G. ELIAS

Overview of Statutory Squeeze-Outs by 90% Majorities under Nigerian Law

Introduction

Minority squeeze-outs have become the subject of significant examination and discussion in the ever-changing corporate world. This practice frequently gives rise to conflicts.

In this article, we will examine the numerous facets of minority squeeze-outs particularly their legal and regulatory frameworks, and financial and ethical implications. This article aims to examine squeeze-out options under section 129 ISA/section 712 CAMA (*defined below*) and section 130 ISA/section 713 CAMA and consider whether and, if so, how far the provisions in issue are sufficient in practical terms to achieve their intended purpose. That purpose seems to us to be that a ninety per cent (90%) majority shareholder who is willing to pay a professionally determined fair price should be able to 'squeeze-out' the ten per cent (10%) minority shareholders and thereby get full control of the company.

Statutory Squeeze-outs: Pervasive Features

In a statutory squeeze-out, a majority shareholder with a legally specified substantial shareholding or voting rights in a company can expel the minority shareholders from the company, typically by acquiring the shares or voting rights of the minority. ('Minority' here refers to a minority that is unwilling to sell its shares to the majority. The shares of minority shareholders who are willing to sell their shares become part of the block of shares held by the majority).

Where there has been a recent purchase of shares by the majority, a statutory squeeze-out process typically allows the minority shareholders to exit the company by selling their shares to the majority shareholder at the same price at which other shareholders sold their shares to the now majority shareholder in a recent acquisition. Otherwise, the minority shareholders are only afforded the right to a fair valuation of their shares by a court or an independent valuer.

Minority squeeze-outs in Nigeria are largely regulated by the following laws: the (i) Companies and Allied Matters Act, 2020 (as amended) ("**CAMA**"); (ii) Rules and Regulations of the Securities and Exchange Commission ("**SEC Rules**"); and (iii) Investments and Securities Act, 2007 (as amended) ("**ISA**"). Key governmental players in minority squeeze-outs include the: (a) Corporate Affairs Commission ("**CAC**"); (b) Securities and Exchange Commission ("**SEC**"); and (c) Federal High Court (**"Court**") (hears and determines applications brought by minority shareholders and matters brought pursuant to ISA and CAMA). SEC Rules, ISA, and the SEC will be relevant where the squeeze-out is to occur in a public company.

The majority shareholders in a company can compulsorily buy out the shares of the minority shareholders under various procedures allowed by the provisions of ISA and CAMA. Some of them are: (a) a scheme of arrangement under section 129 ISA/section 712 CAMA; (b) a scheme of arrangement under section 130 ISA/section 713 CAMA; (c) a scheme of arrangement under section 715 CAMA; and (d) a take-over bid under section 146 ISA.

In this article, squeeze-out options under section 129 ISA/section 712 CAMA and section 130 ISA/section 713 CAMA will be considered. The common feature of squeeze-out options under section 129 ISA/section 712 CAMA and section 130 ISA/section 713 CAMA is that a majority shareholder must have acquired and holds at least ninety per cent (90%) in value of the shares of a company as a precondition for the squeeze-out.

The squeeze-out options under section 129 ISA/section 712 CAMA and section 130 ISA/section 713 CAMA are available in respect of public and private limited liability companies. Where it is a public company, there will be oversight by the SEC and/or the relevant securities exchange (where the company is listed). This means that there is a stronger panoply of checks and balances on squeeze-outs of public company minorities than there is on private company minorities. With private companies, the only real recourse is to approach the courts (as discussed below).

Where the shares of the company are quoted on a securities exchange, a notification to the exchange may be required under the rules of the exchange. For example, the Nigerian Exchange Limited ("**NGX**") requires immediate disclosure by an issuer of any major change to its business or other circumstances relating to the issuer which are not directly specified in the NGX rules, but which are not public knowledge and which may, by virtue of their effect on the issuer's assets, liabilities, operations or reputation, affect the price of its listed or traded securities. Given that a squeeze-out will typically result in a single majority shareholder having full control (and not just majority control) of an entity's business and/or may result in a change of the entity's share price, a disclosure to the NGX will be required.[1]

Statutory Squeeze-outs - Majority Call Options (Section 129 ISA/Section 712 CAMA)

The law provides that "[w]here a scheme or contract, not being a take-over bid under the [ISA] involving the transfer of shares or any class of shares in a company (in this section referred to as "**the transferor company**") to another company, whether a company within the meaning of this Act or not (in this section referred to as '**the transferee company'**) has, **within four months after the making of the offer** in that behalf by the transferee company been **approved by the holders of at least nine-tenth in value of the shares of the [transferor] company** (other than shares already held at the date of the offer by a nominee for the transferee company, or its subsidiary), the transferee company may at any time **within two months after the expiration of the said four months** give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares." (*Emphasis Ours*).[2]

For this provision to apply, Company A ("**Acquirer**") must have acquired ninety per cent (90%) in value of the shares of Company B, the transferor company ("**Target**"), specifically under a scheme or contract before it can proceed to squeeze-out the minority shareholders, who were not in support of the scheme or contract.[3] The Acquirer is then required, within two (2) months from the expiration of four (4) months after it initially made its offer to all shareholders in the Target ("**Squeeze-out Offer Period**"), to give notice to the minority shareholders of its intention to acquire their shares in the company.

During the Squeeze-out Offer Period, the minority shareholders have the right to approach the court to seek a remedy. However, where no such application is made, the Acquirer must, within one (1) month from the date when it gave notice of its intention to purchase the shares of the minority shareholders, acquire those shares on the same terms as it had acquired the shares of the majority shareholders under the scheme or contract.[4]

Section 129(3) ISA and section 712(3) CAMA provide that the minority squeeze-out will not be allowed where the Acquirer holds more than ten per cent (10%) of the shares of the Target unless (a) the Acquirer offers the same terms to all shareholders of the Target; and (b) apart from the Acquirer obtaining the approval of shareholders of the Target whose shares all together amount to ninety per cent (90%) in value of the shares in the Target, at least seventy-five per cent (75%) in headcount of those shareholders must have approved the scheme or contract.

[1] Regulation 17.6, Part C of the NGX Rulebook, 2015.
[2] Section 129(1) ISA and Section 712(1) CAMA.
[3] The ninety per cent (90%) share value of shares expected to be acquired by the Acquirer under a scheme of arrangement or contract excludes those shares already held by the Acquirer or its nominee in the Target.
[4] Section 129(2) ISA and Section 712(2) CAMA.

That is, the Acquirer must obtain: (i) the approval of the shareholders of the Target holding ninety per cent (90%) in value of the shares in the Target, and (ii) also ensure that seventy-five per cent (75%) in terms of head count of all the shareholders of the Target approves the scheme or contract. Failure to get the required number of votes means that the Acquirer would not be able to proceed with the squeeze-out of the minority.

There is some ambiguity here about the scope of the condition that must be satisfied by an Acquirer under section 129(3) ISA and section 712(3) CAMA before such an Acquirer can compulsorily squeeze-out the minority shareholders. The draftsmen may have left out some words while drafting this provision as it is vague and gives no clear picture as to the meaning of the words. Nonetheless, we may infer that the provision was drafted to prevent a single shareholder or a few shareholders who hold a majority of the shares in the Target from transferring their shares in the Target and creating a change of control in the Target without offering protection to the minority shareholders in the Target.

Furthermore, the Acquirer must deliver to the Target: (i) a copy of the notice made by the Acquirer to the minority shareholders of its intention to acquire their shares; and (ii) an instrument of transfer executed on behalf of the minority shareholders by any person appointed by the Target.[5] The Acquirer must do so upon the expiration of one (1) month from the date of the notice given by the Acquirer to the minority shareholders of its intention to acquire their shares in the Target or upon an order of the Court to the contrary, following when an application made by the minority shareholders has been disposed of. The Acquirer shall pay directly to the Target the price for acquiring the shares of the minority shareholders. Thereafter, the Target shall register the Acquirer as the holder of the acquired shares in its register of members.[6]

It is advisable that the price paid by the Acquirer to the Target for the shares of the minority shareholders shall be the same price paid by the Acquirer to other shareholders who were in favour of the purchase of shares by the Acquirer in the Target. The money is paid into a separate bank account set up by the Target for this purpose and held in trust by the Target for all the minority shareholders.[7] The Target is responsible for remitting to each minority shareholder the price of their shares.

Statutory Squeeze-outs - Minority Put Options (Section 130 ISA/Section 713 CAMA)

Sections 130(1) ISA and 713(1) CAMA states that "[t]his section shall apply where, in pursuance of any such scheme of merger, shares in a company are transferred to another company or its nominee, and those shares together with any other shares in the first mentioned company held by, or by a nominee for the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenth in value of the shares in the first mentioned company or of a class of those shares."

The Acquirer must have acquired ninety per cent (90%) in value of the shares of the Target, for this provision to apply.[8] The Acquirer must, **within one (1) month from** the date when shares in the Target were transferred to it by the minority shareholders willing to sell, give notice of its intention to purchase the shares of the unwilling minority shareholders.[9]

Unlike sections 129(2) ISA and 712(2) CAMA, which allow the Acquirer to compulsorily purchase the shares of the minority shareholders, sections 130 ISA and 713 CAMA give the minority shareholders

[5] Section 129(4)(a) ISA and Section 712(4)(a) CAMA.
[6] Section 129(4)(b) ISA and Section 712(4)(b) CAMA.
[7] Section 129(5) ISA and Section 712(5) CAMA.
[8] Section 130(1) ISA and 713(1) CAMA.
[9] Section 130(2) ISA and Section 713(2) CAMA.

the freedom to sell their shares in the Target to the Acquirer and the terms of such share sales. The law provides that "[a]ny such holder **may**, **within three months** from the giving of the notice to him, **require the transferee company to acquire the shares in question**" (*Emphasis Ours*).[10]

That is, unwilling shareholders cannot be compelled to sell their shares in the Target to the Acquirer. In the absence of an application to the Court by the Acquirer or a minority shareholder, where a minority shareholder decides to sell his/her shares in the Target, the Acquirer is bound to acquire those shares on the same terms as it acquired the shares of the minority shareholders willing to sell or on such terms as may be agreed on by the Court hearing the application of either the Acquirer or the shareholder or on such terms which the shareholder deems fit.[11]

Conclusion

Minority squeeze-outs are a somewhat complex and legally-regulated practice that involves the expulsion of minority shareholders by majority shareholders in a company. As such, they have significant implications for corporate governance, legal framework, and ethical considerations.

Save for our reservations on the provisions of section 129(3) ISA and section 712(3) CAMA, the letters of the law under the provisions we have examined above are adequate for ninety per cent (90%) majority shareholders in companies to acquire the remaining ten per cent (10%) minority shareholding. However, in practice, despite the somewhat robust provisions of the law, the sufficiency of the provisions does not always translate to reality. Ninety per cent (90%) majority shareholders often still experience difficulty in obtaining one hundred per cent (100%) ownership as ten per cent (10%) minority shareholders or less still have the capacity to frustrate the squeeze-out process by resorting to or threatening bad faith litigation, exploiting the ambiguities in the statutes and the slow pace of our judicial system.

It is imperative for regulators, corporate governance experts, and legal scholars to continue to examine, refine and make more practical the squeeze-out provisions available under Nigerian law. It will be a welcome development if, in the near-future, upon the minority shareholders receiving compensation that is fair by professional standards, a shareholder(s) with ninety per cent (90%) majority ownership in a company is able to acquire full control of the same with minimal frustration.

[10] Section 130(3) ISA and Section 713(3) CAMA.
[11] Section 130(4) ISA and Section 713(4) CAMA.

Authors

Amanda Opara
Senior Associate
amanda.opara@gelias.com

Faith Emmanuel
Associate
faith.emmanuel@gelias.com

Chidinma Egwu
Associate
chidinma.ekelemegelias.com

LOCATIONS

LAGOS OFFICE
6 Broad Street
Lagos, Nigeria

T: +234 (1) 460 7890
E: gelias@gelias.com

ABUJA OFFICE
2nd Floor, Abia House,
Plot 979, First Avenue,
Central Business District
F.C.T, Abuja.

T: +234 (1) 888 8881

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