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Rethinking Winding Up as a Distress Remedy under CAMA 2020

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Abstract

Modern commerce is law driven. The law is interested in the activities, existence and wellbeing of companies which are core components of the economy of any nation. It is in this connection that the legislature sets out the framework for the operation and management of companies for the purpose of engendering their prosperity, and that of entities who are either members or persons who transact with them. However, one significant threat a company faces, irrespective of size and nature of operation is illiquidity. Illiquidity in a company usually begets distress which ultimately may be its death knell. This work finds that a company in distress in Nigeria invariably gets shipped out to a receiver or receiver/liquidator and ends up being wound up. The paper interrogates the winding up provisions under the Nigerian laws and finds that they suffer from grave inadequacies with no in-built safeguards to further the interest of the company and its shareholders. In essence the provisions lack a competitive edge in the modern economic field. The paper advocates for legislative reform to provide for a rescue plan for companies in distress, particularly as going concerns, rather than the fatality inherent in winding up orders.

Keywords: distress, insolvency, winding up, rescue plan, illiquidity

1.0. Introduction

A company is imbued with legal capacity—similar to a human being—upon registration which allows it to transact business in its name, and own properties amongst other abilities. The law is interested in its activities, existence and wellbeing. However, like humans, companies get sick and become distressed. When this happens the law comes in to effect remedy. One of the remedies provided is winding up. In Nigeria, winding up is provided for mainly in the Companies and Allied Matters Act[1] (CAMA) and the Assets Management Corporation of Nigeria (AMCON) Act. However these laws do not, in the view of this author, adequately address the question of a safety net for the rescue of insolvent companies. They deal mainly with issues arising from the direct holding system of company securities and fail in many respects to provide real remediation in areas of corporate governance, capital securities interplay and insolvency. The growth of the banking and capital market sectors in the Nigerian economy; the resulting need for a robust enforcement framework for secured credit through insolvency laws[2] in addition to sustaining a balance to keep an ailing company going have increased the urgency of the examination of the subject of this paper.

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[1] Law of the Federation of Nigeria, 2020

[2] AMCON in its 2017 4th quarter report states that it has acquired over N12b of non performing bank loans since its inception.

2.0. Definitions and Clarification of Terms

2.1*Winding up*

According to Pennington[3] winding up is the procedure by which the affairs and management of a company's assets are taken from the directors, its properties are managed by a liquidator, and its debts and liabilities are discharged out of the proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. In the Halsbury's Laws of England, it is defined as "a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realized; and applied in payment of its debts; and when these are satisfied, the remaining amount is applied for returning to its members the sums which they have contributed to the company in accordance with Articles of the Company." The Court of Appeal described winding up as the "gathering in of the assets of the company, disposing of such assets, meeting of the liabilities of the company and sharing of the balance between contributories."[4] At the end of the winding up the company it will have no assets or liabilities, and it will take the formal step of dissolution[5].

2.2 *Dissolution*

The terms winding up and dissolution are not coterminous under the company law. In *Pierce Leslie & Co. Ltd v. Violet Ouchterlony,*[6] it was held that winding up precedes the dissolution of a company. Law Times Journal of India[7]clarifies the distinction between dissolution and winding up of a company in the following terms:

1. The procedure to bring the company's life to end in a lawful manner is divided into two stages. In stage one, winding up takes place where assets of the company are realized, liability are paid off and the surplus, if any, distributed among the members. In the second stage, dissolution takes place where the whole existence of the company comes to an end in a lawful manner.

2. The legal entity does not get dissolved during the process of the winding-up; it is only in the dissolution stage that the legal entity of the company comes to an end.

2.3 *Distress*

In ordinary parlance, 'distress' connotes a state of being in danger or difficulty and in need of help. It is a state of 'inability' or 'weakness' which prevents the achievement of set goals and aspirations. Olukotun and others described a distressed financial institution as 'one with severe financial, operational and managerial weaknesses which have render it difficult for the institution to meet its obligations to its customers and owners when due.[8] Distress can also be associated with a cessation of independent operations or continuance of operation.

[3]B.R, Pennington, *Pennington's Company Law, 5th Edition, (Butterworths, 1985), 839*
[4]*Anakwenze v Tapp Industries Ltd*(1994) 3 N. W.L.R. (Prt 162) 265 per Oguntade J.C.A
[5] ibid
[6] 1969 SCR (3) 203
[7]http://lawtimesjournal.in/ what does winding-up mean?- accessed on 23/9/20
[8]G. Olukotun and others, Bank Distress in Nigeria and the Nigeria Deposit Insurance Corporation Intervention; Volume 13 Issue 8 Version 1.0 [2013];*Global Journal of Management and Business Research Finance ,Global Journals Inc. (USA)* Online ISSN: 2249-4588

2.4 *Insolvency*

Corporate insolvency relates simply to the inability of a debtor company to meet up with its commercial commitments; that is to say, financial obligations arising from trade with third parties or secured lending.[9] It is a situation where a natural or legal entity is unable to repay a debt as at when due.[10]

3.0 The Winding up Regime

3.1 *The Law*

Under the CAMA, three modes of winding up are provided for. Section 564 prescribes that:

(1) The winding up of a company may be affected-

(a) by the Court;

(b) voluntarily[11]; or.

(c) subject to the supervision of the Court.

A winding up process may be commenced by any of the entities listed in section 573. Sub section (1) of this section states that an application to the court for the winding up of a company shall be by petition presented subject to the provisions of this section, by — (a) the company or a director; (b) a creditor, including a contingent or prospective creditor of the company; (c) the official receiver; (d) a contributory[12]; (e) a trustee in bankruptcy to, or a personal representative of, a creditor or contributory; (f) the Commission under section 366 of this Act; (g) a receiver, if authorized by the instrument under which he was appointed; or (h) by all or any of those parties, together or separately. However, as relates to a contributory he/she is not entitled to present a petition for winding up a company unless the number of members is reduced below two in the case of companies with more than one shareholder, or shares in respect of which he is contributory or some of them, were originally allotted to him or have been held by him, and registered in his name, for at least six months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.[13]

A winding-up petition shall not, if the ground of the petition is default in delivering the statutory report to the Commission or in holding the statutory meeting, be presented by any person except a shareholder, or before the expiration of 14 days after the last day on which the meeting should have been held. The Court is prohibited from hearing a winding-up petition presented by a contingent or prospective creditor until sufficient security for costs has been given, and a *prima facie* case for winding up has been established to its satisfaction[14].

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[9] I. A,Idigbe, "The Nigerian Insolvency Law and the Rights of Creditors and Account Holders of Intermediate Securities vis-avis the Insolvency Intermediary', being a paper presentation at the SEC UNIDROIT Workshop on Intermediate Securities, May 2009, Abuja Nigeria.

[10] E.O, Okolo, 'Insolvency Law in Nigeria', Available at http://investadvocate.com.ng/2016/10/11/insolvency-law-nigeria/ assessed on 26th may, 2018 at 3.20pm

[11] See sections 627- 633 for members voluntary winding up and sections 635-641 for creditors voluntary winding up

[12] Under section 573, a personal representative of a contributor may petition for a winding up proceeding. A contributory for the purpose it would seem also includes a deceased shareholder. See CAMA 2020, section 568(1)

[13] CAMA 2020, Section 573(2)

[14] See generally subsections (b) and (c) of section 572(2) of CAMA 2020

Under the AMCON Act,[15] the corporation has special powers to apply to court for winding up of the debtor entity where a court gives a decision against a body corporate in a debt recovery action requiring a debtor company to pay to the corporation any sum which remains unpaid after 90 day of the said decision.. Proceedings under this special power are deemed to have been done under CAMA and will have such effect subject, however, to modifications contained in the AMCON Act.

3.2*Grounds for Petition*

Generally, the CAMA provides that a company may be wound up[16] by the court if:

(a) the company has by special resolution resolved that the company be wound up by the Court;

(b) default is made in delivering the statutory report to the Commission or in holding the statutory meeting;

(c) the number of members is reduced below two in the case of companies with more than one shareholder;

(d) the company is unable to pay its debts;

(e) the condition precedent to the operation of the company has ceased to exist; or

(f) the court is of opinion that it is just and equitable that the company should be wound up.

With reference to the issue of debt in (d) above, the Act[17] clarifies in section 572 that 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.

In respect to winding up under the supervision of court, the Act states under section 649 that if a company passes a resolution for voluntary winding up, the court may on petition order that the voluntary winding up shall continue but subject to such supervision of the court, and with such liberty for creditors, contributories, or others to apply to the court, and generally on such terms and conditions as the court deems fit.[18] Section 620 of the Act[19] provides that any company may be wound up voluntarily — (a) when t**h**e period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution

[15] Section 52(1)AMCON Act, 2010 as amended
[16] Section 571, CAMA 2020
[17] CAMA 2020
[18] A petition for the continuance of a voluntary winding up subject to the supervision of the court shall, for the purpose of giving jurisdiction to the court over actions, be deemed to be a petition for winding up by the court. Also a winding up subject to the supervision of the court shall, for the purposes of sections 576 and 577 of the Act, be deemed to be a winding up by the court.

requiring the company to be wound up voluntarily; (b) if the company resolves by special resolution that the company be wound up.

Where under section 354 of the Act a petitioner petitions that the affairs of a company have or are being conducted in a manner unfairly prejudicial and unfairly discriminatory against him or those on whose behalf he is petitioning, or that such conduct is in disregard of his or their interest; or that the act or omission or a proposed act or omission would be oppressive, unfairly prejudicial or unfairly discriminatory, the court may order for the winding up of such company.[20] Under section 366 if, in the case of any body corporate liable to be wound up under the Act, it appears to the Commission from a report made by an inspector under section 363 that it is expedient in the public interest that the body corporate should be wound up, the Commission may (unless the body corporate is already wound up by the Court) present a petition for it to be wound up if the Court considers it just and equitable to do so.

4.0 Discussion

The character of winding up is fatalistic as it inexorably leads to the company's dissolution with a corollary loss of both shareholder funds and economic gains to the nation. In the course of this research it was found that a receivership ends in the winding up of a company contrary to the spirit of section 553(2)(a) which is to the effect that a receiver/manager shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful manager would act in the circumstances. From the aggregation of the provisions of the law it is clear that the main actors in the winding up mill are the member (contributory), the company and the creditor or the creditor's beneficiary.

The CAMA empowers a member to petition the court to wind up a company on the ground that the affairs of the company are being conducted in an illegal and oppressive manner or if the number of members has been reduced to below two (2)[21]. Generally, therefore it would seem that an individual member's power to initiate a winding up proceeding is possible only where the company is a going concern. Where a company is insolvent, winding up is generally initiated either by the company itself, as members winding up proceeding, or by creditor(s). This distinction is significant because it brings to the fore the "harm" inherent in permitting a petition for and making of a winding up order merely because a member is aggrieved and has been able to satisfy a court that the conduct of the majority has occasioned prejudice, oppression and discrimination on him or has been in disregard to his interest or that the membership of his company has reduced to below two (2)[22]; this is in spite of the fact that one person may form and incorporate a private company by complying with the requirements of the Act in respect of private companies.[23]

How, for example, is the extermination of a solvent company an appropriate relief to an allegation of discrimination or oppression or even fraud on the part of the majority? Again if the

[20] Section 355(2)(a), ibid
[21] Sections 357 and 571
[22] Section 18, CAMA 2020
[23] ibid

membership of a company has reduced to below two, is it not possible for the company, under the supervision of the court, to acquire new membership to satisfy the requirement that a company shall have not less than two members? [24] The retention of these same provisions by the legislature as part of the corpus of our corporate law in the new CAMA is unfortunate, passive and retrogressive.

Under the Nigerian law, winding up as a remedy for a company in distress is skewed preponderantly in favour of creditors and holders of secured or preferential instruments. It is submitted, from the provisions of the Act, that the furtherance of the business of the company under a receivership is mainly to satisfy the indebtedness of the company to the appointors of the receiver/manager and not to sustain the continued existence of the company or to assure a better return for the distressed shareholders. For example, a combined reading of the entire gamut of provisions in sections 443 to 449 relating to the appointment of an administrator, his/her powers and the objectives to be achieved shows, without doubt, that the interest of creditors is the essential focus.

As it stands, no administration order can be made in respect of a company in distress where a winding up process has been initiated. Section 447(3) of the Act prohibits the appointment of an administrator for a company which is in liquidation by virtue of- (a) a resolution for voluntary winding-up, subject to section 475 (2) (b) of the Act (where a liquidator is the applicant and the order of court is the exercise of the court's discretionary powers); or (b) a winding-up order, subject to sections 474 and 475 of the Act (where a holder of a charge over some property of the company is the applicant). It is contended that member's and creditor's winding up petitions must be carefully scrutinized to obviate the extermination of a company on the altar of adherence to the law. As warned by Onu JSC in the case of *Air Via Ltd v Oriental Airlines Ltd*, care[25] and utmost caution must be exercised by the institution of justice in proceedings involving the termination of the life of a company with responsibility not only to the society but also to a section of the public.[26]

Winding up under the Nigerian Company law, it is opined, offers no recognizable protection to the shareholder or the company as a business concern. The CAMA 2020 has what may be termed as a rescue provision for ailing companies in section 443. The section states that an administrator of a company may be appointed by- (a) an administration order of the Court under section 449 of the Act; (b) the holder of a floating charge under section 452; or (c) the company or its directors under section 459 to do all things necessary for the management of the affairs, business and property of the company, with the objective of-

> (a) rescuing the company, the whole or any part of its undertaking, as a going concern;
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up; or

[24] Section 18(1) seem to undermine the progressive proviso in subsection (2) of the section
[25] (2004) ALL FWLR (prt 212) 1565 at 1569
[26] ib id at ratio 7

(c) realizing property in order to make a distribution to one or more secured or preferential creditors.

The objectives as seen above suggest a safety net not for the company *per se* or its shareholders but for creditors.

The practice in some other jurisdictions is for moderation of procedure for winding up, or outright expunging of retrogressive provisions. For example while under the unfair prejudice petition,[27]the Nigerian court can order for winding up of the company[28], the United Kingdom's Companies Act in such similar petition stipulates that if the court is satisfied that a petition is well founded and it thinks fit for giving relief in respect of the matters complained of it may: (a) regulate the conduct of the company's affairs in the future; (b) require the company— (i) to refrain from doing or continuing an act complained of, or (ii) to do an act that the petitioner has complained it has omitted to do; (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court; (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.[29] This demonstrates a clear foresightedness and a desire to make legislation for economic sustenance and development.

For a creditor's winding up petition to succeed in Nigeria, the creditor is only required to show indebtedness in a sum exceeding ₦200,000 which has fallen due and a failure to pay upon demand for a period of 21 days.[30] Where a court is satisfied as to these facts the company stands wound up under the gavel. This state of affairs is further exacerbated, in a graver dimension, with AMCON thrown in to the mix. As an undertaker of 'toxic' debts and a beneficiary of debts under section 573,[31]AMCON's unabashed zealousness has thrown many a bank debtor-company out of business because of what has become known as "non-performing loans". The objectives, functions and powers of AMCON are designed mainly for recovery of bank assets not for assisting debtor companies to repay bank loans;[32] in fact AMCON has the power to appoint itself as a receiver of a bank debtor company's assets under the loan obligation.[33]Under such condition an enterprise in difficulty has no alternative than to take a painful decision to wind up or submit to being wound up by creditors.

This state of retardation has become extinct in progressive climes. For example, under the South African Companies Act a company under financially distress is not shipped out but provided statutory safety nets for survival. The Act[34] provides for a rescue plan which involves the:

[27] CAMA 2020, Section 354
[28] Ibid, section 355(2)(a)
[29]See sections 994 and 996 of the UK Companies Act 2006
[30] CAMA 2020, section 572
[31] CAMA 2020
[32] AMCON Act, 2010, sections 4,5,6
[33] Ibid, section 48(1)
[34] section 128(1(b)

- The temporary supervision of the company, and of the management of its affairs, business and property;
- A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders[35] than would result from the immediate liquidation of the company.

In a Covid-19 ravaged world where businesses are gasping for the metaphorical oxygen, Nigeria either by legislation or regulation has not provided any insulation from the stringent provisions of CAMA relating to insolvency in order to mitigate operational difficulties and protect ailing companies from 'cudgel' wielding creditors. In the UK for example the Secretary of State, under his powers to make regulation, in March 2020 made regulations to ease space for companies in difficulty to continue to operate. The regulations[36] include:

1. a moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seek a rescue or restructure;
2. protection of their supplies to enable them to continue trading during the moratorium;
3. a new restructuring plan, binding creditors to that plan;
4. key safeguards for creditors and suppliers to ensure they are paid while a solution is sought; and
5. a temporary suspension of wrongful trading provisions with retrospective effect from 1st March 2020 to give company directors greater confidence to use their best endeavours to continue to trade during the pandemic emergency without the threat of personal liability should the company ultimately fall into insolvency.

In the same vein regulations were made in Malaysia to alter the application of the Malaysian Company Law[37] with respect to company insolvency to reflect the exigency of the moment. The Minister in exercising his power to make regulations under the Companies Act made a regulation exempting all companies from the entire application of section 466(1)(a) of the Companies Act 2016[38](dealing with insolvency) during the period of the Covid-19.

[35] It is instructive that the South African Act show manifest concern for the interest of the shareholder

[36] Corporate Insolvency and Governance Regulations, 2020 which has further been introduced in the Parliament as Bill

[37]The most common method of winding up a company Malaysia is through the issuance of a statutory demand under section 466(1)(a) of the CA 2016 which is impair material with section 571 of the CAMA) based on the prescribed amount. The debtor company then has 21 days to respond to the statutory demand. After the expiry of this period, the creditor can file a winding up petition.

[38]Companies (Exemption) (No. 2) Order 2020,

5.0. Conclusion

Nigeria clearly has no discernable legislation or regulation for companies in difficulty or distress. This is in spite of the declaration that the private sector is the driver of its economic development. In this 21st century Nigeria's company law has remained anachronistic and uninspiring; the CAMA 2020 is in most parts is a repackaging of the 1990 Act[39] and this can hardly aid the ease of doing business.

It is submitted that the CAMA provisions relating to winding up suffer from grave inadequacies with no in-built safeguards to further the interest of the company and its shareholders and further lacks a competitive edge in the modern economic field. The Nigerian company is hamstrung by the laws which overreach their regulatory intent. A safety net is thus desirable to assure the continued existence of a business entity in difficulty subject to the conditions set in the Act[40] for bringing to an end the life of a company. In this wise, it is advocated that a fundamental reform of the provisions relating to winding up in our company law be undertaken urgently as the CAMA 2020 has been shown to be out of tune with modern trends.

Specifically it is proposed that the CAMA be amended to include provisions that would grant a company in distress, within a prescribed timeline, a temporary supervision and the management of its affairs, business and property; a temporary moratorium on the rights of claimants against it or in respect of property in its possession and the development and implementation of a plan to rescue the company by restructuring its affairs; business, property, debt and other liabilities and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis[41]under the supervision of the court and the relevant regulatory agencies. When, upon the effluxion of such timeline, it is not possible for the company to continue in existence, a provision should be made for an arrangement, under the proposed amendment, that would result in a better return for the company's creditors and shareholders than would have been from an immediate liquidation of the company.

[39]The CAMA retained the provision of the 1990 Act that empowers a member to petition the court to wind up his company on the ground that members has been reduced to below two (2) (see section 571) when section 18 of the new Act stipulates that an individual may form a company if he satisfies the relevant provisions of the Act.

[40] CAMA 2020, sections 360, 571(a) and 620, See fn 20

[41] See generally section 128 of the South African Companies Act and also sections 1-14 of the Insolvency Act of the United Kingdom.