact that CAMA 2020 has departed from the common law position on pre-incorporation contract and has now embraced the reality as provided under the extant Companies and Allied Matters Act 2020.

Conflict Between the Provisions of the Memorandum and the Articles of Association with a Pre-Incorporation Contract

Businessmen in Nigeria have devised a method wherein there is a clause in the object that the formation agreement will be superior to any provision of the memorandum and articles of association in the event of conflict, which is bound to arise. Thus, the formation agreement/pre-incorporation contract would provide that in the case of conflict between it and the memorandum and articles of association of the company, the formation agreement will prevail. This is commonly known and stated in pages 137-138 of Chris C Wigwes book as 'The Supremacy Clause'. No doubt, however, about the fact that, as far as a company is concerned, the practice is that it is the memorandum and articles of association that are paramount and should prevail over agreements. By the provision of section 46(1) of Companies and Allied Matters Act 2020, the memorandum and articles of association are a superior contract of the company, and once filed with the Corporate Affairs Commission, they constitute public documents, and there is

no way the provision of an unregistered private document would be superior to the provisions of the terms of incorporation documents, no matter how the 'supremacy clause' is worded. The Supreme Court confirmed this provision in the case of NIB Investment (West Africa) Ltd v Omisore [2006] 4NWLR (Pt 969), when it stated:
When parties make a contract, it is within their prerogative to make their own law to which they are subject. The contract creates a binding obligation on them. In the case of a company, it is the Memorandum and Articles of Association and the Companies and Allied Matters Act that create the rights and obligations.

Pre-Incorporation Contract Under the Ghana Company Act 2013

Section 11 of the Ghana Company Act, it makes provision for a pre-incorporation contract to be ratified. However, its provision is more comprehensive, given the fact that it states clearly the timeframe within which the company should ratify contracts entered into on its behalf before its incorporation. Section 11 (1) of the Ghana Company Act is to the effect that for ratification of pre-incorporation contracts to be effective or have any meaning, it may be ratified within 18 months from the date the company came into existence. The implication of this provision is far-reaching in the sense that if the company fails to ratify within 18 months of coming into existence, ratification can no longer take place.
It is instructive to note that by the provision of section 11(2) of the Ghana Company Act, the company shall become bound by pre-incorporation contracts upon ratification and also take the benefits of those contracts or transactions as if the company had been in existence as at the date of the contract or other transactions or as if the company had been a party to such contract or transactions. Equally, it is important to also note that by the provision of section 11(3) Ghana Company Act, before the company ratifies any pre-incorporation contract or transactions purported to have been carried out in the name of the company or on behalf of the company in Ghana, the person or those involved in such contract or other transaction are personally entitled to the contract or other transactions in the absence of any express agreement to the contrary.

Pre-Incorporation Contract Under the South African Company Act 2008

The South African Company Act 2008 makes provision for pre-incorporation contracts entered into before a company is formed. Section 21(1) of the South African Company Act 2008 permits a person to enter into a written agreement in the name of a company or purport to act in the name of, or on behalf of, a company that is contemplated to be incorporated as a legal entity. Section 21(2) provides that any person who does anything contemplated or as envisaged under this provision is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract. Section 21(3) further provides that if, however, after its incorporation, the company enters into an agreement on the same terms, or in substitution for an agreement contemplated in the subsection, the liability of a person under subsection 2 in respect of the substituted agreement is discharged.
Ratification of the pre-incorporation contract in South Africa should be done within 3 months from the date the company was incorporated by virtue of section 21(4) of the South African Company Act 2008. If, however, within 3 months after the incorporation of the company, the board has neither ratified nor rejected the pre-incorporation contract or other action purported to have been made or done in the name of the company or on its behalf, as contemplated, the company will be deemed to have ratified that agreement. By Section 21(6) South African Company Act 2008, whenever a pre-incorporation contract or action has been ratified or regarded as ratified by the company by virtue of section 21(5) South African Company Act 2008, the agreement becomes enforceable against the company as if the company had been a party to the agreement when it was made; and also, the liability of the person under subsection 2 in respect to the ratified agreement or action is discharged.
By virtue of the provision of section 21(7) South African Company Act 2008, if the company decides to reject an agreement or action envisaged in subsection1, a person who bears any liability in respect to subsection 2 for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

The United Kingdom Companies Act 2006

Under the United Kingdom Companies Act 2006, Section 51 makes provision regarding pre-incorporation contracts, deeds, and obligations. Section 51(1) United Kingdom Companies Act 2006 is to the effect that any contract entered which purports to be by or on behalf of a company at the time when the company has not come into existence or formed, has the effect subject to any agreement to the contrary as one made with the person who purports to act for the company or as agent of it, and is also personally liable on the contract accordingly. In other words, the U.K position recognises sharing the liability between the company and those who purport to enter into the contract on behalf of the company before its formation. It is important to emphasize that by virtue of section 51(2) United Kingdom Companies Act 2006, subsection 1 applies to:

a. The making of a deed under the law of England and Wales, and Northern Ireland.
b. The undertaking of an obligation under the law of Scotland, as it applies to the making of a contract.

In the case of Phonogram v Lane (1981) WLR, 736, it was stated that for the above section to apply, the company need not actually be in the process of formation. In the case of Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd (1986) BCLC-507 it was stated that the section need not apply when the company was in existence at the time when the relevant contracts were made.

Company

In Nigeria, Section 18(1) & (2) of the Companies and Allied Matters Act gives power to two or more persons, including one person, to form and incorporate a company by complying with the requirements of the law in respect of registration of a company. A company under section 868(1) of the Companies and Allied Matters Act means a company formed and registered under this Act, or as the case may be, formed and registered in Nigeria before and in existence at the commencement of this Act. Alobo states that a company is seen as a business entity incorporated as an artificial legal

person formed by a group of legal persons to engage in or carry on business for profit purposes. From this perspective, once a company is registered, it becomes a legal personality separate and distinct from its members, including the promoters of the company who took part in the formation of the company, entered into a contract/agreement purporting to be the contract for and on behalf of the company. As found in the celebrated case of Salomon v Salomon [1897] AC, it was stated that a company, having been incorporated, possesses a legal personality distinct from the people who formed the company. The implication of this decision is that those promoters or even those who were involved in the formation of the company are quite distinct from the company immediately the company assumes the legal status of corporate personality. The law regards the legal conception as an artificial person capable of exercising its own corporate powers, as stated in the case of Ahmed v Fishers (Nig) Ltd & Ors [2020] LPELR-51225 (CA).

Upon the formation of a company, it has the attributes of limited liability, vesting of property, meaning it can own property distinct from the property of its members, it will have a perpetual succession, in other words, the company does not die. Still, it continues to exist until its name is struck off or dissolved through a legal process known as winding up or liquidation. It will also have a common seal; the corporation will sue and be sued under its corporate name, rather than the names of its shareholders or directors. It can enter into a contract for and on behalf of the company as required in furtherance of the object of the company. Section 95 of the Companies and Allied Matters Act 2020 generally deals with the company's contract, the purport of which is that any contract between the company and an individual should be by deed, and which will be varied or discharged only by deed or in writing in the name of the company and to be signed by the individuals or the persons involved in the contract with the company. By the provision of Section 95(2) Companies and Allied Matters Act 2020, the implication is that such contracts made by the company will be effectual in law and shall be binding on the company and its successors and all other parties thereto, their heirs, executors or administrators as the case may be, and may also be varied in the same manner which is authorised by law.

Conclusion/Recommendation

The current provision of pre-incorporation contracts under the extant Companies and Allied Matters Act in Nigeria leaves much to be desired, better put, seen as inchoate in that the Act makes provision for the ratification of pre-incorporation contracts by the company upon coming into being. The provision is open-ended as it does not refer to a time frame, thereby making it look as if ratification can be done even after so many years of the company's formation. This lacuna with respect is capable of being utilized by persons or promoters of the company who might have the mind of being fraudulent by bringing up or cooking up a contract which was never made for and on behalf of the company before the formation of the company, as if those contracts were pre-incorporation contracts made before the formation of the company. The position of the law as regards pre-incorporation contract in other jurisdictions particularly Ghana under the Ghana Company Act 2008, South Africa under the South Africa Company Act 2013 and the United Kingdom under the United Kingdom Company Act 2006, is more comprehensive since they make provision for the duration of ratification of pre-incorporation contract and the liability of the promoters if such pre-incorporation contract are not ratified within the specified time as required.

Recommendation

It is recommended that the extant provision of pre-incorporation contract under the Nigerian Companies and Allied Matters Act should be amended and to make provision for the time frame within which a company should ratify its pre-incorporation contracts as it is the position under the Ghana, South Africa and the United Kingdom Companies Act referenced above which clearly provided for the time frame within which a company could ratify its pre-incorporation contracts that would have binding effect on the company upon incorporation.

Conclusion

It is concluded that there should be an amendment to the extant Companies and Allied Matters Act in Nigeria, with the provision that touches on the issue of pre-incorporation contracts to clearly define the time frame within which the company can rectify pre-incorporation agreements/contracts, so that after the expiration of the given time, liability would become that of the promoters and those involved in pre-incorporation contracts. Doing this will bring the amendment of the extant Nigerian provision of the pre-incorporation contracts as contained in the Companies and Allied Matters Act in line with the clear provision maintained under the Ghana Company Act, the South Africa Company Act, as well as that of the United Kingdom on the issue of pre-incorporation contracts.

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