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Questions:

Perspectives on Share Buy Backs under the Companies and Allied Matters Act 2020

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CAC

Introduction

It is no longer news that share buybacks is one of the innovations introduced by the ***Companies and Allied Matters Act 2020***[1] ***(CAMA)***. Previously, ***section 160(1) and (2) CAMA 2004***[2] generally prohibited companies from acquiring their own shares, except if authorised by the articles and in limited circumstances of: *"(2) ….. (a) settling or compromising a debt or claim asserted by or against the company; or (b) eliminating fractional shares; or (c) fulfilling the terms of a non-assignable agreement under which the company has an option or is obliged to purchase shares owned by an officer or an employee of the company; or (d) satisfying the claim of a dissenting shareholder; or (e) complying with a court order."*

Essentially, whilst share buy-backs can only be made from *"distributable profits"*, as statutorily defined by the ***CAMA***; it appears that many companies have either; out of disinterest, ignorance, 'cultural' *cum* perception issues or absence of compelling necessity, not been utilising or considering utilising share buyback as a mode of capital restructuring.[3] The significant and probably first publicly disclosed share buyback transaction involved Dangote Cement Plc (DCP);[4] there appears to be inactivity regarding buybacks for private companies, whilst even listed companies have also not maximally stepped up to the share buyback plate.[5]

This article illuminates the ***CAMA*** share buyback regime, in the hope that corporates would be more disposed to utilising same as a corporate cum capital restructuring option. It also discusses whether inherent restrictions in the CAMA regime is contributory to the low utilisation of share buy back provisions by Nigerian companies.

The CAMA Share Buy Back Regime

Sections 182 – 190 CAMA provides for transactions by a company in respect of its own shares. Specifically, ***section 184(1)(a)-(c) CAMA*** permits a company (the Coy) to purchase its own shares, ***if so permitted by its articles****, and pursuant to* ***a special shareholders' resolution*** *in that regard; provided that* ***only fully paid up shares are involved****, and that* ***the terms of purchase shall provide for payment for the purchase***.[6]

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[1] ***Act No. 3 of 2020***.

[2] ***Companies and Allied Matters Act Cap. C20, Laws of the Federation of Nigeria (LFN) 2004***; originally enacted in 1990 ***(CAMA 1990)***.

[3] Companies have either on their own or at the instigation of the Corporate Affairs Commission (CAC) been utilising the new provisions of the ***CAMA,*** such as incorporating single shareholder companies (***section 18(2)***); and cancellation of unissued share capital (***section 124(3) and (5)***) at the risk of penalty for every day of default after the stated deadline of 31st December 2022; etc.

[4] ***'Dangote Cement Plans Nigeria's First Share Buyback'***, *Punch, 22.12.2020*: https://punchng.com/dangote-cement-plans-nigerias-first-share-buyback/ (accessed 24.11.2023).

[5] It appears that DCP also has a share buyback programme, Tranche I of which it completed in July 2023. See Dangote Cement Plc, ***'Share Buy-Back Programme by Dangote Cement Plc – Commencement of Tranche I',*** *07.07.2023*: https://www.dangotecement.com/share-buy-back-programme-by-dangote-cement-plc-commencement-of-tranche-i/. *Cf.* with erstwhile listed companies going private as a result of the majority shareholder buying out the minority (as in Nigerian Bottling Company Limited and Seven-Up Bottling Company Limited); such transactions are not share buybacks. See Peter Egwuatu, ***'NSE Approves Delisting of 7-Up After Buyout by Majority Shareholders'***, *Vanguard, 12.-2.2023*: https://www.vanguardngr.com/2018/02/nse-approves-delisting-7-buyout-majority-shareholders/; and Michael Eboh, ***'Nigeria: Bottling Company Set to Delist From Stock Exchange'***, *Vanguard, 15.12.2010:* https://allafrica.com/stories/201012150682.html (all accessed 24.11.2023).

[6] For many extant (pre-***CAMA*** companies), there may be need to first amend the Coy's articles first as part of the process, given that the share buyback provisions were introduced by ***CAMA*** in 2020. This could impact transaction timelines, compared to if there is no need to amend the Coy's articles. *Cf.* the share buyback evolution in the UK: "*Although treasury shares were not permitted under the original reforms of 1981, in 1998, in advance of the Company Law Review, the Government began consultation over the proposition that companies should be able to retain repurchased shares and re-issue them, as required.* ***The main argument in favour of this reform was that it would permit companies to raise capital in small lots but at a full market price by re-selling the repurchased shares as and when it was thought fit to do so. … However, where a company cannot fit its situation into the rules on treasury shares, the principle remains that the re-purchased shares must be cancelled and the amount of the company's share capital account reduced by the nominal value of the cancelled shares***." See Paul L. Davies, *et al*, ***'Gower and Davies: Principles of Modern Company Law'***, *(8th ed. (South Asia) (2014), Sweet & Maxwell), p. 330.* Emphasis supplied.

By way of procedure, ***section 184(d)-(e)*** requires the Coy to ***publish in two national newspapers, a notice of the proposed purchase of its shares within 7 days of the special resolution***;[7] and within fifteen (15) days after the newspaper publications, the Coy's directors must make and file with the Corporate Affairs Commission (CAC), a ***statutory declaration of solvency (SDS)***, that the Coy is solvent and can pay its debts as they fall due, after the share buyback.

Section 184(f) provision that *"a company may not under this section purchase its shares if, as a result of the purchase, there would no longer be any issued shares of the company other than redeemable shares or shares held as treasury shares"*[8] will not apply, if the share buyback is to consummate exit for some, and not all the shareholders.[9] It is noteworthy that ***section 187*** *limits the threshold of share buy-backs to no more than 15%, and otherwise mandates corrective action if the threshold is breached, within stated timelines.*[10] However, where threshold breach does not apply, the Coy has flexibility to undertake the second leg of the transaction at any time.[11]

By ***section 184(2)***, *within six weeks* of the publication in two national newspapers, any of the Coy's creditors can apply to Court for an order cancelling the special resolution, much as a dissenting shareholder who did not vote in favour of the share buyback can also apply to Court for same. Consequently, *"The ability of the company to proceed with the share buyback shall depend on the order of the court,* ***where applicable****"* ***(section 184(3))***.[12]

Presumably, this should not be an issue for the Coy – once its creditors are agreeable to the planned share buyback, as well as all the shareholders.[13] Furthermore, by ***section 185***: *"Where a company buys back its shares,* ***payment for the share buyback shall be made from the distributable profits of the company****."*[14] The question that then arises is *"what is distributable profits?"* and we consider this in detail below.

Computation: What is "Distributable Profit"?

Per ***section 426(5)***, dividends is payable to shareholders only out of the Coy's *"distributable profits"*.[15] By ***section 427***: *"(1) A company may* ***pay dividends only out of profits available for the purpose****. (2)* ***The***

[7]The attendant publicity may draw the attention of regulators, counterparties and the public to the Coy; but it is a necessary price to pay in order to consummate the share buyback. According to a commentator, *"Returning cash to shareholders is always done at the expense of something else, be it investment, M&A or deleveraging. Buybacks, therefore, inevitably throw a company's capital allocation policy into the spotlight."* See Jemma Slingo***, 'Are Share Buybacks Really Worth It?'***, *Investors' Chronicle, 05.06.2023*: https://www.investorschronicle.co.uk/news/2023/ 06/05/are-share-buybacks-really-worth-it/ (accessed 28.09.2023).

[8] This however confirms that ordinary shares may be the subject of the share buyback, and not just the preference shares that ***section 182*** contemplates that the company may redeem.

[9] This, on its own part, also imposes some challenges - as the buyback offer is, pursuant to ***section 186(a) CAMA***, supposed to be made to all shareholders. *The way to ensure that any envisaged exit of only some shareholders is achieved, is for the non-exiting shareholders to decline their pro rata offers, so that only the exiting shareholders can then take them up*. Thus offer is made for (say 10 shares), with each shareholder's *pro rata* entitlement indicated but those not exiting will decline and the Coy can then offer them to the exiting shareholders, thereby achieving the original aim of consummating only their exit. ***Quaere***: is ***section 186(a)*** not conclusive that the buyback must be with all shareholders proportionately, and no other variation is allowed? ***Answer***: not necessarily, otherwise the utility of ***section 186(a)*** is seriously whittled down, and it would be unreasonable for ***section 186(a)*** not to cover an arrangement *whereby share buyback is addressed to all shareholders proportionately but ends up being consummated with only shareholders desirous of exiting*. Since buyback is consensual, no shareholder can be forced to sell their shares; what is important is that they had 'equal access' – they were offered the buyback opportunity like all other shareholders.

[10] The provision stipulates that: *"(1)* ***A company shall not hold more than 15% of the nominal value of the issued share capital of any class of its shares as treasury shares****. (2)* ***Where a company buys back more than 15% of the issued share capital of any class of its shares, the company shall, before the end of 12 months beginning with the date on which that contravention occurs*** *- (a) reissue, (b) cancel, or (c) reissue and cancel such number of shares that will ensure that the company holds not more than 15% of the issued share capital of any class of its shares as treasury shares upon the completion of the transaction."* Emphasis supplied.

[11] By the stipulation of ***section 189***: *"Where shares are held as treasury shares,* ***the company may at any time*** *- (a) sell the shares (or any of them) for a cash consideration, or (b) transfer the shares (or any of them) for the purpose of or pursuant to an employees' share scheme."* Emphasis supplied.

[12] Emphasis supplied.

[13] See also ***section 184(4)****: "For the purpose of determining a company's creditors under this section [184], service providers whose fees are not yet due shall be excluded."*

[14] ***CAMA 2020*** provisions allowing share buybacks represent some innovation to Nigerian corporate law.

[15] *Cf.* with ***section 58(1)(c),(2),(5)*** reference to: ***"undistributable reserves".*** By ***section 58(6)(b)-(d),*** "undistributable reserves" comprises: *"(i) share premium account, and (ii) capital redemption reserve; (c) the amount by which its accumulated or unrealised profits (so far as not previously utilised by capitalisation) exceed its accumulated or unrealised losses (so far as not previously written off in a reduction or reorganisation of capital duly made); and (d) any other reserve that the company is prohibited from distributing by any enactment (other than one contained in this Part) or by its articles."*

profits of a company available for payment of dividends are its accumulated, realised profits (so far as not previously utilised by distribution or capitalisation), less - its accumulated, realised losses (so far as not previously written off in a lawfully made reduction or reorganisation of capital)**."*[16] Thus, **CAMA** obliquely defines *"distributable profits"* by way of ***section 427(2); ***section 427*** therefore is ***a***, if not ***the***, key provision that resolves the distributable profits question.

Section 868(1) stipulates that: *" 'dividend' means* ***a proportion of the distributed profits of the company*** *which may be a fixed annual percentage, as in the case of preference shares, or it may be variable according to the prosperity or other circumstances of the company, as in the case of equity shares".*[17]

It is therefore apposite to draw analogy with dividends, since both dividends and price for the share buybacks are payable out of "distributable profits". Accordingly, if the directors can pay the dividends out of any amount in view, then same can be deployed to share buybacks, and vice versa. *As a rule of thumb, it is safe to assume as much prudence in paying for the share buybacks out of distributable profits, as would have been required if the Coy were to declare and be paying out, dividends.*[18]

> ***"The way to manage related tax risk exposure is to make necessary provisions based on the finance function and tax consultant cum auditors' assessment of tax risk exposure; ..."***

It is noteworthy however, that the tax treatment is different, as only capital gains tax (CGT) will apply to the buyback consideration,[19] instead of witholding tax (WHT) that would have been deducted from dividends, prior to remittance.

Current Year Loss/Retained Earnings/Tax Credit Angle

Companies contemplating share buybacks may have different financial circumstances: some could have been consistently profitable year on year, or made a loss in the current year but have retained earnings, or may even have had losses over time but have tax credits they could creatively apply (for example by borrowing), to fund the transaction. It is respectfully submitted that amounts that are part of the bottom line (post tax, that is, *"Total comprehensive income (loss) for the year"*), can fund or provide a basis for the share buyback.[20]

The way to manage related tax risk exposure is to make necessary provisions based on the finance function and tax consultant cum auditors' assessment of tax risk exposure; and to the extent that the Coy's tax compliance status is optimal, there should be no post audit tax assessment 'surprises' involving significant or huge figures. Assuming the Coy wants to proceed out of the abundance of caution, it could make conservative provisions wherever there are doubts about any potential tax exposure. The only downside is that

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[16] *Cf.* the *in pari materia* provision of ***section 830 UK Companies Act 1986***: *"(1) A company may only make a distribution out of profits available for the purpose. (2) A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made."* See also the definition of *"distributable profits"* in Jonathan Law and John Smullen (eds.), **'A Dictionary of Finance and Banking'** *(4th ed., (2008)), OUP*: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095722571 (accessed 28.09.2023): ***"The profits of a company that are legally available for distribution as dividends****. They consist of a company's accumulated realized profits after deducting all realized losses, except for any part of these net realized profits that have been previously distributed or capitalized."*

[17] Emphasis supplied.

[18] By a community reading of ***sections 426 – 428 CAMA 2020***: dividends are only payable on the recommendation of directors, the amount so recommended may not be increased (but can be reduced) by the general meeting, dividends are only payable out of *"distributable profits"*, ***and there is prohibition against declaring/paying dividends if there are reasonable grounds for believing that the company would, after the dividend payment, be unable to meet its liabilities as they become due****.* Furthermore, by ***section 433***, *"All directors who knowingly pay, or are party to the payment of dividend out of capital or in contravention of this Part, are* ***personally liable jointly and severally*** *to refund to the company any amount so paid"*, albeit with right of recovery *"from shareholders who receive it with knowledge that the company had no power to pay it"*. Emphasis supplied. *Cf.* commentary in ***'Gower and Davies: Principles of Modern Company Law', (supra)*** *at p. 331*: *"… Secondly, the shares must have been purchased out of distributable profits (not out of the proceeds of a new issue, whether wholly or partly). This limitation seems to have been imposed because it was thought that there would be little demand for repurchases out of new issues and because their exclusion enables the legislation to take a much simpler approach to the accounting consequences of treasury shares. …* ***The underlying rationale of the treasury share scheme is given effect by the provision that treasury shares may at any time be sold by the company for cash. When this happens, there is a sale by the company of existing shares, not an allotment of new shares."*** Emphasis supplied.

[19] *Per* ***section 30(1) and (2) Capital Gains Tax Act (CGTA)*** as amended by ***section 2 Finance Act No. 2 of 2022***, *"gains accruing to a person on disposal of its shares in any Nigerian company"* is ***liable to CGT at 10% unless the proceeds therefrom are reinvested within the same year of assessment in the acquisition of shares in the Coy or other Nigerian companies***; and CGT shall accrue proportionately on the portion of the proceeds which are not reinvested as described above. There will also be exemption from CGT if *"the disposal proceeds, in aggregate, is less than ₦100,000,000 in any 12 consecutive months, provided that the person making the disposals shall render appropriate returns to the Service on an annual basis"*. Given the above **CGTA** *provisions, that CGT at 10% of the gains (i.e., disposal proceeds less acquisition costs), will apply to proceeds of the Coy's share buyback.*

[20] It may be asked whether the balance sheet figures has to await tax audit by the Federal Inland Revenue Service (FIRS). The author's respectful view is that *it is immaterial that the or a particular year has not been audited by the FIRS – just as in practice, dividends pay out does not await nor are subject to FIRS audit, before they are declared*. The Coy does not control the audit schedule of the FIRS, and it would be preposterous if companies will stall their corporate plans, because FIRS has not conducted audit for a particular year. If subsequent FIRS audit discloses any tax liability; that does not affect what is *"distributable profit"* as at a certain date, before such audit related tax assessment. Notably also, post-audit FIRS assessments do not automatically transfer to tax liability, because the Coy can successfully challenge them through the statutory tax dispute resolution process, if necessary.

such could negatively affect the Coy's valuation and consequently, the pricing of the share buyback.

Statutory Declaration of Solvency (SDS) Requirement and Incidental Issues

This requirement is somehow similar to the duty imposed by ***section 428 CAMA*** that: *"A company **shall not declare or pay dividend if there are reasonable grounds for believing that the company is or would be, after the payment, unable to pay its liabilities as they become due**."*[21] Presumably, the Coy's directors will also be mindful of the responsibility imposed by ***section 430(1) CAMA*** in making such declaration.[22] ***Section 625(1)*** (***SDS for voluntary winding up***) is also noteworthy, as a helpful, *cum* guidance, analogy.[23]

Sections 868(1) and 572 collegially defines *"inability to pay debts"* by a company. *The directors must have a reasonable basis for any view that the Coy would be able or unable to pay its debts after the share buyback, in the context of the relevant **CAMA** provisions, particularly **section 572**.*[24] Thus ***whether the Coy would be unable to pay its debts after the share buyback or otherwise, would be a question of fact in the light of the Coy's operational circumstances.***[25] The key issue is that such view by the directors if subsequently reviewed by third parties with similar experience, must not be likely to be considered to be 'unreasonable'[26] or 'reckless'.[27]

The directors are unlikely to take the making of an SDS lightly, because inaccuracy is effectively perjury which would implicate exposure to criminal charges, in addition to fines by the CAC that such may attract.[28] Borrowing from ***section 625***, the SDS would be pursuant to a majority decision of the Coy's Board. Incidentally, there is no ***section 572***-specific SDS; hence in practice, the ***section 625 SDS*** would be utilised.[29] The other available precedent ***Form CAC 4A (Directors' Solvency Statement)*** is expressly made inapplicable.[30]

The declaration would be made by as many directors that believe the purport of what the SDS says. As mentioned above, ***CAMA*** *contemplates either all or majority of the directors*. Although ***section 184(1)(e)*** speaks in terms of *"the directors of the company shall make and file the SDS with the Commission"* [thereby arguably suggesting unanimity]; *it is trite that unless otherwise provided, in non-unanimity situations, Board decisions are reached by majority votes*: ***section 289(2)***. The signature of dissenting directors are therefore not required for the SDS to be valid; signature by the pro-SDS directors are sufficient.[31]

Unlike ***section 184(2)*** relief for dissenting shareholders, there is no specific provision for what dissenting directors may do in this instance. However, they may seek relief if there is some legal and credible basis for them to do so - for example, by filing a derivative action for and on behalf of the Coy.[32]

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[21] Emphasis supplied.

[22] It mandates that: *"**The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied**, and pending such application may, at the discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors think fit, and **the directors may without placing the same to reserve, carry forward any profits which they may think prudent not to distribute**."* Emphases supplied.

[23] It provides that *"Where on or after the commencement of this Act, it is proposed to wind up a company voluntarily, the directors of the company **or, in the case of a company having more than two directors, the majority of the directors, may at a meeting of the directors make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding 12 months from the commencement of the winding-up, as is specified in the declaration."*** Emphasis supplied.

[24] According to ***section 572***, *"A company is deemed to be unable to pay its debts if - (a) a creditor, by assignment or otherwise, to whom **the company is indebted in a sum exceeding ₦200,000**, then due, has served on the company, by leaving it at its registered office or head office, **a demand** under his hand requiring the company to pay the sum due, **and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor**; (b) **execution or other process issued on a judgment**, act or order of any Court in favour of a creditor of the company **is returned unsatisfied in whole or in part**; or (c) **the Court, after taking into account any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts**."* Emphases supplied.

[25] Directors who signed the SDS will not by that fact alone have criminal or civil exposure, once they can show that they made the SDS in good faith, and same is consistent with the financial information available to them as at the time of making the SDS *vis a vis* projected outlook for the Coy. Whilst the directors who sign the SDS are not in control of the ability of any aggrieved person to commence actions against them, but if they have a basis for signing the SDS then the actions against them is not likely to succeed. *Cf.* with the evidential rule of certain matters being *"a question of fact to be proved in the circumstances"* - so will any alleged directors' liability exposure be in this instance.

[26] ***Black's Law Dictionary (Blacks)*** defines "unreasonable" *inter alia* as *"not guided by reason; irrational or capricious."* See **Blacks**, Bryan A. Garner (ed.), *(Thompson Reuters, 9th ed. (2009)), at p. 1679*. Also, "The word 'reasonable' has in law the *prima facie* meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know". See ***'Stroud's Judicial Dictionary'***, *(7th ed., (2008) Sweet & Maxwell/Thomson Reuters, Vol. 3, p.2274, quoting **in Re a Solicitor [1945] KB 368 at 371**. "It generally means fair, proper, just, moderate, suitable, under the circumstances. To endow with reason rationally and acting according to the wisdom and good judgment of the individual. **Fumudoh vs. Aburo [1991] 9 NWLR (Pt. 214) 210 at 231**."* See B.P. Ishaku, ***'Nigerian Judicial Dictionary'***, *(2nd ed. (2017), Ritpank, p. 350*.

[27] *Per **Black's (supra)**, at p. 1385, "reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do". Cf.* "recklessly to make a statement which is false" *per **section 14(1)(b) Trade Descriptions Act 1968 (UK)**. "A statement made without regard for its truth or falsity is made 'recklessly' whether or not there is any dishonest intention (M.F.I. Warehouses v. Nattrass [1973] 1 WLR 307"*. See ***Stroud's, (supra)***, *p. 2306*

[28] *Cf.* ***section 868(1) CAMA***: *" 'statutory declaration' means **a declaration voluntarily made under the Oaths Act and in Nigeria** includes one so made under any other enactment or law providing for the taking of a voluntary declaration"*. Emphasis supplied. Per ***section 862 (1)***: *"... if any person in any return, report, certificate, balance sheet, or other document required by, or for the purpose of any of the provisions of this Act, **wilfully makes a statement which is false in any material particular knowing it to be false, he commits an offence and is liable on conviction - (a) to imprisonment for a term of two years; and (b) in the case of a company, to fine as the Court deems fit for every day the default continues**"*. Emphasis supplied. According to ***section 862(3)***: *"Nothing in this section shall affect the provisions of any enactment imposing penalties in respect of perjury in force in Nigeria"*.

[29] For the precedent ***CAC Form 14*** (Notice of SDS (pursuant to section 625)), see ***'Companies Regulations 2021'***, *p.64*: https://www.cac.gov.ng/wp-content/uploads/2021/01/COMPANIES-REGULATIONS-2021-published.pdf. It envisages that ***all or majority of the directors*** will be listed and sign. It is extracted as follows: *"STATUTORY DECLARATION OF SOLVENCY **We** __ of ___ **and** ___ of ___ **being all/majority of the directors** of the above company made a full enquiry into the affairs of the company, and, that having so done, we have formed the opinion that the company will be able to pay its debt in full within a period of ___ months from the commencement of the winding up, and we append a statement of the company's assets and liabilities as at ___ 20___ being the latest practicable date before the making of this declaration. We make this solemn declaration conscientiously believing the same o be true and by virtue of the provisions of the Oath Act. Declared at ___ the ___ day of ___, 20___"*. Emphases supplied.

[30] The caveat at the top of the ***Form CAC4A*** states that: *"You cannot use this form for statutory declaration of solvency."* See ***'Companies Regulations 2021'(supra)***, *pp.29-30*.

[31] *Cf.* the position in India, where: *"This declaration must be signed by at least two directors of the company, one of whom must be the managing director (if there is a managing director) in such form as may be prescribed and verified by an affidavit in the prescribed form."* See Dr. K. R. Chandratre, ***'Company Secretarial Practice Manual'*** *(3rd ed., 2016), Lexis Nexis, p.343*.

[32] On the ground that the share buyback is injurious to the Coy, but the majority want to 'forcefully' have their way.

They would have to discharge the evidential burden of proof and if there is no credible basis, such action should fail. However, in the process, there may be negative reputational exposure for the Coy.

*Is **section 186 CAMA** Conjunctive?*

In answering this question, it is apposite to reproduce ***section 186***:

> *"A company may buy back its shares - (a) **from the existing shareholders or security holders on a proportionate basis**; (b) from the existing shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the court; (c) from the open market; **and** (d) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or any other similar scheme."*[33]

Firstly, it may be thought that given the use of the word *"and"*, the listed ***(a) – (d)*** options in ***section 186*** must be read conjunctively. However, this is not the case; otherwise, an absurd result that will render the section nurgatory, will be inescapable.[34] The reasonable interpretation is to regard the options as distinct because for instance, the instant circumstance may render options ***(b) – (d)*** irrelevant or inapplicable. Would that then mean that ***(a)*** cannot proceed on its own? The author considered answer is in the negative.

This can be illustrated by the fact that for a closely held company, there is no *"open market"* from which the Coy could buy back its shares; *that provision must therefore be referencing only listed, public companies.* For such private (unlisted) company's purposes, ***section 186(a)*** is not only sufficient, but more optimal/simpler; especially as not all buyback schemes would entail the Court's intervention or input.

Is a Scheme of Arrangement an Additional Consideration in Implementing CAMA Share Buybacks?

In line with the explanation above, *a scheme is absolutely not required* –a simple cash based share sale and purchase transaction can be what is contemplated; and the only unique point is that the Coy, rather than a third party, is the purchaser. Consequently, there is no need to treat in detail the requirements of a scheme which being more complex, has more rigorous compliance requirements.

Implementation Timelines

We believe that absent any special issues that could delay the process, the share buyback transactions can be concluded within two (2) to six (6) months, depending on the transaction pace of the parties involved.

However, *part of the compelling reasons for a quick transaction timeline is embodied in **section 187(3)** and **(4)** provision that precludes the Coy from exercising voting rights or receiving dividends (or other equivalent distribution to shareholders), in respect of the subject treasury shares, post-acquisition.* The policy rationale for this must be to discourage the Coy from 'sitting on the shares', after acquisition: it should without undue delay, reissue or cancel the treasury shares.[35] Prompt action will also mean that the funds spent by the Coy is recouped through reissue, or that the Coy's capital structure is streamlined through cancellation of the subject shares.

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[33] Emphasis supplied. Please note our subsequent comments (at *p.3*, especially *footnote* 5 herein), about the practical implications arising from the fact that not all shareholders will be participating in the share buyback ***"on a proportionate basis"***, as contemplated by ***section 186(a) CAMA***.

[34] Under the rules of statutory interpretation, sometimes the context requires *"and"* to be read disjunctively, instead of the generally applicable, conjunctive treatment. We believe this is a good example of the application of the exception to the 'conjunctive rule'. See Deji Sasegbon SAN, ***'Sasegbon's Judicial Dictionary of Nigerian Law'***, *(1st ed. (2019)), DSC Publications, Vol. 1, pp. 306 – 309.* See especially at *p. 308*: *"(3) In ordinary usage, the word 'or' is disjunctive and 'and' is conjunctive.* ***But it is conceded that there are situations which would make it necessary to read "and" in place of "or", and vice versa. This may occur in order to carry out the intention of the legislature****. … "* Dr. Vepa P. Sarathi's ***'Interpretation of Statutes'***, *(5th ed. (2010), Eastern Book Company, p. 435* stated: *"In Director of Mines Safety v. Tandur & Nayandagi Stone Quarries (P) Ltd [(1987) 3 SCC 208] … …* ***The Court held that the word 'and' must in the context be interpreted as 'or'*** *and so, the existence of any one of the conditions stipulated in paragraphs a, b, and c would at once attract the proviso.* ***This construction is in keeping with the legislative intent of ensuring the safety of the workmen employed in the mines.****"* See also, ***'Stroud's Judicial Dictionary of Words and Phrases'***, *(7th (South Asian) ed. (2008)), Thomson Reuters, Vol. 1, p. 128: " 'And' has a generally cumulative sense, requiring the fulfillment of all the conditions that it joins together and herein it is the antithesis of OR.* ***Sometimes however, even in such a connection, it is, by force of a context, read as 'or'****."* Emphases supplied.

[35] Note that cancellation will implicate reduction of share capital, but that would not be necessary if the Coy already has prospective buyers for the treasury shares.

Share Buy-Back Commercial and Transaction Considerations

The question may be asked whether the selling shareholders will get market price for the shares they want to sell to the Coy? *Is it permissible for the Coy to buy its shares at a premium, something that would not raise any eyebrows in the case of a third party purchaser*? Our answers to this is in the positive because when the shares are later to be re-issued and sold to third parties, the Coy can also sell at a premium or even make a profit at that time, on the sale.

There is no direct ***CAMA*** provision precluding share buyback at a premium given that sellers are investors who are expected to make returns on their investment in the Coy. If sale at a premium was not allowed, ***CAMA*** would have so provided expressly. The established practice in other jurisdictions on share buybacks can also provide guidance,[36] including on accounting treatment.[37]

Another issue relates to ***quick transaction timeline*** *in order to minimise interest expense exposure by* the Coy *if it is funding the share buyback through bank or other debt*.[38] If the second leg of the transaction (share issuance/sale) can be concluded quickly, the Coy may end up not incurring significant transaction costs when the premium it could earn on the re-issue/sale is taken into account *vis a vis* the interest it would incur on the debt.[39] The other comforting point though is that the interest would be tax deductible.

Yet another question is: *does **CAMA** actually permit debt funded share buybacks?* This author's reluctant answer is in the negative, because: (a) ***section 185*** uses mandatory language: ***"…, payment for the share buyback shall be made from the distributable profits…"*** This is further reinforced by the provisions of ***sections 426 and 427*** amongst others, thereby displacing any potential argument that the *"shall"* in ***section 185*** could be read otherwise than to have mandatory effect; and (b) the rule of statutory interpretation embodied in the Latin maxim *"expressio unius est exclusio alterius"* (the express mention of a thing is the exclusion of the other (not mentioned)),[40] further confirms that ***CAMA*** does not contemplate debt funded buybacks.

Was this omission - which clearly is a restriction on share buybacks - a true oversight or reflective of the legislator's intent to restrict

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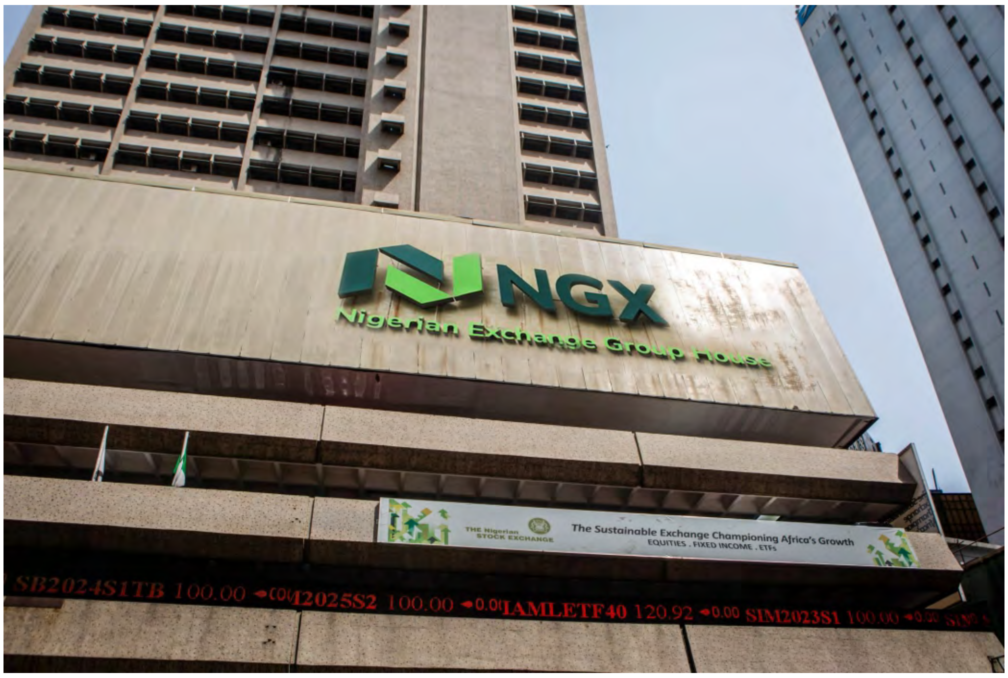
[36] See for example, the detailed Indian regime (and precedent resolutions, etc) in ***Chapter 15 ('Restrictions and Financial Assistance on Buy-Back')*** of Dr. K. R. Chandratre's, ***'Company Secretarial Practice Manual' (supra),*** *at pp. 330 - 353.*

[37] According to the learned authors of ***'Gower and Davies: Principles of Modern Company Law', (supra)*** *at pp. 332 -333:* "… ***Where the proceeds of the sale are equal to or less than the purchase price paid by the company, the money received by the company is to be treated as a realised profit and so potentially distributable by the company. Since the shares will have been acquired out of distributable profits, which were thereby diminished, there can be no creditor-protection objection against the proceeds of the sale being treated as a realised profit. Any excess of the price received by the company over that paid by it, however, must be transferred to the share premium account. This again seems correct. The increase in the price of the shares presumably represents an increase in the value of the company since the shares were purchased, so that the portion of the price obtained on resale which represents that increase in value should be treated as legal capital, just like the consideration received by the company on the initial issue of shares***. … … *However, the company may receive (fully paid) bonus shares in respect of the treasury shares, for otherwise the proportion of the equity represented by the treasury shares would decline, and the bonus shares so allotted are to be treated as treasury shares purchased by the company at the time they were allotted. On a subsequent sale of the bonus shares, their purchase price is to be treated as nil so that the full amount received for them must be transferred to the share premium account. This seems correct, since the purpose of issuing bonus shares is to capitalise profits and so the sale price of the bonus shares news to be added to the company's capital accounts and not treated as a realised profit. …* " Emphasis supplied.

[38] *Cf.* ***sections 187(2) and 189 CAMA***.

[39] *Cf.* the experience with Next, a UK company: *"At the opposite end of the spectrum, however, there is UK retailer Next (NXT). Next was among the first UK companies to start buying back its own shares, and has been doing so for more than 20 years. Since 2000, the number of shares in issue have fallen from 340mn to just 128mn. … Next follows a list of strict company rules. These include only ever using surplus cash, as opposed to debt, and making sure that investment is prioritised over payouts.* ***The retailer also has a method for calculating an "equivalent rate of return" which compares the earnings enhancement of a buyback with the profit that would have to be achieved from investing the cash elsewhere. If the equivalent rate of return falls below a certain level, management is not interested."*** Emphasis supplied. See Jemma Slingo, ***'Are Share Buybacks Really Worth It? (supra).***

[40] See Dr. Vepa P. Sarathi, ***'Interpretation of Statutes'***, *(5th ed., (2010), Eastern Book Company), pp. 117- 121.*



Nigerian share buy backs? The latter view might appear unreasonable; given that globally, debt finance of share buybacks is not uncommon, and such restriction *takes the focus off the key issue of whether the Coy would thereafter be able to pay its debts as they fall due*. However, (and unfortunately), that is the outcome, in the context of ***CAMA's*** phraseology.[41]

There does not appear to have any case law that could have provided direct guidance on this; and it is noteworthy that the CAC tends to take conservative views in the performance of their regulatory roles. They are therefore likely to hold that the ***CAMA*** forecloses debt financing for share buybacks. The CAC is unlikely to change its views without judicial determination; for example, declaratory judgment that the applicable ***CAMA*** provisions must be read to contemplate debt funded share buybacks. This author believes that the likelihood of such judgment is next to nought.

Consequently, *it is prescient to adopt a risk averse approach*; whereby the Court is unlikely to hold that debt (irrespective of how rosy the Company's finances are) could be equivalent in certain circumstances to, *the "distributable profits"* that ***CAMA*** envisages would be the funding source of share buy backs. The solution would be legislative amendment of ***CAMA*** provisions to unleash, within appropriate safeguards of course, the Nigerian debt share buybacks option.[43]

Conclusion

It appears that Nigerian companies (especially private companies) have for whatever reason, not been embracing share buybacks as they ought. In fact, there is a risk that buyback may actually be overlooked as a capital restructuring option; albeit it is a veritable means of achieving exits for desirous shareholders and even (sometimes no less importantly), shoring up share value, if the circumstances of the Coy permits it.[44]

There may be need for legislative amendment to expressly permit share buybacks vide debt, where the Coy's balance sheet cum operating circumstances discloses, and the directors believe, that such transaction is feasible without negative impact on other stakeholders. That way, companies can utilise the share buyback option to the full, as their corporate strategy may require.

[41] In other words, the legislative intent is so clear that there is no room for applying the golden rule of interpretation – which eschews literal interpretation of express statutory provisions where such will lead to absurd result. Thus, restricting funding source of buybacks to only distributable profits is not necessarily absurd, just because other jurisdictions are more permissive, moreso that debt share buybacks also has its own downsides. For example in the USA, *"… many companies use them as a way to increase their reliance on debt financing."* See Justin Pettit, ***'Is a Share Buyback Right for Your Company?'***, *HBR, April 2001*: https://hbr.org/2001/04/is-a-share-buyback-right-for-your-company. See also, Jeff Cox ***'Companies are Ramping up Share Buybacks, and They're Increasingly Using Debt to Do So'***, *CNBC*, 29.11.2019: https://www.cnbc.com/2019/07/29/buybacks-companies-increasingly-using-debt-to-repurchase-stocks.html; and Larry Light, ***'More than Half of All Stock Buybacks are Now Financed by Debt. Here's Why That's a Problem'***, *Fortune, 20.08.2019*: https://fortune.com/2019/08/20/stock-buybacks-debt-financed/ (all accessed 30.11. 2023).

[42] Importantly, sectoral regulators like the Central Bank of Nigeria, National Insurance Commission, Securities and Exchange Commission, National Pension Commission, etc that have pre-approval oversight over share transactions in regulated entities, are also likely to tow the CAC line. ***Quaere***: does such oversight extend to share buybacks since third parties are not involved? The better view may be 'yes' where the relevant provision stipulates that "any" transaction involving acquisition and disposal of shares require prior sectoral regulatory approval, but a case can be made to the contrary if the provision is loosely worded. Provision of detailed specific answers is outside the scope of this article.

[43] See Justin Pettit, ***'Is a Share Buyback Right for Your Company?' (supra).***

[44] See for example, Yomi Ajayi, ***'Rescuing GTCO's Stock Price'***, *Stears, 30.01.2023:* https://www.stears.co/premium/article/rescuing-gtcos-stock-price/ (accessed 24.11.2023). The author wondered: *"Can a share buyback be the answer to GTCO's woes?"* and also stated: *"If GTCO wants to become more valuable, it should consider stock buybacks"*. See also, Osaro Eghobamien, SAN and Tomilola Tobun, ***'Can, and Should a Company Increase Shareholder Value by Buying its Own Shares?'***, *BusinessDay 14.07.2022*: https://businessday.ng/news/legal-business/article/can-and-should-a-company-increase-shareholder-value-by-buying-its-own-shares/#:~:text=With%20the%20coming%20into%20law,in%20the%20register%20of%20members. (all accessed 24.11.2023).

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