

# THE EFFECT OF SECTION 11 BOFIA ON THE RECTIFICATION OF THE REGISTER OF MEMBERS- A NIGERIAN COMPANY LAW PERSPECTIVE

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## Abstract

The law requires the company to keep a register which records information about members of the company and their shareholding. In the keeping of the register, errors are bound to occur and sometimes disputes could result from those records. The courts are given broad power under the companies statute to rectify the register, but the exercise of that power is now restricted in Nigeria by section 11 of the Banks and other Financial Institutions Act of 1991 (BOFIA) in relation to banks. Two superior courts in Nigeria in two different cases respectively interpreted section 11 of the BOFIA and pronounced on its relationship with the Companies Act arriving at conflicting decisions which are bound to lead to further confusion and injustice in some cases as the courts continue to abide by the rules of precedents. The paper examines those decisions of the courts in the context of the statutory provisions interpreted and applied in those cases with a view to straightening the legal position as would make those decisions more acceptable and reliable as guides to future developments of the law.

Keywords: BOFIA, Court, Shareholders

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## 1 Introduction

An essential condition for acquiring membership status in a company in those jurisdictions where such as in Nigeria where there is no distinction between certificated and uncertificated shares is the entry of a person's name on the register of members. Until this is done, the person cannot in the strict sense be referred to as a member of the company. It is only when a person's name is entered on the register of members that the rights of membership and other relationships between the member and the company are fully established.

The Nigerian Companies and Allied Matters Act of 1990 (CAMA) requires every company to keep the register of its members in which shall be entered the names and addresses of members, the number and classes of shares held by each member, the amount paid and agreed to be considered as paid on the shares of each member. The date on which a person is registered as a member and the date on which he ceases to be one shall also be recorded.<sup>4</sup>

The register of members need not be in any particular form. It may be in bound books or by recording in any particular way, such as storage of the information in a computer or other electronic device so long as the material information can be reproduced in legible form and is so reproduced for purposes of inspection and supply of copies thereof.<sup>5</sup> Although the

Nigerian law, unlike its counterpart in the UK, does not bear any express provision on this pattern of recording, the courts in Nigeria seem favourably disposed to that approach. In *International Agric Ind & Anor v Chika Brothers Ltd*<sup>6</sup> the Supreme Court of Nigeria held that the words 'to enter in a book' means to record some thing in that book. Accordingly, minutes book need not be kept in a hand book, but may be recorded in loose leaf books, scrap books or pasted into a book kept by the company or in any other manner according to accepted usage provided that an adequate precaution is taken against falsification and facilitation of discovery. The point made by the court is that once the essence of keeping of the register is satisfied, the manner in which it is kept does not have any material consequence.

A company having more than fifty members is additionally required to keep an index of members.<sup>7</sup> This will enhance discovery of the members of the company and their entitlements especially in public companies where there are large number of members holding varying number of shares.

The object of the register of members is to provide information about the particulars of members of the company and their shareholding.<sup>8</sup> Keeping the

<sup>6</sup> [1990] 1 NWLR (pt. 124) 70.

<sup>7</sup> S. 85 CAMA, s. 150 UK CA 2006.

<sup>8</sup> In *Gomes-Sebastiao v Quarry Cats (Pty) Ltd* [2010] ZAGPJHC 103 (Saflii) para 24 Claassen J stated that the importance of the register is to be found in the fact that all who are reflected therein are regarded as members of the company. See also Stephen Girvin, Sandra Frisby and Alastair Hudson, *Charlesworth's Company Law* 18<sup>th</sup> ed (London: Sweet & Maxwell, 2010) at 298 where the authors referred to the register as the document of title to shares as

<sup>4</sup> S. 83(1) CAMA. See also s. 113 UK Companies Act, 2006, s. 103 South African Companies Act 61 of 1973 (now repealed).

<sup>5</sup> See s. 1135(1)(2) UK CA 2006.

register is advantageous to the company as it enables the company to know its members when dealing with matters involving members such as sending notices of meetings and payment of dividends. It also helps members (and non members) to know who are the other members of the company. The presence of a particular name on the register may induce another person to invest or refrain from investing in the company. The importance attached to the register of members has led to its being described as the document of title to the shares as against the share certificate which is merely an acknowledgement on the part of the company that the name of the person mentioned in it is duly recorded in the register.<sup>9</sup> This assertion should however be seen as merely comparing the evidential values of the register with the share certificate, thus suggesting that the former is stronger evidentially than the latter.

The register of members merely records shareholding and not title. The names appearing on the register may not in fact be those of the actual owners of shares in the company<sup>10</sup> as the register does not record the status in which a member holds shares in the company.<sup>11</sup> Indeed the right to be on the register could exist independently of share ownership; hence a person with a forged transfer certificate could have his/her name on the register with all the rights appertaining to shareholding while issue of ownership of the shares is contested in legal proceedings.<sup>12</sup> The realization of the vulnerability of the register in terms of the accuracy of its records informs the position of the law that declares the register as *prima facie*, instead of conclusive, evidence of the matters required by law to be recorded in the register.<sup>13</sup> This legal position creates room for the matters recorded in the register to be challenged and for the courts to order the rectification of the register in appropriate cases.

## 2 Essence of rectification of register

A rectification, whatever manner it takes, is aimed at restoring the parties to their originally intended position which has been erroneously captured in the resultant document. The power of rectification is an equitable power given to the courts to give effect to the intentions of the parties through the correction of

against the share certificate which is merely an acknowledgement by the company that the name of the person mentioned is recorded in the register.

<sup>9</sup> See *Re Baku Consolidated Oilfields Ltd* [1994] 1 BCLC 173. See *Charlesworth's Company Law* note 5 above at 145 & 298.

<sup>10</sup> *Gomes-Sebastiao v Quarry Cats (Pty) Ltd* [2010] ZAGPJHC 103 (Saflii) para 25.

<sup>11</sup> See s. 86 CAMA, s. 126 UK CA 2006.

<sup>12</sup> *Jeffery v Pollak and Freemantle* 1938 AD 1 at 18, *Davies v Buffelsfontein Gold Mining Co Ltd & Another* [1967] 4 All SA 360 (W) at 363.

<sup>13</sup> See s. 127 UK CA 2006, s. 91 CAMA. See also *Alberta Rolling Mills Co. v Christie* 58 SCR 208 at 215, *Reese River Silver Mining Co. v Smith* (1869) LR 4 HL 64 at 80, *Re Briton Medical and General Life Association* (1888) 39 Ch D 61 at 72.

mistakes that obstruct the true intention behind the document's formation.<sup>14</sup> Rectification is not intended to make contract for the parties where none exists.<sup>15</sup> Reference is usually made in this regard to the famous statement of James VC in *Mackenzie v Coulson*<sup>16</sup> that "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contract".

The role of the court in the rectification process is corrective and not speculative. Rectification does not apply to instances of ambiguity or mistaken assumptions, or even ignorance as the essence of rectification is to ensure that the instrument contains the provisions which the parties actually intended it would have contained had they been better informed.<sup>17</sup> As an equitable remedy, the court's exercise of power of rectification is discretionary and must be informed by a 'convincing proof'<sup>18</sup> that the parties had a common intention which existed and remained unchanged before the making of the formal document that erroneously captured that intention.<sup>19</sup>

## 3 Rectification of the register of members under the Companies Act

The power of the court to rectify register of members is contained in section 90 of the CAMA which provides as follows:

(1) If-

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person

<sup>14</sup> *McPeake v Canada (Attorney General)* 2012 BCSC 132 (CanLII), *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd* 2002 SCC 19 (CanLII), *771225 Ontario Inc v Bramco Holdings Co* 1994 CanLII 7240 (ON SC), *Juliar v. Canada (Attorney General)* 1999 CanLII 15097 (ON SC), *Rose v. Rose* 2006 CanLII 20856 (ON SC).

<sup>15</sup> *Bank of Montreal v Vancouver Professional Soccer Ltd* 1987 CanLII 2588 (BC CA), *257955 BC Ltd v Capital Financial Securities Inc* 2003 BCSC 889 (CanLII).

<sup>16</sup> (1869) LR 8 Eq 368 at 375.

<sup>17</sup> John McGhee, *Snell's Equity* 30<sup>th</sup> ed (London: Sweet & Maxwell, 2000) at 696. See also *Council of the Wasauksing First Nation v Wasausink Lands Inc.* 2004 CanLII 15484 (ON CA).

<sup>18</sup> A standard of proof which was initially construed by courts as evincing an intermediary between criminal and civil standards of proof. See *Josecelyne v Nissen* [1970] 1 All ER 1213 (CA), *Peter Pan Drive-In Ltd. v Flambro Realty Ltd* (1978) 22 OR (2d) 291, 93 DLR (3d) 221, affirmed 26 OR (2d) 746, 106 DLR (3d) 576 (CA), *257955 BC Ltd v Capital Financial Securities Inc.* 2003 BCSC 889 (CanLII), *Council of the Wasauksing First Nation v Wasausink Lands Inc.* 2004 CanLII 15484 (ON CA), *Bank of Montreal v Vancouver Professional Soccer Ltd* 1987 CanLII 2588 (BC CA), but was rejected by the Supreme Court of Canada in *F.H. v McDougall* 2008 SCC 53 (CanLII) where the court held that in Canada there is only one civil standard of proof at common law and that is proof on the balance of probabilities. See also *McPeake v Canada (Attorney General)* 2012 BCSC 132 (CanLII).

<sup>19</sup> *Council of the Wasauksing First Nation v Wasausink Lands Inc.* 2004 CanLII 15484 (ON CA),

having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may refuse the application, or order rectification of the register and payment by the company of any damages sustained by the party aggrieved.

(3) On an application under this section, the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members and alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.<sup>20</sup>

The broad reach of this provision was alluded to by the Nigerian Court of Appeal in *FATB v Ezegebu*<sup>21</sup> where Kalgo JCA emphasized that the section empowers the court to rectify the register of any company and the court can for this purpose, generally consider or decide any question necessary or expedient for the determination of that issue. The provision must not however be misconceived as conferring exclusive power on the court to rectify company's register as is implicit in *FATB* where Sulu-Gambari JCA held that "[t]he C.B.N. had already cancelled Exhibit 'B' [one of the disputed registers of members] which action was also invalid in that it is the court by virtue of section 91 [sic] of the Companies and Allied Matters Act that can effect such rectification".<sup>22</sup> Companies are generally not precluded from rectifying errors in their own register unless there is a dispute arising, or potential dispute that could arise as a result of such rectification.<sup>23</sup> In doubtful cases, however, recourse to judicial protection might be essential.

A similar provision in the South African Companies Act was interpreted by the South African court in *Gomes-Sebastiao v Quarry Cats (Pty) Ltd*<sup>24</sup> specifically as concerned with the title to be on the share register and not with ownership of shares in the company, but that the court is empowered by the

provisions of section 115(3)<sup>25</sup> to determine the issue of ownership. The distinction between 'title to be on the register' and 'ownership of shares' implies that being entitled to be on the register of members is not synonymous with the ownership of shares. This distinction was positively demonstrated in the decision of Corbett J in *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd and Others*<sup>26</sup> where he held:

*A Court hearing such an application may, therefore, quite properly confine itself to the minor and direct dispute as to whether the register should be rectified or not and leave it to the parties thereafter to debate the question of ownership in a trial action. On the other hand, in terms of sub-sec. (3), the Court is empowered to investigate all questions in dispute between the parties and would, accordingly, be entitled to determine the issue as to ownership, if so advised.*

The courts have shown some reluctance in some other cases, and understandably so, to delve into issues of ownership of shares while hearing applications seeking the rectification of register. This is in realization of the fact that the right to be on the register could exist independently of share ownership,<sup>27</sup> and that some undisclosed private arrangements could have a bearing on the capacity of the registered holder of shares.<sup>28</sup> Disputes relating to ownership of shares could therefore be conclusively adjudicated between the registered holder of shares and the beneficiary or the alleged owner without the involvement of the company.

These two broad aspects of the power of the court relating to the rectification of the register of members will form the basis of the discussion of the Nigerian courts' interpretations of section 11 of the Banks and Other Financial Institutions Act 1991 (BOFIA).<sup>29</sup>

#### 4 Impact of Section 11 BOFIA on rectification of the register

The BOFIA is the principal legislation that regulates the affairs of banks and other financial institutions in Nigeria. Section 11 of that Act touches on issues relating to the courts power to rectify register of members. The provision of section 11 is as follows:

*Restriction of legal proceedings in respect of shares held in the name of another*

*Notwithstanding anything contained in any law or in any contractual instrument, no suit or other proceeding shall be maintained against any person registered as the holder of a share in a bank on the*

<sup>20</sup> This broad powers of the court have also found expression in the Companies statutes of co-ordinate jurisdictions such as s. 165 CA 1965 Malaysia, s. 125 UK CA 2006, s. 68 Company Act RSBC 1968 (Canada), s. 115 SA CA 1978.

<sup>21</sup> [1994] 9 NWLR (pt.367) 149 (CA) at 218.

<sup>22</sup> Ibid at 213. See also *Archer & Anor v Registrar General & Anor (The Bahamas)* [2004] UKPC 31 held that Registrar of Companies cannot rectify register of members. *Re Derham and Allen Ltd* (1946) Ch 31 held only the court can rectify on proper application.

<sup>23</sup> See *Econet Wireless (Nig) Ltd v Econet Wireless Ltd* [2014] 7 NWLR (pt 1405) 1, *Mujjaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd & Ors* [1998] 3 CLJ 202, *Central Securities (Holdings) Bhd v Haron Mohammed Zaid* (1979) 2 MLJ 244, *Re Poole Firebrick & Blue Clay Co, Hartley's case* (1875) LR Ch App 157, *First National Insurance Co v Greenfield* (1926) 2 KB 260, *Mayers and Anor v Akira Ranch Ltd* [1971] EACA 9.

<sup>24</sup> [2010] 2 ZAGPJHC 103 (Saffii) para 23.

<sup>25</sup> Similar to s. 90(3) CAMA.

<sup>26</sup> 1973 (4) SA 1 (C) at 9.

<sup>27</sup> *Majujaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd & Ors* [1998] 3 CLJ 202, *Davis v Buffelsfontein Gold Mining Co Ltd and Another* [1967] 4 All SA 360 (W).

<sup>28</sup> *Blue Square Advisory Services (Pty) Ltd v Pogiso* [2011] ZAGPJHC 53.

<sup>29</sup> Cap B3 Vol 2 Laws of the Federation of Nigeria 2004.

ground that the title of the said share vests in any person other than the registered holder;

*Provided that nothing in this section shall bar a suit or other proceeding on behalf of a minor or person suffering from any mental illness on the ground that the registered holder holds the share on behalf of the minor or person suffering from the mental illness.*

The provision is clear on what it excludes from the restriction; actions on behalf of minors and persons with mental illness that contest the title of the registered holders of shares in banks. Persons not falling within the exempted group are not so fortunate as they must fight their way through the restrictions imposed by the provision which was subjected to close scrutiny by the Nigerian Supreme Court and the Court of Appeal in *Kotoye v Saraki*<sup>30</sup> and *FATB v Ezeibu*<sup>31</sup> respectively.

While construing the provision in *Kotoye's case*, the Supreme Court by a majority decision proceeded on the premise that the provision seeks to curtail the powers of the court to entertain matters that challenge the title of the registered holders of shares in banks. Provisions of such nature are usually construed strictly and not liberally, loosely or wantonly as the court jealously guards its own jurisdiction.<sup>32</sup> Thus, while in delivering the judgment of the majority, Kutigi, JSC observed as follows:

*I must say at once that the opening clause that "Notwithstanding anything contained in any law or in any contract or instrument" ought to be restricted to a provision in any law or contract or instrument which allows a litigant to maintain the suit against a registered holder on the ground that the title in the shares vests in any other person other than the registered holder. We have not been referred to any law or contract or instrument which provides as such.*<sup>33</sup>

Such law exists, as seen earlier, in section 90(3) of the CAMA which empowers the court to determine issue of ownership of shares. The Court of Appeal had taken cognizance of this in *FATB* where Kalgo JCA said: "It seems to me that there is no conflict between the provisions of section 11 [BOFIA] and 90 of CAMA (sic) on the issue pertaining to the register of members of company".<sup>34</sup> The accuracy of this statement should not be tested beyond the narrow confines of the facts of that case which showed that there were two registers of members of the bank. One was prepared by the Secretary/Legal Adviser, while the other was prepared by the Managing Director. Power to prepare register of members was, however, vested in the Board of Directors. The plaintiffs whose

names did not appear on the first register prepared by the Secretary/Legal Adviser went to court to challenge the validity of that register. The defendants invoked the provision of section 11 of the BOFIA to deny the plaintiffs locus to maintain the suit. The court, however, found that both registers were not validly made and as such were not protected by section 11 of the BOFIA. The power of the court to rectify register under section 90 of the CAMA was accordingly preserved.

This aspect of the decision of the Court of Appeal is consistent with the exercise of the equitable jurisdiction of the court in matters of rectification of register of members. The court could not have been constrained in that circumstances by the provision of section 11 of the BOFIA, although it could have found re-enforcement in section 90(3) of the CAMA. A challenge of the validity of the register *per se*, is not the same as the challenge of the entries in the register. The equitable power of the court is as such that the court could, while in the exercise of such power, create a register for the company where none exists provided that there is a clear intention on the part of the parties to have a register of members.<sup>35</sup> This was evident in the majority judgment of the Nigerian Court of Appeal in *FATB* where Sulu-Gambari, JCA held *inter alia*:

But this is a court of law as well as equity... this court cannot give judgment that could not resolve the issues in dispute between the disputants. It will not cancel the two Register of members and leave the litigants to find settlements [sic] for their issues anywhere outside the law court. That will result in some anarchy. *Though Exhibit 'L' as a Register of Members was not properly or validly issued, the list of the names therein contained along with the number of shares (Except the three who are dead) held by the individuals listed shall and is hereby held and ordered to be the authentic members with their shares as tabulated.*<sup>36</sup>

The equitable power of the court, which is admittedly broadly expressed, cannot however be used to subvert the express statutory provisions. It is on this premise that the impact of section 11 of the BOFIA on the broad powers of the court to rectify register under section 90 of the CAMA will be addressed.

The question as to whether there is a conflict between section 90(3) of the CAMA and section 11 of the BOFIA can only be answered by taking a broad view of section 11 of the BOFIA, a position seen in another aspect of the majority decision in the Court of Appeal where Kalgo, JCA said:

*The effect of section 11 [BOFIA] is to make the register of members conclusive only where the register was made and composed in accordance with the relevant rule governing the making of the same. If*

<sup>30</sup> [1994] 7 NWLR (pt.357) 414 (SC).

<sup>31</sup> [1994] 9 NWLR (pt.367) 149 (CA).

<sup>32</sup> See *Barclays Bank v CBN* (1976) All NLR 409, *Guardian Newspaper Ltd v AG Federation* [1995] 5 NWLR (pt. 398) 703, *Fawehinmi v Abacha* [1996] 9 NWLR (pt.475) 710.

<sup>33</sup> *Kotoye's case* note 27 above at 422-433. Emphasis added.

<sup>34</sup> *FATB's case* note 28 above at 217.

<sup>35</sup> *Re Data Express Ltd* (1987) Ch D The Independent 13 April, 1987, *Re Transatlantic Life Assurance* [1980] 1 WLR 79.

<sup>36</sup> *FATB's case* note 31 at 213-214, emphasis added.

such is the case, then the persons named in the register shall be legally and validly registered and the provision of the said [Act] shall apply with full force and effect. But if the register of members was not legally and validly made, and evidence to that effect is revealed on enquiry, it ceased to share the protection of section 11 aforesaid. In that case, any action to challenge the register can be maintained and if successful the register of members can accordingly be rectified under section 90 of [CAMA].<sup>37</sup>

The statement reflects an implicit conflict between the two provisions, at least, to the extent that rectification is not allowed under the BOFIA provision once it is shown that the process of making of the register has complied with the relevant rules, while under the provision of the CAMA rectification is always available in all circumstances. But section 11 of the BOFIA does not go as far as it is portrayed in the passage. The introductory heading of that provision refers to 'restriction' and not 'prohibition'. What is restricted is stated as action 'against any person registered as a holder of a share in a bank on the ground that the title to the said shares vests in any person other than the registered holder'. Put simply, the provision restricts contests as to the ownership of shares in a bank. Issues of rectification under section 90 of the CAMA are not restricted to ownership of shares, hence a register of members of a bank even when legally and validly made, can still be rectified under section 90 of the CAMA provided that the contest does not relate to the title of the registered holder of shares. This restriction in the application of section 11 of the BOFIA was captured, though not in the most convincing manner, in the dissenting opinion of Ayoola, JCA where he held *inter alia*:

The action prohibited is that based 'on the ground that the title to the said shares vests in any person other than the registered holders'. I am inclined to the view that what section 11 prohibits are disputes as to title to specific shares. Thus where A has been registered as the owner of X number of shares, B cannot sue to claim that those particular shares vest in him or any other person other than A. For section 11 to operate B must be claiming those particular shares for himself or for someone else. I am of the opinion that *where B does not claim that the shares vested in A should vest in him but that no shares vested in A at all, section 11 would not apply. In such a case B's claim is that title to the shares does not vest in any one at all.*<sup>38</sup>

The risk in adopting this pattern of interpretation lies on the inherent procedural difficulty. The person seeking the rectification of register could be confronted with the question of *locus standi* which again would impinge on the jurisdiction of the court. A party cannot maintain a civil action unless he/she has significant interest in the subject matter of dispute. Where the only reason for challenging the title of the

registered holder of shares is that the 'title to the shares does not vest in any one at all', sustaining such an action would be almost impossible especially on the face of the expected resistance by the registered holder. It does not seem less a challenge on the title of the registered holder of shares to assert that the shares do not belong to any one at all than for the party to claim that the title to those shares belong to him/her and not the registered holder.

The Supreme Court of Nigeria in *Kotoye's case* seemed at consensus that section 11 of the BOFIA prohibits actions that contest the title of the registered holder of shares, but there was a division where such contest is directed at the status in which the title is held. The majority of the judges were of the view that the provision cannot prevent an action where the plaintiff is merely asserting that the defendant holds shares as trustee for the plaintiff or any other person as the beneficiary. But in the minority decision, especially that of Ogundare JSC, this approach by the majority was seen as directed against the implicit object of that provision which the judge stated as follows:

*The object of section 11, in my respectful view, is to prohibit 'fronts' being used to hold shares in a bank thus preventing such an important section of the national economy being controlled by a few individuals. That being so, I cannot imagine that the legislature would intend that actions to enforce such an arrangement (under the guise of trusts) ... would be ... maintained. As revealed by cases that have come before this court, the constant boardroom conflicts in the banking sector before the promulgation of the Banks and other Financial Institutions [Act] centered around the control of these institutions by powerful individuals through the use of fronts. This the [Act] sets out to put an end to by the provision of section 11 in the [Act].*<sup>39</sup>

Adio JSC, although aligned with the majority on other grounds, opined that

*It would be enough, whatever way in which the claim, against the registered holder of shares in a bank, is framed or presented, if the basis or the ground upon which the claim is in reality based is that the title to the shares is vested in any person other than the registered holder.*<sup>40</sup>

It is trite that under the general law the register of members is merely evidence of membership of a company and not evidence of title to shares. Though a registered member is invariably a holder of the company's shares, shares, as stated by Pennington, belong to the person who can show a chain of title from the original issue by the company down to the disposition to himself and if the register of members shows a person other than the true owner as the proprietor of the shares, the true owner may have the

<sup>37</sup> Ibid at 217. Also per Sulu-Gambari, JCA at 201.

<sup>38</sup> Ibid at 238. Emphasis added.

<sup>39</sup> *Kotoye's case* note 30 above at 500.

<sup>40</sup> Ibid at 467.

register rectified.<sup>41</sup> It is this rectification process that section 11 of the BOFIA seeks to prevent in the context of that provision. The question then is; would the purpose of the provision be defeated by asserting that the registered holder of shares holds same as trustee?

The concept of trust is usually seen from two broad perspectives, i.e., trust in the wide sense and trust in the narrow sense. A trust in the wide sense is ordinarily seen as existing whenever a person is bound to hold or administer property on behalf of another or for some personal object and not for his/her own benefit.<sup>42</sup> A reconstruction of the wide sense of trust from a legal perspective would reflect an arrangement by which a person is entrusted the property of another to control and administer on behalf of the beneficiary without necessarily being vested with ownership in such property. The trustee in that sense has at the minimum a duty to keep the property entrusted to him/her separate from his/her own property and avoid a conflict between his/her interest and that of the beneficiary.<sup>43</sup> It is in this sense that the directors of the company are, for instance, described as trustees of the company's property and powers.

Trust in the strict or narrow sense exists when ownership and control of property are transferred to the trustee to administer for the benefit of another usually referred to as *cestui qui trust*.<sup>44</sup> There is a separation, in such a case, between the legal title which is vested in the trustee and the equitable title that vests in the beneficiary of the property. The trustee could as such deal with the property as the true owner which would include a transfer of valid legal title to a bona fide purchaser for value who is unaware of the trust arrangement.<sup>45</sup>

Although the decision arrived at by the majority of the judges of the Supreme Court in *Kotoye's case* did not go as far as drawing this distinction and examining its implication on the case, it is apparent that whether that decision could be said to have defeated the object of section 11 of the BOFIA as identified by Ogundare JSC would depend on whether trust is viewed from the narrow/strict or wide perspective.

A party that seeks to establish the existence of trust from a wide perspective would invariably be contesting the title of the registered holder of shares as the beneficiary in that instance does not recognise the title of the holder. This will obviously invoke the application of section 11 of the BOFIA to prevent the

action from proceeding and thus lending some credence to the opinion expressed by Adio JSC as earlier set down. The position will, however, not be the same when trust is viewed from a narrow perspective. The registered holder's title to the shares would not ordinarily be in issue in such a case as the beneficiary would have implicitly acknowledged the legal title as vested in the registered holder while asserting his/her equitable interest. It is indeed this narrow perspective of trust that was adopted in argument by the plaintiff's counsel in that case as captured in the minority judgment delivered by Ogundare JSC as follows: "I do not dispute that title to shares are vested in B who is the registered holder thereof. But I ask the court to declare that he holds those shares in trust for me".<sup>46</sup> The counsel strengthened this argument by illustrating the purpose of the Act as being to preclude the court from determining a dispute as to whether title to a share vests in A (who is not the registered holder) or in B (who is the registered holder). The reason being that the Act treats the fact that B is the registered holder of the shares as conclusive evidence of his title to the shares. But the Act in no way precludes the court from deciding a claim by A that B holds the shares registered in his (B's) name in trust for A. This is because, on a true analysis, it cannot be said that in such a case A would be questioning the title of B to the shares on the ground that title is vested in someone other than B.

Ogundare JSC was not impressed by this argument and did not mince words in saying so.<sup>47</sup> He was of the view that the substance of the plaintiffs' case is to the effect that the defendant, although a registered holder, is merely a notional or nominal owner of the shares while the 2<sup>nd</sup> plaintiff is the true owner. In such a case it cannot be said that the plaintiffs are not disputing the title of the defendant, the registered holder of the shares. This line of the decision was significantly influenced by Professor Keeton's definition and analysis, extensively reproduced in that part of the decision, of the nature of trust where Keeton observed that

*it has been said, somewhat broadly, that 'all that is necessary to establish the relation of trustee and cestui qui trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant.' It is not however, always accurate to say that the trustee is the legal owner while the cestui qui trust is the equitable owner, for the interest of the trustee may be (and often is) equitable only, as where a beneficiary under a settlement himself makes a settlement of his interest while the legal ownership is still in the hands of the trustees of the former settlement, or for some other reason the legal estate is outstanding. It is*

<sup>41</sup> Robert R. Pennington, *Pennington's Company Law* 4<sup>th</sup> ed (London: Butterworths, 1979) at 286.

<sup>42</sup> Francois du Toit, *South African Trusts Law Principles & Practice* 2<sup>nd</sup> ed (Capetown: LexisNexis, 2007) at 2-3. See *Conze v Masterbond Participation Trust Managers (Pty) Ltd* [1996] 1 All SA 521 (C) 528.

<sup>43</sup> Tony Honore' and Edwin Cameron, *Honore' 's South African Law of Trusts* 4<sup>th</sup> ed (Capetown: Juta & Co Ltd, 1992) at 2-3.

<sup>44</sup> *Ibid* at 3.

<sup>45</sup> Richard Edwards & Nigel Stockwell, *Trust & Equity* 2<sup>nd</sup> ed (London: Pitman Publishing, 1995) at 8-9.

<sup>46</sup> *Kotoye's case* note 37 above at 482.

<sup>47</sup> In rejecting that line of argument, he said: "Although this argument seems to find favour with some of my brethren, I must, with profound respect, disagree. I think there should be no room for sentiments in a matter concerning interpretation of statute". *Ibid* at 483.

therefore better to say that the trustee is the nominal owner of the property, while the *cestui qui trust* is the beneficial owner.<sup>48</sup>

But the situations alluded to by Keeton to justify his preference for the description of trustee as nominal owner do not exist in *Kotoye's case*. In cases of straight forward relationship between the trustee and the beneficiary, no harms would be done to that concept by recognising that the trustee is the legal and not just nominal owner of the trust property.

Incidentally the judge had subscribed to the defendant's counsel's argument that section 11 only takes away a remedy but does not destroy the right. A number of common law courts decisions were relied on to substantiate the argument including *Fullalove v Parker*<sup>49</sup> where Willes J held that if the plaintiff has made advances to the attorney, he cannot recover them back upon a *condictio indebiti*, as for money paid under a mistake; the attorney though uncertificated, is entitled to retain the money so advanced, and the plaintiff would have a right to recover this amount from the defendant.

The Supreme Court judge thus concluded, while drawing inferences from those cases, that in the case of a trust in respect of shares in a bank, while a beneficiary's rights are preserved, his remedy of access to the court is taken away by the section. From the nature of trusts as discussed above coupled with the exclusion clause in section 11, if interpreted as dictated by rules of construction the conclusion is inescapable that the section covers the kind of plaintiff's claims.

The reference by the judge to 'trust' in that part of the decision presupposes an acceptance of the existence of trust relationship between the plaintiff and the defendant in that case. But contrary to his lordship's analysis and inferences, trust does not extinguish the right of the beneficiary against the trustee, it only extinguishes a remedy against the bona fide purchaser of the trust property for value and without notice of the existing trust. Thus, if the defendant as the trustee in that case had sold the shares to a third party, section 11 of the BOFIA would have barred the plaintiff from claiming against the bona fide purchaser whose name would be entered on the register of members as the holder of title to the shares. The provision would, however, not prevent recourse against the defendant by the plaintiff for remedy for a breach of trust. This seems the most reasonable inference from the authorities.

It is generally accepted that the capacity in which a person holds shares in a company is a matter of private arrangement between the registered holder and

the beneficial owner.<sup>50</sup> In *Societe Generale de Paris and Another v The Tramways Union Co Ltd and Others*<sup>51</sup> Lindley, LJ held that if a shareholder in a company agrees to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it. As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains the shareholder still. He is the person entitled to exercise the rights of a shareholder, for example, to vote as such, to receive dividends as such and to transfer the shares.

Such private arrangement will significantly affect the manner of dealings and exercise of the rights attached to the shares by the registered holder even if the registered holder is on the face of the register regarded as the owner of the shares as is intended by section 11 of the BOFIA. That provision does not however proscribe private arrangements relating to the holding of shares as described above. If it is accepted that the object of section 11 is to prevent 'fronts',<sup>52</sup> from being used to hold shares in banks as stated by Ogundare JSC, that object cannot be achieved simply by adopting an interpretation that seeks to prevent the beneficial owner of shares from asserting his/her equitable interest against the registered holder as many instances of such private arrangements are not contested in court. It is only the courts that can in appropriate cases go behind the register to identify the beneficial owner of shares for the purpose of determining who controls the company.<sup>53</sup>

## 5 Conclusions

The register of members of a company, though acknowledged as an important corporate document, remains under the general law a *prima facie* evidence of its contents. This is in recognition of possibility of errors and disputes relating to the recorded information hence the power given to the court under section 90 of the CAMA to rectify the register.

<sup>50</sup> See *Blue Square Advisory Services (Pty) Ltd v Pogiso* [2011] ZAGPJHC 53).

<sup>51</sup> (1884-1885) 14 QB 424 (CA) at 451-452. See also *Inland Revenue Commissioners v J. Bibby & Sons, Ltd* [1945] 1 All ER 667 (HL), per Lord Macmillan at 671, *Pulbrook v Richmond Consolidated Mining Company* (1878) 9 Ch D 610 per Jessel MR at 615, *Pender v Lushington* (1877) 6 Ch 70 per Jessel MR at 77-78.

<sup>52</sup> A 'front' was defined by the Nigerian Court of Appeal as the apparent or nominal leader behind whom the real powerful man works anonymously. He is also called a 'front man' acting as a cover or disguise mostly for secret or disreputable activities. See *Onyekwulunne v Ndulue* [1997] 7 NWLR (pt. 512) 250 at 280.

<sup>53</sup> See *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A), *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (A), *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A), *Lourenco and Others v Ferrela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (T).

<sup>48</sup> Robert Megarry and PV Baker, *Snell's Principles of Equity* 27<sup>th</sup> ed (London: Sweet & Maxwell, 1973) at 87-88.

<sup>49</sup> (1862) 31 LJ (CP) 239 at 240. See also *In re Jones* (1869) LR 9 Eq. 63 at 67 where Romilly MR observed that the distinction between destroying a debt and taking away a remedy is a familiar one, as in the case of the Statute of Limitations, where there is no means of recovering a debt after six years, and yet the debt is not extinguished.

Rectification as an equitable remedy is meant to restore the parties to their originally intended position and not to create a new relationship for the parties. The broad powers conferred on the court under section 90 of the CAMA to rectify register of members is presently curtailed by section 11 of the BOFIA which restricts the courts from entertaining suits that contest the title of the registered holder of shares. Section 11 of the BOFIA is obviously in conflict with section 90 of the CAMA to the extent that the issue of title to shares which courts could determine under the latter is now prohibited under the former. The Court of Appeal's decision in *FATB* was certainly wrong on that premise though the decision could be justified on the peculiar facts of that case.

A realistic interpretation and application of section 11 of the BOFIA should not overlook the tendency for members of a company, including banks, to enter into private arrangements relating to their shareholding which could materially affect the status of the registered holder of the shares. Such private arrangement is not prohibited by section 11 of the BOFIA even as it seeks to protect the title of the registered holder. The effect of this is that any private arrangement or agreement by shareholders which does not put the title of the registered holder of shares in issue is accommodated under section 11.

This approach to that provision would sustain the cases of trust when that concept is defined from the narrow/strict perspective as the beneficiary in that instance invariably acknowledges the title of the registered holder while asserting his/her equitable interest. The decision of the majority of the judges of the Supreme Court of Nigeria in *Kotoye's case* seemed aligned to the concept of trust in the strict sense though the judges did not go as far as drawing that important distinction between the wide and narrow meanings of trust to justify the position adopted by the court.

The decision of Ogundare, JSC which was in the minority, significantly articulated that distinction. But his application of the legal principles to the facts was faulty to the extent of his refusal to accept the distinction between a legal title and an equitable interest, and that the assertion of an equitable interest does not impinge on the title of the registered holder of shares. Accepting this interpretation would not harm the object of that provision as identified by the judge. The registered holder of the shares remains for all intents and purposes the legal owner of the shares and could deal with them as such, both in his/her relationship with the company and third parties subject however to the right of the beneficiary to have recourse against the holder for a breach of trust

resulting from the underlying private arrangement between them.

The expression of the effect of section 11 of the BOFIA as appeared in the majority judgment of the Court of Appeal is too broad to the extent that it suggests that once the register is validly made, it cannot be rectified. What the provision restricts is a contest predicated on the title of the registered holder of shares. Rectification is therefore available in other respects under section 90 of the CAMA.

The minority's opinion as represented by the decision of Ayoola, JCA had in a bid to narrow down the scope and impact of the provision, adopted a tenuous root by suggesting that all that is needed to avoid the application of the provision is for the plaintiff to assert that the shares registered in the defendant's name does not vest in any one at all. That suggestion is defective in two respects. Firstly, it does not seem to have countenanced the effect of *locus standi* on a civil process and its impact on the jurisdiction of the court. Secondly, the title of the registered holder would invariably become an issue once the plaintiff asserts that the shares registered in the name of the defendant does not vest in any one all which includes the registered defendant.

These interpretation difficulties can only be explained as informed by the court's desire to guard its own jurisdiction and by so doing ensure that the aggrieved persons are not denied of their right of access to the court. Accepting the existence of trust as the majority did at the Supreme Court will ensure that the court's jurisdiction is preserved. But there is also the need to show that 'trust' as accepted is only in the narrow or strict context as it is only in that manner that effect will be given to the provision of section 11 of the BOFIA by ensuring that the title of the registered holder of shares is upheld.

## References

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