THE TRUE AMBIT OF MAJORITY RULE UNDER THE COMPANIES AND ALLIED MATTERS ACT 1990 REVISITED[*]

Modern Practice Journal of Finance and Investment Law, Lagos,
Vol. 7 No. 3-4, p. 386-403

INTRODUCTION

Majority rule is a very familiar term in the vocabulary of the constitutional law of democratic nations.[1] *But because legal theory conceives of a company as a democratic business organization the principle of majority rule is also applicable to registered companies. From the point of view of judicial authorities the* locus classicus *is the case of* Foss v. Harbottle[2] *hence the rule is generally referred to as the Rule in Foss v. Harbottle. In that case, it was held that an action to redress a wrong done to the company could not be entertained at the suit of the minority. This common law rule, which is now part of the Nigerian law, has been applied in many decided cases*[3] *and recognized statutorily under the Companies and Allied Matters Act*[4] *1990. However, the rule has attracted some controversial literature in company law*[5] *and its true ambit under the Nigerian law is the subject of examination in this contribution.*

A STATEMENT OF THE RULE

The Rule may be summarized as follows:

"The proper plaintiff in an action in respect of a wrong done to the company or association of persons is *prima facie* the company or association itself. And, the court will not interfere in the internal affairs of a company at the instance of the minority if the irregularities complained of could be legally done or rectified by the majority."

Section 299 of the Companies and Allied Matters Act 1990 enacts the rule as follows:

"Subject to the provisions of this Act, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."

Jenkins L.J. articulated the rule more lucidly in *Edwards v. Halliwell*[6] thus:

"The rule in Foss v. Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been down, then *cadet quaestio*

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[1] The Constitution of the Federal Republic of Nigeria 1999 returned Nigeria to a democratic system of government in which majority rule is central after a prolonged period of military dictatorship.

[2] (1843) 2 Hare 461; 67 E.R. 189.

[3] Omisade v. Akande (1987) 2 N.W.L.R. (pt. 55) 158, Yalaju-Amaye v. Associated Registered Engineering Co. Ltd. & Ors. (1990) 4 N.W.L.R. (Pt. 145) 422; Sparks Electric (Nig.) Ltd. & Anor. V. Ponmile (1986) 2 N.W.L.R. (Pt. 23) 516; Edokpolo & Co. Ltd. V. Sem-Edo Wire Industries Ltd. & Anor. (1984) 5 S.C. 119.

[4] Cap. 59, Vol. 3, Laws of the Federation of Nigeria 1990 (section 299).

[5] See for example Sealy (1982) C.L.J. 247; Osunbor (1987) 36 I.C.L.Q.1; Rider (1978) 37 C.L.J. 270, Boyle (1969) J.B.L. 120; Prentice (1976) 92 L.Q.R. 502; (1986) L.Q.R. 176; Wedderburn (1958) C.L.J. 77, (1967) C.L.J. 93; (1967) 30 M.L.R. 77; Sealy (1967) C.L.R. 3; Mason (1978) 41 M.L.R. 161.

[6] (1950) 2 All E.R. 1064 (C.A.)

no wrong had been done to the company or association and there is nothing in respect of which anyone can sue[7].

The rule is acknowledged to be based on two principles – the **doctrine of corporate personality of registered companies[8]** and **the principle of the supremacy of the majority[9]** which has its ancestry in the principle of partnership law that courts would not interfere as between partners in respect of internal irregularities which the partners could rectify[10]. Affirming this legal position in *Edokpolo & Co. Ltd. v. Sem-Edo Wire Industries Ltd. and Another[11]* the Supreme Court observed that the court will not interfere with the internal management of companies acting within their powers and if there is a wrong done to the company for which redress is needed, it is the company that must sue. In *Ephraim Faloughi v. Haniel Williams and Others[12]* where the plaintiff, a minority shareholder brought an action for a return of all property of the company allegedly taken by the defendants and an account of all the affairs of the company to the plaintiff. It was held that the action would not be maintained at his instance since the alleged wrongs were done to the company, unless his action was within any of the exceptions to the rule. In *Macdougall v. Gardiner[13]* there was a motion for adjournment at a meeting but the chairman refused a demand for a poll and declared the motion carried contrary to the articles. A shareholder sought a declaration that the chairman's ruling was illegal. Holding that the court would not interfere with the internal management of the company, Mellish L.J. stated this principle clearly thus:

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly …. There can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes"[14]

However, the rule has been held applicable not only to incorporated bodies but also to unincorporated associations in possession of a constitution or a set of rules and regulations entitling them to sue and be sued as legal entities. Accordingly, it was applied to trade unions in *Nigerian Stores Workers Union v. Uzor and others,[15]* *Mbene v. Ofili[16]* and *Cotter v. National Union of Seamen[17]* and to a religious community or organization in *Alhaji Iman Abubakri and Others* v. *Abudu Smith and Others[18]* and *Eternal Sacred Order of the Cherubim and Seraphim* v. *Adewunmi[19].*

The rule has some advantages which appear to justify it. It is more convenient for the company to sue by itself as this will prevent a multiplicity of suits and needless,

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7 Ibid. 1066.

8 Trenco (Nig) Ltd. v. African Real Estate & Investment Co. Ltd. (1978) 11 N.S.C.C. 220; Marina Nominees Ltd. v. Federal Board of Inland Revenue (1986) 2 N.W.L.R. (Pt. 2)) 48; Wallersteiner v. Moir (No. 2) (1975) 1 N.W.L.R. 991; Berliet Nig. Ltd. v. Francis (1987) 2 N.W.L.R. (Pt. 58) 673; Salomon v. Salomon & Co. Ltd. (1897) A.C. 22; Akanki "The Relevance of the Corporate Personality Principle" (1977-1980) 2 N.L.J. 9

9 Edokpolo & Co. Ltd. v. Sem-Edo Wire Industries Ltd. (supra); Sparks Electric (Nig.) Ltd. & Anor. v. Pononile supra.

10 Carlen v. Drury (1812) 35 E.R. 61. Featherstone v. Cooke (1873) L.R. 16 Eq. 298, Trade Auxilliary Co. v. Vickers Probate (1812) 21 V.R. 835.

11 (1984 S.C. 119; Burland v. Earle (1902) A.C. 83 @ 93 (per Lord Davey.)

12 (1978) 4 F.R.C.R. 32.

13 (1875)1 Ch. D. 13; Mozley v. Alston (41 E. R. 833).

14 Ibid 25.

15 (1971) (2) A.L.R. Comm. 412.

16 (1968) N.C.L.R. 293.

17 (1929) 2 Ch. 58.

18 (1973) 1 All N.L.R. (Pt. 1) 730

19 (1969) N.C.L.R. 73.

futile, oppressive and blackmailing actions by the minority which may lead to a tearing apart of the company, waste of time and resources. However, the rule has a major disadvantage. Under the division of powers between the General Meeting and the Board of Directors, the latter is incharge of management of the company and therefore the appropriate organ to order an action in the name of the company. Where the directors are the wrongdoers, they will not sue. This decision not to sue may be approved by the General Meeting where the wrongdoers may also be in control of the votes. Consequently, if the rule in Foss v. Harbottle is rigidly adhered to, the wrongdoers would go unpunished and the minority shareholders and the company, would be at the mercy of the majority[20] hence the law admits of certain exceptions to the rule.

EXCEPTIONS TO THE RULE

The four established exceptions to the rule at common law[21] and the two extensions in decided cases[22] have been codified under section 300 of the Companies and Allied Matters Act 1990 to the effect that the court, on the application of any member, may, by injunction or declaration, restrain the company from the following:

(a) entering into any transaction which is illegal or ultra vires;
(b) purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution;
(c) any act or omission affecting the applicant's individual rights as a member,
(d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong doing;
(e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and
(f) where the directors are likely to derive a profit or benefit, or have profitted or benefitted from their negligence or from their breach of duty.

1. Illegal or Ultra Vires Acts (Section 300(a)

Where the act complained of is illegal or ultra vires, a shareholder is allowed to sue, for not even the unanimous consent of all the members of the company can ratify and render valid any ultra vires or illegal act[23]. Thus, in *Associated Registered Engineering Co. Ltd and Others v. Yalaju-Amaye*[24] where the purported appointment of new directors, by the board was held ultra vires as there was no such power in the articles of association, the minority shareholder was allowed to sue.

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20 See Wallersteiner v. Moir (No.2) supra.

21 The so-called fifth exception at common law never really enjoyed judicial, or academic support and is not recognised under the Companies and Allied Matters Act 1990. See the articles cited in note 5. Gower's Principles of Modern Company Law, 4th edition p. 645, Heytin v. Dunpont (1964) 1 W.L.R. 843; Baillie v. Oriental Telephone & Electric Co. Ltd. (1915) 1 Ch. 503; Russel v. Wakefield Waterworks Co. (1875) L.R, 20 Eq. 474, Cotter v. National Union of Seamen (supra), Prudential Assurance v. Newman Industries (No. 2) (1982) Ch. 904; Eastmanco (Kilner House) Ltd., v. Greater London Council (1982) 1 All E.R. 437; Oshio, Modern Company Law in Nigeria, 1995, p. 203-204; Akanki (ed.) Essays on Company Law 1992, 277-278, Bames, Cases and Materials on Nigeria Co.

22 Hodgson v. NALGO (1972) 1 W.L.R. 130, Daniels v. Daniels (1978) Ch. 406; Alexander v. Automatic Telephone Co. (1900) 2 Ch. 56.

23 Ashbury Railway Carriage & Iron Co.v. Riche (1875) 33 L.T. 450; Hoole v. Great Western Rly Co. (1867) L.R. 3 Ch. App. 262.

24 (1986) 3 N.W.L.R. (pt. 31) 653.

The fact that a shareholder present at a meeting voted for a resolution does not preclude him from attacking its validity on the ground that it was not authorised by its constitution or that it was illegal. Shareholders can restrain the directors from committing illegal or ultra vires acts at any time. Thus, in *Benson Oduduro and Another v. National Union of Hotels and Personal Services Workers and Others*[25] *where a* resolution was passed which was ultra vires the Trade Union Constitution, the court held that the plaintiffs were entitled to sue inspite of the fact that they participated in the meeting at which the resolution was passed.

2. Special Majority (Section 300(b)

Where the matter complained of could only be validly done or sanctioned by a special majority or special resolution. In Edwards v. Halliwell[26] two members of a trade union succeeded in restraining an attempt by the delegates meeting to increase the members' contribution without obtaining the two-thirds majority required under their rules. This exception also covers a breach of any particular procedure laid down in the articles or constitution or rules of the organization. Thus, in *Quin and Axtens Ltd. v. Salmon*[27] ratification by a simple majority by members at general meeting of a transaction entered into with the consent of one Managing Director instead of the consent of the two Managing Directors as required by the articles, was held void, as being an attempt to alter the terms of the contract in the articles by an ordinary rather than by a special resolution.

3. Invasion of Personal Rights (Section 300(c)

Where the personal rights of a member or shareholder have been infringed or are about to be infringed the rule has no application and the minority member can sue. In *Edokpolo and Company Ltd*. v. *Sem-Edo Wire Industries Ltd*.[28] the appellant, a minority shareholder holding 40 percent of the company's shares,. alleged collusion between, 2nd and 3rd respondents, the result of which was the allotment to the 2nd and 3rd respondents of shares out of the 40 percent belonging to the appellant. The Supreme Court held that the appellant minority shareholder was entitled to sue to protect its personal right to the shares held by it. In *Pender v. Lushington*,[29] a minority shareholder was allowed to sue to enforce his right to have his votes recorded at the general meeting of the company. Also, in *Nigerian Stores Workers Union v. Uzor and Others*[30], where the court found that the scale of contributions of members of the trade union was altered contrary to the rules of the union, it was held that this was an invasion of the personal rights of the members in the union for which they could sue.

4. Fraud on the Company or on the Minority (Section 300 (d))

This appears to be the most important exception. At common law, "fraud" would include dishonesty and deceit. Hence, in *Associated Registered Engineering Contractors Ltd. and Others v. Yalaju-Amaye*[31] the Supreme Court held that in going

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25 (Unreported) Suit No. FCA/L/226/83, F.C.A. decision – see Kiser Barns op cit. P. 365.

26 (1950) 2 All E.R. 1064.

27 (1909) A.C. 442; Nigerian Stores Workers Union v. Uzor (supra.)

28 (Supra

29 (1877) 6 Ch. D. 70.

30 Supra.

31 (Supra)

on a withdrawal spree from the bank account, and forging minutes of meetings to cover lack of a resolution to change the signatories to cheques, the majority had committed fraud on the company. However, under this exception, "fraud" is not restricted to its common law definition and the Supreme Court defined it in a wider sense as "any act which may amount to an infraction of fair dealing, or abuse of confidence or unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company", in which case the minority shareholder was allowed to sue. Thus, "fraud'' is used in a loose, wider and equitable sense as an abuse or misuse of power on the part of the majority or the directors, and indeed, breach of duty by directors. Consequently, no actual fraud need be proved; it may simply be presumed.[32] In this sense, it includes expropriation of the company's property or other members' property and any attempt to release the directors' from liability arising from breach of duty of good faith.

To succeed, plaintiff must prove (a) fraud on the minority and (b) that the wrongdoers are in control of the company and this prevents the company itself from bringing action in its own name.

(a) *Expropriation of the Company's Property*

In *Burland* v. *Earle*[33], the principle was stated that the majority will not be allowed to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate[34]. Hence, in *Cook* v. *Deeks*[35] where the directors diverted to themselves a contract which the company was actively negotiating, the Privy Council held that a resolution secured by the director's majority votes at the general meeting which sought to ratify this action by the directors was invalid as constituting a fraud on the minority. Also, in *Menier* v. *Hooper's Telegraph Works*[36] the defendants held a controlling interest in the company which it was alleged that they had exercised so as to compromise a pending action to their own advantage and then put the company into liquidation, leaving them in possession of the company's assets to the exclusion of the minority. It was held that such action could be entertained at the suit of the minority. Similarly, a resolution secured by the votes of the majority shareholder of the company to discontinue proceedings against the majority for breach of contract was held bad as a fraud on the minority in *Estmanco (Kilner House) Ltd*. v. *Greater London Council*[37]. The case of *Omisade* v. *Akande*[38] properly falls within this exception and the reference to "the interest of justice'' in the case must be taken as obiter. In that case, plaintiff and the first defendant were both directors and equal shareholders in the fourth defendant company. In a contract entered into between the fourth defendant and the third defendant, a U.S. based airline, it was agreed that in consideration for flight bookings of muslim pilgrims brought by the fourth defendants , the airline would pay a commission. The plaintiff alleged that the first defendant falsely represented to the

32 As in Daniels v. Daniels (supra)
33 (1902) A.C. 83
34 Nor are they entitled to give away the company's property to employees - Parke v. Daily News Ltd. (1962) Ch. 927.
35 (1916) 1 A.C. 554
36 (1874) L.R.9 Ch. App. 350
37 (1982) 1 All E.R. 437.
38 Supra

U.S. based airline with whom the fourth defendant had a contract that the fourth defendant was being wound up in order to divert the commission due to the latter to the second defendant company in which the first defendant was principal shareholder. The first defendant raised objection to the plaintiff's right to sue to redress a wrong done to the fourth defendant company. It was held *inter alia* that the first defendant had clearly committed a breach of his fiduciary duty as a director of the fourth defendant by making false representations about the company in order to divert profit from it and this amounted to a fraud on the company for which a minority shareholder could sue. It was also clear that the disagreement between the two equal shareholders was such that it would be impossible for the plaintiff to get the company to sue. The plaintiff was therefore deemed to be a minority shareholder, for the purpose of bringing a minority shareholder's action to seek redress for the wrong done to the Company. Similarly, in *Atwool* v. *Merryweather*[39] the minority successfully challenged a resolution of the general meeting which purport to authorise the directors to act in fraud of the company. This was followed in *Alexander v. Automatic Telephone Co.*[40] where directors who were the majority shareholders issued to other applicants on the term that they paid 3s per share on allotment but the directors themselves paid nothing on the shares and they did not inform the other shareholders of this fact or obtain their consent. It was held that this was a breach of their duty in that it deprived the company of the money for the shares and further it is a fraud on the minority as the directors gave themselves advantage which was not made available to other shareholders.

> Thus, the principle which may be gleaned from decided cases[41] is that a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently, or negligently, in a manner which benefits themselves at the expense of the company[42]

(b) *Expropriation of other Members' Property*

The directors and the majority are not entitled to make a gift of other member's property to the company or to themselves or to some other persons. Generally, alteration of articles by the majority must be in the interest of the company as a whole. But if the power is used to expropriate the interests of the minority in the company, this will amount to a fraud and such resolution will be null and void at the suit of the minority. We have a plethora of decided cases here. For instance, such resolution was held bad by the court at the instance of the minority who held two percent of the shares in *Brown* v. *British Abrasive Wheel Co.Ltd*.[43] This was followed in *Dafen Tinplate Co. Ltd*. v. *Llannely Steel Co. (1907) Ltd*.[44] where, by altering its articles the company empowered the majority shareholders to compel any member to sell his shares at a price to be fixed from time to time by the directors to a person (whether a member or not) determined by the directors. In an action by the minority, the court held that the company could not confer such power on the majority. In *Re Burgle Press*[45] the court also resisted a ploy by the majority to get rid of the minority by forming another company which made a take over bid to buy out the 10 percent minority shares under section 209 of the English Act. The court held that it would not allow the statute to be used as an engine of fraud by the majority. However, from the

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39 (1867) L.R.5 Eq. 464n.
40 (1900) 2 Ch. 56.
41 See Cook v. Deeks (1916) I.A.C. 554, Pavlides v. Jensen Alexander v. Automatic Telephone Co. (supra).
42 Daniels v. Daniels (supra)
43 (1919) 1 Ch. 290.
44 (1920) 2 Ch. 124.
45 (1961) Ch. 270.

decision in *Sidebottom* v. *Kershaw Lee & Co.*[46] an alteration by the majority which is aimed at getting rid of a minority competing with the company will be valid since it is in the interest of the company. This was also the approach taken in *Greenhalgh* v. *Arderne Cinemas*[47] where *Dafen Tinplate Co. Ltd*. v. *Llanelly Steel Co. (1907) Ltd*. was distinguished. In *Clemens v. Clemens Bros. Ltd.*[48] the plaintiff held 45 percent and her aunt held 55 percent of the issued shares. The latter, unlike the plaintiff, was also one of the five directors. Resolutions in general meeting were passed by the aunt's votes to issue further shares to the directors and to trustees of an employees share-ownership scheme. The result was to reduce the plaintiffs holding from 45 per cent to under 25 per cent, thereby depriving her of her power to block a special or extraordinary resolution and reducing the value of her rights under an article entitling her to pre-emptive rights if another shareholder wishes to sell. The court set aside the resolutions which were specifically and carefully designed to injure her interest by depriving her of her negative control and ensuring that she could never get control of the company.

(c) *Abuse of Power*

This is common in directors' breach of duty to act bona fide in the interest of the company and not for collateral purpose, especially in issuing shares. Two situations may be distinguished. The first, is where directors acted bona fide but for a collateral purpose such as happened in *Hogg* v. *Cranphorn Ltd*[49] *Bamford* v. *Bamford*[50] which suggest that such acts may be ratified by the majority but that action at the suit of the minority is not barred by the rule in Foss v. Harbottle[51] The second, abuse of power in bad faith for collateral purpose which cannot be ratified by the majority such as in *Cook* v. *Deeks*; *Menier* v. *Hooper's Telegraph Works* – for which an action may be entertained at the suit of the minority[52]. There appears to be a third category represented by the decision in *Tika-Tore Press Ltd*. v. *Abina*[53] which is simply anomalous, where irregular allotment of shares by directors in bad faith to their friends and themselves to secure control of the company's affairs was held ratifiable by the majority for which a suit by the minority is barred by the rule in Foss v. Harbottle.

What may be concluded from a critical appraisal of these decisions is that abuse of power either by use of majority votes or by directors breach of duty, if it constitutes a fraud on the minority or the company, whether ratifiable or not, will not bar a suit at the instance of the minority[54].

(d) *The Test of "Control"*

"Control under this exception includes majority by controlling votes, that is, *de jure* control[55] and control in management even though those in control do not hold majority shares in the company, that is, *de facto* control. An example of the latter is in

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46 (1920)1 Ch. 154.
47 (1951) Ch. 286.
48 (1976) 2 All E.R. 268.
49 (1967) Ch. 254.
50 (1968) 3 W.L.R. 317.
51 Regal (Hastings) Ltd. v. Gulliver (1942) 1 All E.R. 378
52 Re W.M. Roith (1967) 1 W.L.R. 432; Parke v. Daily News (supra), Estmanco (Kilner House) Ltd. v. Greater London Council (supra.)
53 (1973) 4 S.C. 63.
54 See Daniel v. Daniel (1978) Ch. 406 Hodgson v. National and Local Government Offers Association (1972) W.L.R. 130, Hogg v. Cramphorn Ltd. (supra); Regal (Hastings) Ltd. v. Gulliver (supra.)
55 See Ex. P. Fox (1871) 6 Ch. App. 176

Prudential Assurance Co. Ltd. v. *Newman Industries Ltd*. (No.2)[56] where Vinelott, J. extended the test to include alleged fraud committed by directors who did not exercise actual voting control, but who exercised *de facto* control. It was observed that the wrongdoers would be held to be in control if it would be futile to call a general meeting because they would "directly" or "indirectly" dominate it, or if they are shown to be able "by any means of manipulation of their position in the company to ensure that the action is not brought by the company". This is also true of *Omisade* v. *Akande*[57] where the two directors held the shares of the company equally between them. One was allowed to bring a minority shareholder's action as the other who committed fraud on the company used his position to manipulate the affairs and it was obvious that attempt to rectify the wrong at a meeting of the company called for that purpose would be frustrated by him. The decision also shows that "minority" is not restricted to numerical minority or minority shareholding; but it may simply be presumed in certain circumstances.

5. Belated Meetings (Section 300(e)

This enacts the principle in the decision in *Hodgson v. National and Local Government Officer*[58] Association where it was held that where a company meeting cannot be called in time to be of practical effect to redress a wrong done to the company a shareholder can sue. In that case, the trade union's executive council had passed a resolution which purported to mandate the union's delegates at the TUC Conference a month later to vote in a manner contrary to an earlier resolution of the union's conference. Since there was no time for the union's conference to meet again prior to the TUC Conference, the court held that, even if the Foss v. Harbottle rule applied to an unregistered trade union that could not sue in its own name, a suit at the instance of a minority member could be entertained in this situation to enable the majority to decide on the matter at a later. The Court ordered the withdrawal of the executive's direction and the delegates should vote in accordance with the union conference's earlier resolution.

6. Directors Benefitting From Negligence or Breach of Duty(Section 300(f)

This enacts the principle in *Daniels v. Daniels*[59] *and Alexander v. Automatic Telephone Co.*[60]to the effect that where directors benefit from their breach of duty a minority shareholder may be allowed to sue. It is thus an extension of (d). In Daniels v. Daniels a husband and wife were the directors and majority shareholders of a company. The company sold land to the wife for ₦4,250. which she sold for ₦120,000 four years later. There was no proof of any intention to defraud the minority shareholders. However, the court held that there had been a misappropriation of the company's land in respect of which an action would lie at the instance of the minority.

ACTIONS FOR THE PROTECTION OF THE MINORITY

1. **Personal Action** (Section 300-301)

Section 300 makes provision for a member whose personal rights as a member have been infringed to bring personal action to redress the wrong. In such a case the

[56] (1980) 2 All E.R. 841; (1981) Ch. 257.
[57] (1976) 1 S.C. 63.
[58] Supra.
[59] Supra.
[60] Supra.

rule in *Foss. v Harbottle* does not apply. *In Pender v. Lushington*,[61] Jessel, M.R. explained the position thus:

"this is an action by Mr. Pender for himself. He is a member and whether he votes with the majority or the minority he is entitled to have his votes recorded – an individual right in respect of which he has a right to sue. This has nothing to do with the question .. raised in Foss v. Harbottle and that line of cases. He has right to say, "whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refused to record my vote I will institute legal proceedings against you to compel you,"[62]

However, it is provided that the plaintiff/member is not entitled to any damages but only to a declaration or injunction to restrain the company and/or the directors from a particular act although the court may also award costs to him whether or not his action succeeds (section 301 (1) and (3).

2. Representative Action (Section 3000 – 301)

This is normally instituted by a member on behalf of himself and other affected members to enforce any rights due to them. The company will usually be joined as a defendant so that it will be bound by the judgment in the case. Unfortunately, this procedure had, in the past, been confused with a derivative action but as we shall show presently, the two actions are quite different, the latter being in the name or on behalf of the company.

The rationale for a representative action as explained by the court in *Chief Otuguor Ogamioba and Others v. Chief D.O. Oghene and Others*[63] is that those joined as co-plaintiffs have a common interest and a common grievance and the relief sought is in its nature beneficial to them.

In providing for a representative action section 301 (2) says that the plaintiff/member is not entitled to any damages but only a declaration or injunction to restrain the company and/or directors from doing a particular act although the court may award costs to him whether or not the action succeeds (section 301 (3).

3. The Derivative Action (Section 300 – 303)

This is an action in the name or on behalf of the company. Being a corporate action, the real purpose of those instituting it is to protect the interest of the company or remedy a wrong done to the company. In this action the member sues in the name or on behalf of the company against the wrongdoers, the company being a normal defendant. The action is an equitable devise to enforce the rights of the company. This is different from a personal action where the member sues on his own behalf or a representative action where he sues on behalf of himself and other members.[64] Accordingly, section 303 (1) provides that:

"an applicant may apply to court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for

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61 (1877) 6 Ch. D. 70

62 Ibid. p. 80-81; see also Yalaju Amaye v. Associates Registered Engineering Co. Ltd. & Ors. (1990) 4 N.W.L.R. (pt. 145) 442.

63 (1961) All N.L.R. 411

64 Omisade v. Akande supra; Spokes v. Grosvenor & West End Rly Terminus Hotel Co. Ltd. (1897)2 Q.B. 124, Bornu Holding Co. Ltd. v. Dipcharima (1976)1 S.C. 63; Wallersteiner v. Moir No(2) supra; Sealy, Cases and Materials in Company Law, 2nd Edn. 1978, 419

the purpose of prosecuting, defending or discontinuing the action on behalf of the company."

The processes for commencing the action are contained in section 303 (2) under which no action may be brought unless the court is satisfied that:-

(a) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court if the directors of the company do not bring, diligently prosecute or discontinue the action;

(b) the applicant is acting in good faith; and

(c) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

By section 305, an application, action or intervention under section 303 will not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the shareholders. But evidence of such approval by the shareholders may be taken into account by the court in making an order. This means that the shareholders's approval is not conclusive of the matter; an action by the minority in respect of breach of a right or duty or abuse of power by the directors or the majority will be entertained by the court whether or not such breach is ratifiable. This gives legislative approval to such cases already discussed, such as *Regal (Hastings) Ltd. v. Gulliver, Hogg v. Cramphorn Ltd,., Bamford v. Bamford, Daniels v. Daniels*; amongst others.

Section 306 makes it clear that it is for the court to decide whether or not ratification or approval by the majority can validly put an end to the minority's complaint. Accordingly, proceedings under section 303 shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the proceedings to give notice to the applicant.

Under section 304 the court has the power to make any such order or orders, as it thinks fit, including one or more of the following, that is, an order

(a) authorising the applicant or any other person to control the conduct of the action;
(b) giving directions for the conduct of action;
(c) directing that any amount adjudged payable by defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of the company;
(d) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

While an applicant is not required to give security for cost, the company may be ordered to pay interim costs to him during the proceedings (S.307)-308).[65]

CONCLUSION

From this critical appraisal of the true ambit of majority rule as presently enacted by the Companies and Allied Matters Act 1990, it is evident that in recognition

[65] Note that other aspects of minority protection or remedies are not considered here.

of the prevailing need as exemplified by existing judicial authorities, the Act has extended the exceptions beyond the common law established exceptions. However, to avoid confusion, the Act clearly omitted the so-called “interest of justice” as a separate exception thus laying to rest existing controversies on the subject. The six exceptions recognised by the Act would appear to furnish substantial means of protection of majority rights and interests in the company.

However, although the provisions of the Act on this subject may be said to be comprehensive, the flexibility with which the courts will interprete them would go a long way to justify the arduous task undertaken in furtherance of the clear intention of the legislature to reform the law on the subject.