

CERTAIN PUNCTUATIONS IN PUBLIC OFFERS AND SALE OF SECURITIES IN NIGERIA COMPANY LAW

**By
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INTRODUCTION

This paper will be treated in two phases, namely as treated in the Companies and Allied Matters Act (CAMA) 2004 and in the Securities and Investment Act (ISA) 2007, as well as in the Securities and Exchange Commission (SEC) (Rules) 2007¹. Because of the fact that the provisions of the CAMA 2004, are at variance with those of ISA 2007 and the SEC Rules 2007, the two Acts and SEC Rules will be treated differently.

The main characteristics of a public company is the fact that it can offer its securities for sale or subscription. In order to protect the investing public from the danger of losing their money in fake investments, various restrictions are placed on the invitation of a company to the public to sell or buy or subscribe to its securities. Securities for this purpose include shares, stocks, debentures, debenture stock, bonds, notes (other than promissory notes) and units under a unit trust scheme (Section 117 CAMA, 2004)².

Shares Generally Under the Companies and Allied Matters (CAMA) Act 2004

Section 117 provides that a company shall have power to issue shares, shares as aforesaid being part of the securities³. Section 118 provides that a company may where so authorized, issue classes of shares while Section⁴ 119 says that without prejudice to any special rights previously conferred on the holders of any existing shares or classes of shares, any share in a company, may be issued with such preferred, deferred, or other rights or restrictions whether with regards to dividend, return of capital or otherwise as the company may from time to time determine by ordinary resolution. Section 120 says shares of a company may be issued at a premium, whereas section 121 provides that shares of a company may lawfully be issued at a discount⁵.

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¹ Unless the context otherwise admits, reference in this chapter to the "Commission" is to the Securities and Exchange Commission Rules 2007.

² This section should now be read subject to S.1 (2) of the Nigerian Enterprises Promotion

³ *Andrews v. Mockford*, (1816) Q.B. 377

⁴ See *Government stock & Other Securities Investment Co. Ltd. v. Christopher* (1956)

⁵ *R.V. Kysant* (1932) 1 K.B. 442

Subject to Section 158 of the CAMA and by Section 122 of the CAMA, a company limited by shares may if so authorized by its articles issue preference shares which shall or at the option of the company be liable to be redeemed.

Allotment of Shares under the CAMA (2004)

By Section 124, subject to the provisions of the Investments and Securities Act⁶, the power to allot shares shall be vested in the company which may delegate it to the directors, subject to any conditions or directions that may be imposed on the articles or from time to time by the company in general meeting⁷ and at the same time by Section 127 of the CAMA⁸ and subject to Sections 135 to 138 of this Act, a company, may in its articles make provisions with respect to payments on allotments of its shares.

By Section 126, an allotment of shares made and notified to an applicant in accordance with Section 125 of this Act shall be an acceptance by the company of the offer by the applicant to purchase its shares and the contract takes effect on the date in which the allotment is made by the company⁹.

Debentures under the Companies and Allied Matters Act (2004)

The Creation of Debenture and Debenture Stock

By Section 166, a company may borrow money for the purpose of its business or object and may mortgage its undertaking, property and uncalled capital or any part thereof, and issue debentures, debenture stock and other securities, whether out right or as security for any debt, liability or obligation of the company, or of any third party. Section 166 provides that any company shall within 60 days after the allotment of any of its debentures or after the registration of the transfer of any debentures deliver to the registered holder thereof, the debenture or a certificate of debenture stock under the common seal of the company¹⁰.

In case a debenture or debenture certificate is defaced, lost or destroyed, the company at the request of the registered holder of the debenture shall issue a certified copy of the debenture or renew the debenture stock certificate on

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⁷ See *Henderson v. Lacon* (1867) L.R. 5 Eq. 249, 252

⁸ *Aaron Reef v. Twiss* (1896) A.C. 273 H.L. Per Lord Halsbury

⁹ See *Derry v. Peek* (1889) 14 App. Cas 337

¹⁰ *Peek v. Gurney* (1873) L.R. 6 H.L 377

payment of certain sum of money, and on such terms as to evidence and indemnity and the payment of the companies out of pocket expenses, of investigating evidence as the company may reasonably require.

Section 168 provides that statements to be included in the debentures are:

- a) The principal amount borrowed
- b) The maximum discount

Which may be allowed on the issue and re-issue of the debentures, and the maximum premium at which the debentures may be made redeemable and so on. By Section 169 (1) statements made in debenture or debenture stock certificate, shall be prima facie evidence of the title to the debentures of the person named therein, as the registered holder and of the amount secured thereby, while finally by Section 170, a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Investments and Securities Act 2007 No. 29

This is an Act to repeal the Investment and Securities Act 1999 and to establish the Security and Exchange Commission as the Apex Regulatory Authority for the Capital Market as well as Regulation of the Market to ensure protection of investors, maintain fair, efficient and transparent market and reduction of systemic risk and for related matters¹¹.

Part VIII: Regulation of Securities

Registration of Securities

Compulsory registration of Securities and Investment of Public Companies and Collective Investment Schemes.

This is governed by Section 54 of the SEC Rules.

By Subsection (1), all securities of a public company and all securities or investments of a collective investment scheme shall be registered with the commission, under the terms and conditions herein contained and as may be supplemented by regulations prescribed by the commission from time to time.

¹¹ Watts v. Bucknall (1903 1 /Ch. 766

Subsection (2) provides that the issuer shall file with the commission a registration statement which shall be signed, by each issuer, its chief executive officer or officers, its principal financial officer, and any person named as a member, of the board of directors or parties performing similar functions and in case the issuer is a foreign person, by its duly authorized person in Nigeria.

According to sub-section (3), a registration statement shall be deemed effective only as to the securities or investments therein, as proposed to be issued.

Sub-section (4) says that the commission shall issue a certificate of registration in respect of securities and investments registered by it, but by sub-section (5) no securities or investment of a public company or collective investment scheme, shall be issued, transferred, or sold or offered for subscription by or sale to the public without the prior registration of the securities or investment with the commission.

By the provision of subsection (6) any person who issues, transfers, sells, or offers for subscription or sale to the public, the securities or investments of a public company or collective investment schemes without the prior registration of the securities or investments with the commission commits an offence and is liable on conviction to a fine of ₦1, 000,000.00 (one million naira), or to a term of 3 years or to both fine and imprisonment.

By the provision of sub-section (7) the commission may in lieu of a prosecution under subsection (2) of this section, impose a penalty of ₦5,000.00 (five thousand naira only) for every day which the violation continues¹².

Part IX, Public Offer and Sale of Securities and Invitations to the Public Control of Invitation to the Public – Section 67 of the ISA 2007

By subsection (1) of the act, no person shall make any invitation to the public or acquire or dispose money with anybody corporate for a fixed period or payable at site whether bearing or not bearing interest, unless the body, corporate concerned is

¹² Ross v. Estates Investment Co. (1868) 3 Ch. App 682. Re London & Staffordshire, foreign Co. 1883 24 Ch. D.149, Ross Rivers & Co v. Smith 1869 C.L.R. HL

- a) a public company whether quoted or unquoted, and whether the provisions of Sections 73 to 87 of this Act are duly complied with; or
- b) a statutory body, a bank established by or pursuant to an Act of the National Assembly and is empowered to accept deposits and savings from the public or issues its own securities (as defined under this Act) promissory notes; bills of exchange and other instruments; provided that nothing in this subsection, shall render unlawful the sale of any shares by or under the supervision of any court or tribunal as may be authorized by the law¹³.

Invitation to the Public to Deposit Money by Public Companies – Section 68, ISA Act 2007

By subsection (1) a public company, making an invitation to the public, to deposit money with it, shall prior to the making of the invitation, obtain the written consent of the commission and shall only make the invitation in accordance with such conditions and restrictions as may be imposed by the commission¹⁴.

Offers for Sale Deemed to be Made by the Company – Section 70 ISA 2007

Where any company allots or agrees to allot any of its securities to any person with a view to the public being invited to acquire any of those securities, then for all the purposes of this Act, any invitation so made shall be deemed to be an invitation to the public made by the company as well as by the person actually making the invitation, and any person who acquires any such securities in response to the invitation shall be deemed to be an allottee from the company of those securities¹⁵.

Form of Application for Shares to be Issued with Prospectus Section 71

By subsection (1) and subject to the provisions of Section 76 of this Act, no person shall issue any form of application to deposit money for the purpose of subscribing to purchasing or in any way acquiring the securities for a

¹³ Derry v. Peck, ante

¹⁴ See Andres v. Mockford: ante

¹⁵ McConnel v. Write (1903) 1 Ch. 546, Clark v. Urquhart (1930) A.C. 28.

public company, unless the for is issued with a prospectus which complies with the requirements of Section 79 of this Act¹⁶.

Effective Date of Prospectus

Section 72 states that a prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall unless the contrary is proved, be taken as the date of application of the prospectus.

Section 73 (1) goes to the effect that the contents of a prospectus subject to provisions of Section 76 of this Act, every prospectus issued by or on behalf of a company or by or on behalf of any person, who is or has been engaged or interested in the formation of the company, shall state the matters specified in Part I of the Third Schedule of this Act, and set out the reports specified in Part III of that schedule and Parts I & II shall have effect subject to the provisions concerned in that schedule¹⁷.

Registration of Prospectus¹⁸

According to Section 73 (1) no prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of application, there has been delivered to the commission, a copy of the prospectus, for registration, signed by every person who is named in it as a director of the company, or by his agent authorized in writing and having endorsed on it, or attached to it, a consent, to the issue¹⁹.

Interpretation as to State Reports in Prospectus

It is in Section 83 that for the purpose of provisions of this Act, a statement included in a prospectus shall

- a) be deemed to be untrue if it is misleading in the form and context in which it is included and
- b) shall be deemed to be included in a prospectus if it is contained in the prospectus or on any report or memorandum appearing on the face of it or by reference incorporated or issued with it.

¹⁶ Nash Lynde (1929) A.C. 158; Re South of England Natural Gas Co. (1911) 1 Ch. 573; see Gower, Op. cit at p. 335

¹⁷ See generally, Palmers Company Law, para 23-167, p. 358

¹⁸ Greenwood v. Leather Shod Wheel Co. (1900) 1 Ch. 421, Aaron's Reefs Ltd. v. Twiss ante

¹⁹ Re Pacaya Rubber & Produce Co. Ltd., Birds Application (1914) 1 Ch. 562

Form of Statements in Lieu of Prospectus

It is provided in Section 84 that a statement in lieu of prospectus shall be in the form and contains the particulars set out in Part I of the Fourth Schedule to this Act and in the cases mentioned in Part II of that Schedule sets out – the reports specified therein, and the said Part I & II shall have effect subject to provisions contained in Part III of that schedule.

Civil Liability for Statements in Prospectus

By Section 85 (1), where a prospectus invites persons to subscribe for shares in a company, the persons referred to on subsection (2) of this section, shall be liable to pay compensation to all persons who subscribe for shares or debentures, relying on the prospectus for the loss or damage they may have sustained by reason of any untrue statement out of the statement included in it.

Criminal Liability for Misstatements in Prospectus

By the provision of 86(1), whereas prospectus includes any untrue statement or misstatement, any director or officer who authorized the issue of the prospectus commits an offence and is liable on conviction to a fine not less than ₦1,000,000.00, or to imprisonment for term not exceeding three years, or to both such fine and imprisonment.

Criminal Liability in Respect of Statements in Lieu of Prospectus

According to Section 87 (9), where a statement in lieu of prospectus includes any untrue statement or misstatement, any person who authorized the delivery of the statement in lieu of prospectus for registration, commits an offence, and is liable to fine or imprisonment or both²⁰.

Allotment of Securities

It is clearly stated in Section 88 that where a public offer of securities is made whether listed or not, under such rules and regulations as may be laid down by the commission, the issue and the issuing house, shall be responsible for the allotment of the securities of the company, subject to approval of such allotment by the commission, in accordance with the guideline prescribed under the rules and regulations made there under.

²⁰ See Re Scottish Petroleum Co. 1883 23 Ch. D. 413, Estates Ltd. (1911) L. N. 216

No Allotment Unless Minimum Subscription Received

A thorough looking through Section 90, will show that no allotment shall be made of any securities of a company offered to the public for subscription, unless level exceeds the minimum percentage provided by the commission from time to time.

Effect of Irregular Allotment

On the other hand, a perusal of Section 93 (1) indicates that an allotment made by a company to an applicant in contravention of the provisions, of Sections 90 and 92 of this Act shall be voidable at the instance of the applicant within one month of the holding of the statutory meeting of the company, or where the allotment is made after the holding of the statutory meeting, within one month after the date of the allotment, and allotment shall be so voidable notwithstanding the company is in the course of being wound up²¹.

The Stock Exchange Establishment

Stock exchange business started in Nigeria in 1960 with the establishment of the Lagos Stock Exchange which was incorporated in September 1960 as a private company limited by guarantee but having a share capital and permitted under Section 20 of the Companies Act to dispense with the use of the word "Limited" as the last word in its name. It started with an authorized capital of £5,000; and in 1961, the Lagos Stock Exchange Act was enacted²².

Section 3 of the Lagos Stock Exchange Act 1961 provides that:

"the business of stock broking in Nigeria in relation to stocks, shares and other securities for the time being granted a quotation by the Exchange shall be undertaken only by members of the Exchange".

The Lagos Stock Exchange was transformed into the Nigerian Stock Exchange in December 1977, and two new branches, namely, in Kaduna

²¹ Re South of England Natural Gas & Petroleum Co. Ltd.

²² Re Overend, Gurney & Co. 1987 L.R. 2 H. L. R 325

and Port-Harcourt, were established in addition to Lagos which is the main office. A third branch has now been established in Kano and the first session was held on 2nd march 1989. These branches operate as trading floors with Branch Councils, and the National Council in Lagos retains responsibility “for quotation and the regulation of and discipline in the Capital market”²³.

The membership of the Nigerian Stock Exchange is open to individuals, firms and corporate bodies registered in Nigeria.

There are two types of members, namely, “ordinary members” and “dealing members” and the latter must have been ordinary members before being elected dealing members. A dealing member is a member who is granted a license to deal in stocks, shares and other securities quoted on the Exchange, and is bound by the Rules and Regulations of the Exchange. He is generally referred to as a stockbroker.

The Stock Exchange provides a market for selling and buying of shares and securities issued by companies, governments and other statutory bodies on the basis of wide distribution of ownership, and of adequate information²⁴.

Listing Requirements

A company will only be listed on the Exchange if it has satisfied the requirements set out in the Listing Requirements. The requirements are subject to the overall supervision and control of the SEC which is charged with the function of regulating and maintaining the integrity of the securities market²⁵.

Quoted Securities

The securities are said to be quoted if they appear in the Stock Exchange Daily Official List. Such securities may be divided broadly into two, namely:

- a) government securities which include the various development Loan stocks and Treasury Bills issued by the Central Bank of Nigeria on behalf of the Federal Government, and

²³ *Sharpley v. South & East Coast Ky* (1876) 2 Ch. D. 663

²⁴ See Daily Times of March 4, 1989, at p.8, a branch was also established in Ibadan 1990

²⁵ See The Nigerian Stock Exchange Handbook, vol. III 1987/88 p. 30

- b) industrial and private securities which consist of shares and industrial loan stocks in the form of debentures and preference shares of companies.

The Stock Exchange Market

In financial parlance, the operation of the Exchange is said to consist of several markets, but the two main markets are the New Issues or Primary Market, and the Secondary Market.

The New Issues or Primary Market is concerned with the offering of new issues of securities on the Stock Exchange, while the Secondary Market is the process of buying and selling securities already owned and quoted on the Exchange²⁶.

Dealing on the Stock Exchange

All dealings on the Nigerian Stock Exchange are made through the dealing members who are the stockbrokers. Their duty is to make arrangements for the listing or quotation of stocks, shares and other securities for trade on the Exchange, to act as agents in buying and selling of securities on the Exchange and to act as advisers to their clients as regards the relevant investments on the Exchange. The members of the public can only buy or sell securities on the Exchange through them²⁷.

Second-Tier Security Market

In order to encourage intermediate companies to take advantages of the stock exchange market, the Second-Tier Security Market (SSM) was launched on 30th April, 1985. It is said to be patterned after the Unlisted Securities Market (USM) of the United Kingdom with the primary aim of providing a platform for small and medium scale business to have access to a pool of investible funds by seeking quotation. Indeed, it has been said that the main reasons given by these companies for seeking admission into SSM include the desire to raise money for expansion, to create a market for their shares and to increase public awareness about their product with the hope that this can in turn expand patronage and raise their capability to attract new business²⁸.

²⁶ See Lagos Stock Exchange Listing Requirements, p. 1 para 1.

²⁷ See The Nigerian Stock Exchange Handbook vol. III 1987/88 p. 33

²⁸ See Alile and Amao, op. cit. at p. 82

In order to enable such companies to take advantage of the market, the requirements of listing has been relaxed for the²⁹. They must, however, be public companies and all contract notes must bear a statement in the prescribed form showing that the securities are not listed.

Procedures

A company that resolves to seek admission into the SSM should submit through its sponsorship Issuing House or Stockbroker to the Exchange, an application for admission, and it must comply with the Rules of the Second-Tier Security Market³⁰.

A company admitted into the SSM is required to sign a "General Undertaking" with the Nigerian Stock Exchange in the form set out at pages 18 to 23 of the Rules of the SSM.

Conclusion

Despite the wide powers in Nigeria law given to companies to sell their shares and invite public to buy or subscribe to their securities, the companies must always show that they have genuine intention to safeguard the members of the public.

²⁹ Ibid at p.75

³⁰ See Ibid p.77 for further details