

## A COMPARATIVE ANALYSIS OF MAJORITY ACTS AND MINORITY PROTECTION IN A CORPORATE ENTERPRISE

---

**Esther Inko Abili\***  
**Matthew Omanayin Thomas\*\***  
**Isiaka Jamiu Isiaka\*\*\***

### Abstract

*This paper examines one of the most daunting challenges ever encountered in company law jurisprudence, that is, the protection of minority shareholding members within the sphere of corporate business. The far-reaching and sometimes negative actions of members having major shareholding interests have impacted on the minorities. This is due to the conferment of corporate personality on a company, which requires majority votes in a company's decision making. The paper employed the doctrinal research methodology in examining the power authorising majority acts in the locus classicus case of Foss v Harbottle. Consequently, an analysis was made on the rationale for the doctrine, the applicable reliefs open to minority members, and the position of the Nigerian legislation and judicial authorities on the principle of majority acts and minority protection vis-à-vis comparative examples in other jurisdictions. The paper found eight exceptions to the rule in favour of the minorities, and that derivative action is a veritable tool in setting straight the human 'organ' saddled with managerial roles in a company. Furthermore, it advised legal professionals to better negotiate specific clauses in the Members/Shareholders' Contract whilst on the drawing board, to further strengthen minority protection, such as right to first refusal and tag-along rights.*

### 1.0 Introduction

The protection of minority shareholders within the sphere of corporate business has posed a huge challenge in company law jurisprudence. This is especially the case due to the conferment of corporate personality on a company, which makes it distinct and separate from its members. A company as an 'artificial person', has natural persons to manage its affairs and operations in

---

\* LL.M (Rivers State University), BL (Abuja), Lecturer in the Department of Public Law, Faculty of Law, Rivers State University, and a Ph.D researcher. Tel: +234 803 541 8737; Email: esther\_abili@yahoo.com.

\* LL.B. (Kogi State University), BL (Abuja), LL.M in view (Rivers State University). An Associate in Adedipe & Adedipe (Legal Practitioners), 1c Isaac Boro Street, Old GRA, Port Harcourt. Tel: +234 806 213 2988; Email: omanayimatt@gmail.com.

\*\* LL.B. (Kogi State University), BL (Abuja), LL.M in view (Rivers State University). An Associate in Adedipe & Adedipe (Legal Practitioners), 1c Isaac Boro Street, Old GRA, Port Harcourt. Tel: +234 806 213 2988; Email: omanayimatt@gmail.com.

\*\*\* LL.B. (Rivers State University), BL (Abuja), LL.M in view (RSU). An Associate in Gray-Edge Attorneys, No.E12 Isiokpo Street, D/Line, Port Harcourt. Tel: +234 803 525 3933; Email: isiakajamiuisiaka@gmail.com.

the best manner possible, such as the Members in General Meeting and the Board of Directors.<sup>1</sup> Furthermore, legal theory conceives of a company as a democratic business organisation in which decision-making are done by a simple majority, or where specified by its Articles or a Statute, by a special majority.<sup>2</sup> However, it is not alien to find majority acts that are illegal, unfairly prejudicial and/or oppressive to minority shareholders, despite robust laws enacted to regulate company activities in Nigeria and other jurisdictions. Also, where a wrong is done to a company, it is the company that has the locus to sue to remedy the said wrong. The decision whether or not to sue lies within the purview of the majority while the minority have to abide by the said decision reached by the majority.<sup>3</sup> Thus, the popular saying that ‘majority will always have their way while the minority will have their say’, plays out when decision of the majority holds sway. Note importantly that the ‘majority’ in corporate parlance is with reference to shareholding ratio or portfolio, not members.

In this work, a cursory attempt will be made to define as well as trace the origin of the principle of Majority Acts and Protection of Minorities. We will thereafter x-ray the rationale for the doctrine, the applicable reliefs open to the minorities such as personal action, representative action, derivative action, and the position of the Nigerian legislation and judicial authorities on the said principle vis-à-vis the United Kingdom, South Africa, Ghana, and India comparative examples.

## 2.0 Conceptual Clarifications

Corporate Sovereignty evinces the idea that a company is autonomous in the management of its affairs. Thus, corporate democracy refers to the fact that it is the will of the majority that stands at every point in time and therefore represents the mind, will and intentions of the company. In other words, a single member may have the right to participate in decision making process of a company but cannot insist on having his way where it is inconsistent with that of the majority. It is only the company that is entitled to seek for enforcement of its rights or remedy any wrong done to it. This is usually expressed in decisions of the majority through resolutions, which could be by unanimity (100%), special (75%), or ordinary (51%). It is important to reiterate that the term ‘majority’ as used in corporate parlance is with reference to shareholding ratio or portfolio only, not members.

Garner,<sup>4</sup> described Majority Shareholder as one who owns or controls more than half the corporation’s stock. Majority Rule operates where a majority of a group has the power to make decisions that bind the group; in the choice of alternatives, the one preferred by the greater number is selected. It is governance by the majority of those who participate, regardless of the

---

<sup>1</sup> Clive M Schmitthoff (ed), *Palmer’s Company Law* (24<sup>th</sup> edn, Vol 1, Stevens & Sons Edinburg 1987) 975.

<sup>2</sup> Eshi Oshio *Modern Company Law in Nigeria* (Lulupath Publications 1995) 195.

<sup>3</sup> *Ibid.*

<sup>4</sup> Bryan A Garner (ed), *Black’s Law Dictionary* (8<sup>th</sup> edn, West Group 1999) 975, 1408.

number entitled to participate.<sup>5</sup> Majority rule evinces the principle that in a group of individuals, the majority has the power to make decisions that will bind all other members of the same group. It may also be described as a system of politico-organisational procedure which allows the majority to dictate the pace of things within the political setup geared towards the advancement of its objectives.<sup>6</sup>

Conversely, the Companies Act of India, 2013,<sup>7</sup> states that a minority shareholder is one who holds few number of shares in the company less than 50%, so they are ineligible to exercise any power or authority in the company's management. A minority shareholder is a shareholder who owns less than half the total shares outstanding and thus cannot control the corporation's management or single-handedly elect directors.<sup>8</sup>

### 3.0 Origin of the Principle of Majority Rule

The rights bestowed by membership of a company are either of two kinds: personal rights or corporate rights. Personal rights are specifically attached to the status of the membership. Corporate rights, however, are those rights exercisable and enforceable solely by the company itself. Put differently, corporate rights are those not exercisable by an individual member but by several individual members, through resolutions. Thus, corporate sovereignty evinces the supremacy and independence of the company in the management of its affairs. Corporate democracy always recognizes the will of the majority as representing the intention, mind, and will of the company. Consequently, though an individual member may have a say in decision making, he cannot have his way when it does appear inconsistent with those of the majority members of the company.

The rule of corporate democracy dates to the nineteenth century with the non-interference of chancellors in the internal regulation of partnerships, out of respect for their internal remedial mechanisms especially in the event of mismanagement, save for their dissolution. This rule later received judicial backing in the locus classicus case of *Foss v Harbottle*,<sup>9</sup> where two minority shareholders of Victoria Park Company, as Plaintiffs, filed an action on behalf of the company against the directors and promoters over an alleged sale of properties of the said company at an inflated rate. The reliefs sought by the Plaintiffs, *inter alia*, was for the guilty parties to be held accountable to the company and a receiver appointed. The court, in dismissing the claim, held that when a company is wronged by its directors, it is only the company that has the *locus standi* to sue. This principle was later well-articulated by Jenkins L.J. in *Edwards v Halliwell & Ors*,<sup>10</sup> thus:

---

<sup>5</sup> *Ibid.*

<sup>6</sup> David Ejesu *Company Law: Majority Rule and Minority Protection* available at [www.academia.edu](http://www.academia.edu) accessed on 17 February 2023.

<sup>7</sup> (CA 2013) ss 235, 244.

<sup>8</sup> (n 4) 1408.

<sup>9</sup> [1843] 2 K.B. 461.

<sup>10</sup> [1950] 2 All E.R. 1064, 1066

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 the 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 done, then *cadit quaestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgement, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.

It should be mentioned that two rules were established from the judicial pronouncements *to wit*:

1. The proper plaintiff rule which is to the effect that the wrong done to the company may be righted by the company alone, thereby heralding the doctrine of corporate personality. Consequently, it is for the company to complain by suing the alleged wrongdoer(s). The company, as the proper plaintiff, is the majority.<sup>11</sup>
2. The majority rule which is to the effect that where the alleged wrong can be ratified by a simple majority of members in general meeting, the court will not interfere.<sup>12</sup> This is because it is not the business of the court to interpret internal commercial matters.

### 3.1 Justification for the Majority Rule

The rights conferred by virtue of being a member of a company may be personal or corporate. Personal rights encapsulate the relationship of an individual member to the company as created by the membership contract. Corporate rights are those rights exercisable and enforceable by

---

<sup>11</sup> (n 1) 979.

<sup>12</sup> David Ejesu (n 6); Eshi Oshio (n 2).

the company itself. Those rights are exercisable, not by an individual member, but by several individual members (the majority shareholders) through resolutions. The rationale for the rule, amongst others, are:

1. To affirm the corporate personality concept. Thus, if the company is separate and distinct from its shareholders and a wrong is supposedly done to it, it stands to reason that it is no business of the individual or minority shareholders to seek to right the said wrong.<sup>13</sup> The company remains the proper and right person to seek a redress.
2. To maintain the self-regulatory powers of the company, especially in periods of crisis where the majority can ratify any irregularities. In the circumstance, the court always insists that the majority are the only persons who can complain that a thing was done irregularly since the power of rectification lies with them.<sup>14</sup>
3. To avoid a multiplicity of suits and futile actions. This prevents the affairs of the company to be free from oppressive litigation by the minorities as well as a breakdown of the company.<sup>15</sup> In *Macdougall v Gardiner*,<sup>16</sup> Mellish L.J. succinctly stated that if every irregularity in the company's affairs gives right to every member of the said company to file an action, should there exist a cantankerous member, or one who loves litigation, every irregularity will be litigated. However, if the company should bring an action, it must be predicated upon the consent of the majority, which if not gotten, such litigation will not go on.
4. To avoid inordinate waste of time and resources. It goes without saying that any such suits will impact negatively on the finances of the company, which becomes inimical to it staying afloat as a going concern.

#### **4.0 Domestication of the Rule in *Foss v. Harbottle* and Exceptions Thereto Across Various Jurisdictions**

In Nigeria, the rule in *Foss v Harbottle* received statutory approval under section 341 of the Companies and Allied Matters Act.<sup>17</sup> It states thus,

Subject to the provisions of this Act, where an irregularity is made 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.

<sup>13</sup> Deji Sasegbon, *Nigerian Companies and Allied Matters Law and Practice* (1<sup>st</sup> edn, DSc Publications Limited 1991) 474.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> (1875) 1 ChD 13.

<sup>17</sup> 2020 (CAMA 2020).

In the case of *Onuekwusi v R.T.C.M.Z.C.*<sup>18</sup> the Supreme Court, in deciding the proper plaintiff where wrong is allegedly done to a company, held:

In the realm of company/corporate law, the principle of law enunciated in the case of *Foss v Harbottle (1843) 2 Hare 461*, in relation to *locus standi*, that, subject to certain exceptions, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or an association of persons is the company or association of persons itself and not a shareholder or member of the association. Such a shareholder or member of the association would only be fighting the suit of company or the association for which he has no *locus standi*.

Nonetheless, there are exceptions to this honourable rule, *to wit*:

- i. Illegal and/or *ultra vires* act.<sup>19</sup> This is strictly limited to fraudulent acts or omissions perpetrated by the Directors, thereby giving rise to a derivative action claim from minority members.<sup>20</sup>

In the United Kingdom, the Companies Act 2006,<sup>21</sup> provides as follows:

A derivative claim... may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The cause of action may be against the director or another person (or both).

It is submitted that the courts in the United Kingdom have made a radical departure from the anachronistic common law stance where minorities are subjugated. In *Re Unisoft Group Ltd (No 3)*,<sup>22</sup> the English court held that the right of a shareholder is inherent in his status as a shareholder and is separate from the rights of the company, which by no means is extinguished by the nature of the relationship the company has with its members.

- ii. Passing by ordinary resolution instead of special resolution.<sup>23</sup> The Majority Rule can be obviated where a statutory provision, which stipulates that an act be done by special resolution, (a measure designed to protect the minority) is breached, that is, carried out by ordinary

---

<sup>18</sup> [2016] 6 N.W.L.R. [PT 1243] 341, 361, *per* Muhammad, J.S.C.

<sup>19</sup> (n 17) s 343 para (a).

<sup>20</sup> *Ibid*, s 346(2).

<sup>21</sup> (UKCA 2006) s 260(3); *cf* s 994.

<sup>22</sup> (1994) 1 BCLC 629.

<sup>23</sup> (n 17) s 343 para (b).

resolution (51% votes). It was held in *Edwards v Halliwell*,<sup>24</sup> that a resolution for increasing members' subscription was invalid as it lacked the requisite two-third majority resolution.

iii. Infringement of personal rights of a member.<sup>25</sup> This is only actionable in a personal capacity, not derivatively. However, balance must be applied before this right could be properly protected. For instance, in *MacDougall v Gardiner*,<sup>26</sup> it was held that if an individual member could bring an action over every infringement, and there exists one cantankerous member, or one member who loves litigation, then it will be litigation unending. In contrast, the decision in *Pender v Lushington*,<sup>27</sup> is to the effect that each member has a personal right to be taken cognisance of with his vote, and he reserves the right to bring an action in his name or that of the company to protect that right. Further, pursuant to section 344(1)(2), the available entitlement of an aggrieved minority member includes pecuniary damages, declaratory and/or injunctive reliefs.

iv. Fraud.<sup>28</sup> This may include expropriation or looting of the company's property, obtaining certain favours through some corrupt dealing with or in respect of the company's property, the directors appropriation to themselves of company's contracts and thereafter purport to ratify their illegal act at general meeting, the making ill-motivated gifts of company's property by the directors and/or controlling shareholders, directors negligently benefitting themselves at the company's expense, and so on. In *Megarry VC in Estmanco (Klner House) Ltd v Greater London Council*,<sup>29</sup> the court declared that 'an abuse or misuse of power' could fall within the framework of fraud on the minority.

v. Where the company's meeting cannot be beneficially held.<sup>30</sup> Since every Notice of Meeting is made by the 'Order of the Board', where, in the unlikely event, all members of the board of directors are dead or not physically accessible, this exception applies.

vi. Where the directors derive benefits from their breach of duty.<sup>31</sup> The minority members must suffer, therefore. Consequently, an action will only lie for a restraining declaration or injunction against those defaulting directors simpliciter, but no action in damages will succeed herewith.

Interestingly, Ghana makes no provision for the majority rule in the Companies Act 2019.<sup>32</sup> However, it makes similar provisions with section 343 CAMA 2020 as replicated below:

---

<sup>24</sup> (n 10).

<sup>25</sup> (n 17) s 343 para (c).

<sup>26</sup> (n 16).

<sup>27</sup> (1877) 6 ChD 70.

<sup>28</sup> (n 17) s 343 para (d).

<sup>29</sup> (1982) 1 All ER 437.

<sup>30</sup> (n 17) s 343 para (e).

<sup>31</sup> (n 17) s 343 para (f).

<sup>32</sup> (GCA 2019) s 201(1) paras (a)(b); cf s 218.



The court may, on the application of a member or director of a company, grant leave to that member or director to bring proceedings in the name of the company or intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, discontinuing the proceedings on behalf of the company or a subsidiary of the company, as the case may be.

It is further provided that the court may, by injunction, restrain the company from doing an act or entering a transaction which is clearly illegal or beyond the power or capacity of the company or which infringes a provision of the constitution of the company.<sup>33</sup>

vii. Petition for winding up under the just and equitable rule. The CAMA 2020,<sup>34</sup> provides that an application to the court for an administration order in respect of a company may be made by either of the following persons:

- (a) The company
- (b) The directors of the company
- (c) One or more creditors of the company
- (d) The designated officer of the Federal High Court appointed to act as a receiver
- (e) A combination of the persons listed in paragraphs (a) –(d).

On hearing the application, the court may treat it as ‘a winding-up petition.’<sup>35</sup> Furthermore, ‘a company may be wound up by the court if the court is of opinion that it is just and equitable that the company should be wound up.’<sup>36</sup> Moreover, an attempt at protecting minority members is the fact that such application may come from the afore listed parties either ‘together or separately.’<sup>37</sup>

viii. Illegal or unfairly prejudicial and oppressive conduct.<sup>38</sup> Karibiyi Whyte,<sup>39</sup> in *Ogunade v Mobile Films (West Africa) Limited*, in explaining the term, held that, ‘The oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful, and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time.’

---

<sup>33</sup> (n 32) s 218(1) para (a).

<sup>34</sup> (n 17) s 450(1).

<sup>35</sup> *Ibid*, s 451(1)(e).

<sup>36</sup> *Ibid*, s 571(f).

<sup>37</sup> *Ibid*, s 573(1)(h).

<sup>38</sup> (n 17) ss 353-356.

<sup>39</sup> (1976) 2 FRCR 10.



It is apposite to state, from the decision of the Supreme Court in *Williams v Williams*,<sup>40</sup> that an isolated act of oppression is not sufficient to give right to a claim for illegal or unfairly prejudicial and oppressive conduct contained under Section 354. It should be noted that acts, by themselves, are not exhaustive; omissions are inclusive.

The India Companies Act 2013,<sup>41</sup> likewise states:

Any member of a company who complains that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interest of the company... may apply to the Tribunal....

Similarly, in South Africa, by section 163(1) of the Companies Act 2008,<sup>42</sup> the provision of relief from abuse of separate juristic personality of company goes as follows:

A shareholder or a director of a company may apply to a court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

Whilst these ouster provisions may not appear to diminish the interests of majority members of the company in whom power is vested to make decisions that are binding to all concerned. However, it could be submitted that majority acts are no longer business-as-usual. Certainly, they have greatly lost their stronghold and validity in developing countries such as South Africa, Ghana, and India. The ouster clause is adequately provided for, as robustly stated above, under sections 994-999 of UKCA 2006; section 163 of SACA 2008; sections 201 & 218 of GCA 2019, and sections 241-246 of ICA 2013. Essentially, therefore, the aim of these ouster provisions in the jurisdictions afore listed, is to protect the interests of minority members.

## **5.0 Persons Entitled to Bring an Application in Nigeria under Sections 353-355 CAMA 2020 and the Class of Orders the Court has Inherent Powers to Make**

The following persons are so entitled to file an action at the Federal High Court over conducts of directors that are illegal or unfairly prejudicial and oppressive:

---

<sup>40</sup> (1995) 2 SCNJ 26.

<sup>41</sup> (ICA 2013) s 241(1) para (a).

<sup>42</sup> (SACA 2008) s 165(1)(2).

- i. A Member.<sup>43</sup> This includes both a representative of a deceased member and any person to shares have been transferred or transmitted by operation of law,<sup>44</sup> such as a trustee in bankruptcy.<sup>45</sup>
- ii. A Director.<sup>46</sup>
- iii. A Creditor.<sup>47</sup>
- iv. The Corporate Affairs Commission.<sup>48</sup>
- v. Any other person, who in the Court's discretion, has a reason to make an application.<sup>49</sup>

In like manner, section 165(1) of SACA 2008 provides:

Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished... a person may serve a demand upon a company to commence or continue legal proceeding, or take related steps, to protect the legal interests of the company...

In consequence to an application by any of the afore-mentioned applicants, the court may make an order for any of the following: the winding up of the company; a purchase of the share of any member by the company; the company to institute, prosecute, defend or discontinue an action or authorise a certain member to take up the action on its behalf; the setting aside of a contract to which the company is supposedly a party; the CAC to investigate the affairs of the company, the appointment of a receiver or a receiver/manager to cater to the company's property, restraining a director from continuing a specific conduct, and so on.<sup>50</sup>

## 5.1 Types of Actions

1. Personal or Individual Action: This refers to an action instituted by a member for a redress due to a breach of his individual rights.<sup>51</sup> In *Pender v Lushington*,<sup>52</sup> it was held that where it is established that there is a breach of an individual's rights, the aggrieved has the *locus* to bring an action in his personal capacity, without approval or consent of any other member. Besides, injunctive, and declaratory reliefs, an aggrieved minority may be entitled to an award of pecuniary damages.<sup>53</sup>

---

<sup>43</sup> (n 17) s 353(1) para (a).

<sup>44</sup> *Ibid*, s 345 paras (a)(b).

<sup>45</sup> Lee Roach, *Company Law* (Oxford University Press 2019) 398; *cf* Companies Act 2006, s 994(2).

<sup>46</sup> (n 17) s 353(1) para (b).

<sup>47</sup> *Ibid*, s 353(1) para (c).

<sup>48</sup> (CAC) *Ibid*, s 353(1) para (d).

<sup>49</sup> *Ibid*, s 353(1) para (e).

<sup>50</sup> (n 17) s 355(1)(2).

<sup>51</sup> *Ibid*, s 343 para (c).

<sup>52</sup> (1877) 6 CH 701.

<sup>53</sup> (n 17) s 344(1) para (b).

2. Representative Action: This is an action brought by a member on behalf of a group of members, and with their consent, seeking redress for the violation of rights common to them. This prevents multiplicity of actions.<sup>54</sup>
3. Corporate Action: This is often instituted by the company itself, to seek the enforcement of a right vested on it and/or to seek redress for a wrong done to it. Equally pertinent is the fact that for a corporate action to be validly instituted, the condition precedent thereto must be satisfied, that is, a resolution of the Board of Directors in General Meeting.<sup>55</sup>
4. Derivative Action: The UKCA 2006 defines derivative claim, also known as Common Law Derivative Claim, as proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.<sup>56</sup> The application for leave to commence a derivative action in the UK is a two-way procedure. By section 261 UKCA 2006, to bring a derivative action, an applicant must show a *prima facie* case to grant leave of court to so proceed with the claim. In the second lap of the procedure, the court requires the company to furnish pieces of evidence for the court to determine whether the claim will continue. Amongst the factors the court will consider includes: good faith, duty to act in the overall interest of the company, whether the wrong is of such nature that may be remedied by ratification by the company itself, whether the company truly entertains no interest to bring the action, the availability of alternate remedy, and the independent views of other members of the company.<sup>57</sup> It is only after the mini trial pulls through, will the actual derivative suit lie.

In *Agip (Nigeria) Ltd v Agip Petroleum International & 7 ors*,<sup>58</sup> Adekeye, JSC explained derivative action to be the same as shareholder derivative claim, which is initiated by a shareholder on behalf of a company against a third party. Often the third party is an insider of the corporation such as the directors or executive officers.<sup>59</sup> This type of action is unique because it is an action which the company alone, is empowered to maintain ordinarily pursuant to the CAMA 2020. However, the CAMA empowers a minority member, with leave of court to institute an action in the name or intervene in an action by the company where the wrongdoers are in control and will not act.<sup>60</sup> Gower,<sup>61</sup> proffered a resounding rationale for the permission of this action as follows:

---

<sup>54</sup> Alan Dignam and John Lowry, *Company Law* (11<sup>th</sup> edn, Oxford University Press 2018) 185.

<sup>55</sup> (n 17) s 259.

<sup>56</sup> UKCA 2006 s 260(1).

<sup>57</sup> UKCA 2006 s 263.

<sup>58</sup> (2010) 5 NWLR (Pt 1187) 349.

<sup>59</sup> *Ibid.*

<sup>60</sup> (n 17) s 346.

<sup>61</sup> Gower, *Principles of Modern Company Law* (5<sup>th</sup> edn, London: Sweet and Maxwell) 593.

If anyone other than the company is allowed to appear as plaintiff, it is an anomaly allowed only as a matter of grace to prevent serious wrong from going un-remedied because the wrongdoers control the company...Its true nature is that the individual member sue on behalf of the company to enforce rights from it.

Derivative action, therefore, is a ‘mere matter of procedure in order to give a remedy for a wrong which otherwise would escape redress.’<sup>62</sup>

In Nigeria, the laws regulating derivative proceedings are the CAMA 2020 and the Company Proceedings Rules.<sup>63</sup> In *Agip (Nigeria) Ltd v Agip Petroleum International & 7 ors*,<sup>64</sup> it was held that the court will only be satisfied to grant leave to proceed with a derivative suit when it is shown that the wrongdoers are the directors who are in control of the company and will not take necessary action, the said defaulter directors are given reasonable notice by the applicant of his intention to bring the application as well as a factual basis for the claim and the actual or potential damage caused to the company, the applicant is acting in good faith, and it appears to be in the best interest of the company.<sup>65</sup> By Rule 2(1) of the CPR 1992, such an application shall be made by originating summons. Hence, the appellants’ appeal to the Supreme Court was lost because the suit, albeit commenced via writ of summons, was subsequently attached with an *ex parte* application seeking leave to institute a derivative action in the name of the company. The fact that the application for leave was made *ex parte* was construed as a clear denial of the alleged defaulting directors’ constitutional right to fair hearing guaranteed by Section 36(1) of the 1999 Constitution.<sup>66</sup> Therefore, it is significant to state that since it is the company that is suing for the protection of its corporate right, albeit through a minority member, it is usually joined as both plaintiff and defendant in the suit to be bound by the judgement. The proceedings should be initiated *via* originating summons.

## 6.0 Conclusion and Recommendation

In *Olawepo v S.E.C.*<sup>67</sup> the appellate court described the unique role of directors as follows:

The Directors and the Managing Director are in the eyes of the law, the directing mind and will of the company. Notwithstanding that a company in law is a person distinct from the directors, a director is a person appointed or elected according to law and authorised to direct and manage the

<sup>62</sup> *Ibid*; Adenyua I Gabriel, ‘A Perspective on Shareholder Rights Action under CAMA and the Judicial Attitude in Nigeria’ [www.researchgate.net](http://www.researchgate.net) accessed 19 February 2023.

<sup>63</sup> 1992 (CPR 1992).

<sup>64</sup> (n 58).

<sup>65</sup> CAMA C 20 LFN 2004 s 303(2), now CAMA 2020 s 346(2).

<sup>66</sup> (n 58).

<sup>67</sup> [2011] 16 NWLR. [PT 1272] 122, 145, *per* Nwodo, J.C.A.

affairs of the company. He acts as one of the members of a board with power to bind the company.

The majority rule principle confers power on those persons holding majority of shares in a corporate entity. Under the division of powers between the Members in General Meeting and the Board of Directors, it is the latter who are saddled with managerial duties and decision-making for the interest of the company and thus is the proper agency to institute an action, in the event of any wrong done on behalf of the company.<sup>68</sup> Where the directors are in themselves the wrongdoers, it poses a challenge how such alleged wrong done by them could be righted. Since the wrongdoers (who oftentimes are majority shareholders and/or directors) will vote against bringing up a court action, it does appear that such wrongdoing will be overlooked and the wrongdoers, unpunished.<sup>69</sup> Such was the harshness the rule in *Foss v Harbottle* occasioned on minority shareholders and/or members as well as on a company.

However, contemporary strides in corporate governance have prevailed to mitigate the frustrations of the past suffered by the minorities, such that at special occasions, a minority member could bring a derivative action against or on behalf of the company, despite the hitherto overriding opinions of the majority.

In the circumstance, this lone recommendation is hereunder suggested:

1. To further strengthen minority protection and prevent the rather burdensome procedure at securing leave to bring a derivative action in court, it is germane that corporate lawyers duly negotiate specific clauses in the Members/Shareholders' Contract in such professional manner that ensures the protection of minorities' interests in key areas such as right to first refusal, tag-along rights, consent duly obtained before any increase in liability, voting rights, pre-emptive rights, share transfer restrictions, rights of first offer, and so on.

---

<sup>68</sup> (n 2) 197

<sup>69</sup> *Ibid.*