

The Status and Role of Liquidators in the Winding-Up of Companies in Nigeria: A Critical Evaluation

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Abstract

Winding-up or liquidation is the process by which the company's life is terminated and its property administered, for the benefit of its creditors, members and other interested parties. The liquidator is the principal officer involved in the winding-up proceedings and it is obvious that he has to perform his functions and exercise his powers effectively and without abuse, in order to address the claims of all the parties satisfactorily. This paper therefore evaluates the status and role of the liquidator in the winding-up of companies in Nigeria. It also proffers suggestions on the measures to be adopted to achieve effectiveness in the exercise of his powers and performance of his functions for the overall benefit of all the interested parties in the winding-up proceedings.

Keywords: Legal status, Powers and functions, Liquidators, Winding-up of Companies.

1. Introduction

The liquidator is unarguably the most important actor in the process of winding-up of companies. His role is not only significant but almost indispensable in every mode of winding-up, whether compulsory winding-up,¹ voluntary winding-up² or winding-up, subject to the court's supervision. Indeed, the liquidator's powers, as specified in the Companies and Allied Matters Act³ (CAMA), are enormous and therefore susceptible to misapplication and outright abuse.

The CAMA has actually made provisions for the supervision and control of the liquidator by the court and the Committee of Inspection, among others, in the performance of his duties and exercise of his powers, as liquidator. However, complaints and disenchantments among the creditors and other interested parties in the winding-up process in relation to the high-handedness and abuse of power by liquidators point to lack of effective supervision and control of the liquidators. As the officer responsible for conducting the winding-up proceedings, the liquidator is normally expected to perform his functions and exercise his powers effectively in the interest of all the parties, but, in practice, the parties have often been disillusioned by the liquidator's performance.

It is against this background that this Paper sets out to examine the status and role of the liquidator in the winding-up of companies in Nigeria, and to determine the measures that should be adopted to achieve effectiveness in the exercise of his powers and performance of his functions for the overall benefit of all the interested parties in the winding-up proceedings.

2. Concept and Meaning of a Liquidator

A liquidator is that person appointed for the purpose of conducting the proceedings in the winding-up of a company.⁴ The Black's law dictionary defines a liquidator as the official charged with the winding-up of a company.⁵ In specific terms, a liquidator is a person appointed by the company or court to wind up the affairs of the company and to distribute its assets, if any, among the creditors and contributories in accordance with the Articles and rules of priority during winding-up.⁶

A liquidator could be a provisional liquidator or a substantive liquidator. However, irrespective of the prefix used in describing the liquidator, his functions are identifiable and specific. A provisional liquidator is generally appointed where the assets of the company are in jeopardy and the primary objective of his appointment is to prevent the directors of the company from dissipating such assets of the company, and unless expressly restricted, therefore, the provisional liquidator has the authority of any liquidator *vis-à-vis* securing the

¹ This is also referred to as winding-up by the Court.

² There are two types of voluntary winding-up, namely, Members' Voluntary winding-up and Creditors' Voluntary winding-up.

³ Cap. C.20 Laws of the Federation of Nigeria (LFN), 2010, ss. 425 – 431.

⁴ E.O.A. Idowu, "Winding-Up of Companies" in E.O. Akanki, ed., *Essays on Company Law* (Lagos: University of Lagos Press, 1992) p. 266.

⁵ H.C. Black, *Blacks Law Dictionary* 9th edn (St. Paul Minn: West Pub. Co. 1979) p. 931.

⁶ N.C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Lagos: Novena Publishers Ltd, 2010) p. 687.

safety of the properties that would appear to belong to the company being wound up.¹

A distinction is sometimes drawn between a provisional liquidator and a provisional liquidator proper. The provisional liquidator proper is one appointed upon the presentation of winding-up petition or anytime thereafter but before the winding-up order is made. The purpose is to preserve the assets of the company with a view to equitable distribution pursuant to the contingency of a winding-up order.² A provisional liquidator proper can only be appointed pursuant to an effective petition already filed and properly before the court³ usually upon information that the appointment of a provisional liquidator is of utmost necessity or that public interest dictates the appointment of one.

The provisional liquidator on the other hand, in compulsory winding-up, is the official receiver, usually, the Deputy Chief Registrar of the Federal High Court upon the making of a winding-up order, *virtute officii* (by virtue of office), with all the powers of a liquidator.⁴ It then becomes his duty to take possession and collect the assets of the company.⁵ The provisional liquidator continues in the office until confirmed as the substantive liquidator or a new one is appointed.

The liquidator's role continues after the making of the winding-up order by the court. He is one appointed out of or in court, responsible for the final rites of the company; responsible for distributing the assets of the company to contributories, paying creditors and if there is any balance, he pays it to the Companies Liquidation Account.

3. Appointment of a Liquidator and Legal Consequences

The CAMA has unequivocally declared that a liquidator is appointed for the purpose of conducting the proceedings in winding-up a company and performing such duties in reference thereto.⁶ In a compulsory winding-up, the liquidator will be appointed by the court, that is, the Federal High Court, which has the exclusive powers over the winding-up processes, by the combined effect of section 567 of the CAMA and section 251 of the Constitution of Nigeria, 1999. The liquidator will generally be appointed after the presentation of the winding-up petition and not before. Therefore, at any time after the presentation of a petition and before the making of a winding-up order the appointment shall be "provisional" and the court making the appointment may limit and restrict the powers of the liquidator by the order appointing him.⁷ The word "provisional" that qualifies a liquidator relates only to the period of his appointment. The provisional liquidator has been judicially held to be in the same position as a receiver *pendentelite*. He is not entitled to appear on a winding-up petition even though served; as he is not a party. He is appointed only to preserve the property of the company pending the making of a winding-up order or such shorter period as the court may deem fit.⁸

In the case of *Anakwenze and Ors v Tapp Industry Ltd and Ors*,⁹ Uwaifo, JCA (as he then was) stated *inter alia* that:

In law the provisional liquidator, although under the control of the court, stands generally within its restricted powers, in the place of the Board of Directors of Tapp Industries Ltd., see *Re: Nawcon Ltd.* (1969) 1 All E.R. 188 at 192. It is however recognized that the Board may still exercise some residual powers such as instructing solicitors or counsel to oppose the Winding-Up or to contest certain actions of the Provisional Liquidator.¹⁰

Although section 422 of the CAMA stipulates that a liquidator may be appointed upon the presentation of a petition, the courts have held that the provision should be read conjunctively with Rule 21(1) of the Winding-Up Rules which provides that:

After the advertisement of a petition for the winding-up of a company by the court, upon the application of a creditor, or of a contributory, or of the company and upon proof by affidavit of sufficient grounds for the appointment of a provisional liquidator, the court, if it thinks fit and upon such terms as in the opinion of the court shall be just and necessary, make the appointment.¹¹

¹ *Ibid.*, p. 40.

² *Levy v Napier* (1962) SC 468.

³ *Re: A. Company* (1974) All E.R. 256.

⁴ A.O. Alubo and A.M. Olong, "A Critical Appraisal of the Position of the Liquidator in the Winding-up of Companies in Nigeria," *Modern Practice Journal of Finance and Investment Law* Vol. 10 Nos. 1 – 2, (2006) p. 80.

⁵ *Ibid.*

⁶ CAMA, s. 429(1).

⁷ *Ibid.*, s. 422(2).

⁸ *Ibid.*, p. 137.

⁹ (1991) 7 NWLR (Pt. 202) 177 at 142.

¹⁰ *Ibid.*, p. 159.

¹¹ Companies Winding-Up Rules, Rule 21(1).

Thus, in the case of *Intercontra Limited v Messrs Golden Eagle Shipping Agencies Limited*,¹ the petitioner brought a petition to wind up the respondent/company on the grounds that the respondent/company was insolvent and unable to pay its debts; and that it was just and equitable to wind-up the company. The court, upon an application, ordered that the petition be advertised in some national newspapers. The petitioner later brought a motion under Order 33 Rule 1 of the Federal High Court (Civil Procedure) Rules and Rule 21 (1) of the Companies Winding-Up Rules for the appointment of a provisional liquidator pending the order for the winding-up of the respondent. The court held, striking out the application, that by virtue of Rule 21(1) of the Companies Winding-Up Rules, the advertisement of a petition is a condition precedent to the bringing of an application for the appointment of a provisional liquidator.² The appointment can therefore be made only when an effective petition is pending and before a winding-up order is made.³

The principal purpose of appointing a provisional liquidator, as already alluded to, is to ensure that the assets of the company are preserved and the directors are prevented from dissipating them before the winding-up order can be made. It follows therefore, that his first duty and indeed that of liquidators generally, is to preserve the company's assets before a winding-up order can be made.⁴

In members' voluntary winding-up of companies, the appointment of liquidators for the purpose of winding-up the affairs and distributing the assets of the company as well as the payment of remuneration of liquidators shall be made by the company.⁵ The appointment of a liquidator or liquidators may be made at the meeting where a resolution is passed.⁶ Usually, it is important to notify members through the notice of meeting that the liquidator(s) will be appointed. It is obvious that even if there is failure to so notify members through the notice of meeting, the meeting could still make a valid appointment of liquidators.⁷ However, we suggest that the Winding-up Rules should provide that the appointment of a liquidator or liquidators should expressly be included as an item in the notice of meeting of the company or creditors for a resolution to wind-up a company compulsorily or voluntarily. This is currently omitted under the Winding-Up Rules and could seriously affect resolutions reached at the meeting or result in unnecessary controversy as to the validity of the appointment, which would invariably be referred to the court for a decision.

It is also important to state that if a vacancy occurs by death, resignation or otherwise in the office of a liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy; and for that purpose a general meeting may be convened by any contributory or; if there were more liquidators than one, by the continuing liquidator.⁸

With respect to the appointment of a liquidator or liquidators in a creditors' voluntary winding-up, section 472 of the CAMA, directs the convening of creditors' meeting as well as the company meeting simultaneously, where voluntary winding-up is proposed but not before an exhaustive statement of the affairs of the company is given. The convening of creditors' meeting is analogous to a declaration of insolvency. At the respective meetings of the creditors and the company, a person to be appointed as a liquidator may be nominated for the purpose of winding-up the affairs of the company and distributing the assets of the company. If different persons are respectively nominated, then the nominee of the creditors shall be the liquidator; and if no one is nominated by the creditors, then the company's nominee becomes the liquidator.

In a winding-up subject to supervision,⁹ where an order is made, the court may by the same or any subsequent order, appoint an additional liquidator.¹⁰ The liquidator so appointed, shall have the same powers and be subject to the same obligations, and shall be in the same position, with the liquidator appointed in a voluntary winding-up.¹¹ The court has the powers to fill any vacancy occasioned by removal, death or resignation of a liquidator.

The appointment of a liquidator in a compulsory winding-up has the effect of rendering the board of directors, *functus officio* because the powers of the board of directors are assumed by the liquidator. In this regard, section 422(9) of the CAMA provides that "If a liquidator is appointed under this section, all the powers of directors shall cease, except so far as the courts may by order sanction the continuance thereof".

This statutory provision received judicial interpretation in the case of *NDIC v FMB*,¹² where Uwais,

¹ (1985) FHNLR 45.

² *Ibid.*, p. 48 C.

³ See *Re: A Company* (1974) 1 All E.R. 256.

⁴ *Provisional Liquidator Tapp. Ind. v Tapp Industries Ltd.* (1995) 5 NWLR (Pt. 393) 9 at 40.

⁵ CAMA, s. 464.

⁶ D. Sasegbon, *Nigerian Companies and Allied Matters Law and Practice* (Lagos: DS.C Pub. 1991) . 805.

⁷ *Ibid.* See *Oakes v Turquand* (1867) LR 2, HL 325, *Re: Tubeless Tyre Co.* (1990) WN 42.

⁸ Winding-up Rules, Rule 41(8).

⁹ *Ibid.*, s. 486.

¹⁰ *Ibid.*, 489(1).

¹¹ *Ibid.*, 489(2).

¹² (1997) 4 NWLR (Pt. 501) 519.

JSC, held that “on the appointment of a provisional liquidator, the directors cannot exercise any of their powers unless the court grants them the leave to do so”. Thus, the effect of the appointment of a liquidator under section 422(9) of the CAMA is the divestiture of the powers of its board of directors and the investiture of such powers on the liquidator. When this happens, the board is said to be *functus officio*.¹

In the case of *Gbedu v Itie*,² one of the issues for the court’s determination was whether the trial judge was correct in holding that by operation of law, on the making of a winding-up order and appointment of a liquidator, the servants of a company affected are *ipso facto* dismissed?

The Court of Appeal held that the effect of a winding-up order envisaged by the combined effect of section 422(1)(2) and (3) of the CAMA is, truly far-reaching. In the first place, the appointment of a liquidator under section 422(9) upon the winding-up of a company has the effect of divesting the board of directors of its powers and vesting the same in the liquidator who assumes the powers and functions of the board.

The court stressed that the exercise of the liquidator’s powers does not only supplant the powers of the board, but also actually negates the capacity of the company to sustain its contractual obligations.

With regard to a contract of service, the court noted that in such a contract, both the employee and the employer (the company) have continuing obligations. While the employee has an obligation to work, the company has a duty to remunerate him for such exertions by way of payment of wages. However, a winding-up order hampers a company’s capacity to sustain its obligations under the contract of service. A winding-up order drains the company of all powers; particularly, powers of dealing with its assets and of the continued performance of its obligations. By the winding-up order, a new officer, an officer of the court (the liquidator) inherits these powers.

The court therefore held that the servants of the company must be deemed to know the legal effect of a winding-up order, on their employment, which is that such an order operates as a notice to them that the company cannot continue its obligations to them under the contract of service and this constitutes a breach going to the root of their contract. What actually operates is not the fact of the winding-up but the notice implied in the making of the order.³

The court therefore concluded that by the winding-up order and appointment of a liquidator, the servants of the company were discharged from the date of the order.

It is significant to observe that the effect of a winding-up order and appointment of a liquidator on a contract of employment depends on whether the winding-up is compulsory or voluntary.⁴ The above case of *Gbedu*, illustrates the position under compulsory winding-up of companies.

In a member’s voluntary winding-up, the effect of the appointment of liquidator(s) is that all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator, sanctions the continuance thereof.⁵ Thus, upon the appointment of a liquidator, the directors become *functus officio*, except in special circumstances. Similarly, in a creditors’ voluntary winding-up, upon the appointment of the liquidator or liquidators, the powers of the directors shall cease, except as the Committee of Inspection or the creditors sanction the continuance thereof.⁶

4. Persons That May be Appointed as Liquidators

The CAMA expressly excludes certain persons from being appointed to act as liquidators of a company. In this regard section 509(1) of the Act provides as follows:

The following persons shall not be competent to be appointed or to act as liquidator of a company, whether in a winding-up by court or under the supervision of the court or in a voluntary winding-up.

- (a) an infant
- (b) any one found by court to be of unsound mind;
- (c) a body corporate;
- (d) an undischarged bankrupt;
- (e) any person convicted of any offence involving fraud, dishonestly, official corruption or moral turpitude and in respect of whom there is a subsisting order under section 254 of this Act.

The appointment of those persons disqualified under the CAMA as liquidators will not only be a nullity but will also constitute a criminal offence.

¹ *Per* Belgore JSC in *NDIC v FMB Ltd*, (1997) 4 NWLR (Pt. 501) 519, at 933.

² (2010) 10 NWLR (Pt. 1202) 227.

³ Nweze JCA, in his judgment relied on G.B. Graham, “The Effect of Liquidation on Contracts of Service” 15 MLR 52 (1952). See also M.R. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976) p. 333.

⁴ Smith and Wood, *Industrial Law* 4th edn. (London: Butterworths, 1989) 210.

⁵ CAMA, s. 464(2).

⁶ *Ibid.*, s. 473(2).

Though no reasons have been provided under the CAMA for the disqualification of these categories of persons as liquidators, it is possible to justify their exclusion. Thus, an infant is excluded from being appointed a liquidator because of his intellectual and managerial limitations vis-à-vis the intricacies of the liquidator's duties. According to Sasegbon,¹ "One can readily appreciate the disqualification of an infant. His intellectual and commercial horizon is so limited that he cannot fit into the scheme". An infant in this context is a person below the age of twenty one years, which is the age of maturity under the Infant Relief Act, 1874.²

Also, persons who have been found to be of unsound mind by a competent court are disqualified from being appointed as liquidators. It is obvious that the common law principle that a person of unsound mind has full capacity to enter into a binding contract, during his lucid intervals has no application to the issue of appointment of liquidators and managers. This is because there can be no guarantee that a person of unsound mind will have his lucid period throughout the duration of his tenure as liquidator or manager. The disqualification of such persons is therefore justified.

An undischarged bankrupt is also disqualified from appointment as a liquidator and manager unless the court which adjudged him bankrupt has given the leave to allow the bankrupt to act as a liquidator and manager.³ Under the Bankruptcy Act,⁴ a bankrupt is expressly disqualified from acting as a trustee of a trust estate,⁵ and from being admitted to practise any profession, for the time being, regulated by law.⁶ In the light of the foregoing, his disqualification from acting as a liquidator is therefore justified.

Other persons who are statutorily disqualified from appointment as a liquidator include a director or auditor of the company and any one who had been convicted of any offence relating to fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of the CAMA.

However, the disqualification of a body corporate from being appointed as a liquidator is difficult to justify. This is because a corporate body is competent for appointment as company secretary under the CAMA.⁷ The disqualification of a body corporate in this regard, is one of the few instances where a company is denied the powers of a natural person of full capacity.⁸ It may be contended that the disqualification of a corporate body from appointment as a liquidator is based on the fact that in the performance of his duties, the liquidator is required to exercise due care and good faith; and natural persons are in a better position to fulfill such obligations. We, however, maintain that this reason is clearly unsatisfactory because the office of company secretary which a body corporate is statutorily allowed to occupy, also requires due diligence and good faith. Besides, a body corporate, in all cases, usually functions through human agents,⁹ as it has no hands or mind of its own.

It is also significant to observe that apart from listing the persons who are disqualified from being appointed as a liquidator based on age, mental incapacity or previous conviction for fraud, among others, there are no prescribed academic or professional qualifications for liquidators.¹⁰ The effect therefore is that any person, who is not disqualified under the CAMA as aforesaid, is not only qualified but competent to act as a liquidator. This conclusion is supported by section 509(1) of CAMA which provides that "the following persons shall not be competent to be appointed or to act as liquidator of a company...." This is a most unsatisfactory state of affairs.

5. The Legal Status of a Liquidator

The liquidator occupies a central position in the whole process of winding-up of companies. If a liquidator is not appointed in a compulsory winding-up, then the Official Receiver¹¹ is deemed to be the liquidator.

¹ Sasegbon, *Op. Cit.* p. 632.

² A Received English Statute of General Application, see also *Labinjoh v Abake* (1924) 5 NLR 33.

³ CAMA, s. 387(1)(d).

⁴ Cap. B2, LFN, 2010.

⁵ *Ibid.*, s. 126(1)(f).

⁶ *Ibid.*, s. 126(1)(g).

⁷ CAMA, s. 295(e).

⁸ *Ibid.*, s. 38.

⁹ See *Ekunola v CBN* (2013) 15 NWLR (Pt. 1377) 224 at 249 where the Supreme Court reiterated that a corporate entity has to perform through its accredited officers.

¹⁰ The qualification of a company secretary, as contained in section 295 of the CAMA includes the following: (a) Membership of the Institute of Chartered Secretaries and Administration. (b) A legal practitioner within the meaning of the Legal Practitioners Act. (c) A member of the Institute of Chartered Accountants of Nigeria or such other bodies of accountants as established from time to time by an Act. Similarly, the qualification of an auditor as provided for in section 358 of the CAMA is membership of a body of Accountants in Nigeria established from time to time by an Act. Also under the English Insolvency Act 1986, a liquidator must be a qualified insolvency practitioner; who must be a member of a recognised professional body, such as The Chartered Association of Certified Accountants, The Insolvency Practitioners Association etc.

¹¹ This is usually the Deputy Sheriff of the High Court.

It is not easy to state succinctly yet accurately the position occupied by a liquidator¹ in relation to the winding-up of companies. Indeed, there is no clear definition of the liquidator's status; it is a mixture of common law and statutory duties and obligations. He partakes partly of the nature of a trustee, partly of an agent of the company and partly of an officer of the company.

(a) As Trustee: A liquidator is clearly not a trustee in the strict sense of trusteeship, because the property of the company does not automatically vest in him² as does trust property in trustees; although the court can make an order to vest the property in him. However, the liquidator takes over the powers of directors who equally, without being trustees, owe fiduciary duties to the company. His duty, like that of the directors, is owed to the company as a whole and not to individual contributories. Also, like a trustee, he cannot buy the company's property without leave of the court, or make a profit out of sales to the company.³ Moreover he is in a more vulnerable position than a lay trustee because he is always paid to assume his responsibility and in *Re: Home and Colonial Insurance Co.*,⁴ the court referred to the 'high standard of care and diligence' required from him. 'His only refuge was to apply to the court for guidance in every case of serious doubt or difficulty'.

Furthermore, although it has not been definitely decided, it does not appear that the liquidator can claim the protection of section 61 of the Trustee Act 1925 if he has acted honestly and reasonably and ought to be excused. In *Re: Windsor Steam Coal Ltd.*,⁵ the Court of Appeal held on the facts that the liquidator had not acted reasonably in paying a claim without the directions of the court, but left open the question of whether section 61 of the Trustee Act was available as a defence.

(b) As Agent: Generally, a liquidator is regarded as an agent of the company; apparently because "the Companies Act... confers power on him equivalent to those of the directors while the company is a going concern, and if the winding-up is a compulsory one, because the Act requires him to have regard to the wishes of the members of the company as well as its creditors in exercising his powers".⁶ Moreover, he is required to institute or defend action and execute documents in the name of the company.⁷ Keenan,⁸ maintains that the liquidator can be described as an agent for the company in that he can make contracts on behalf of the company for winding-up purposes. He has, of course, the paid agent's obligation to bring reasonable skill to his duties.⁹ However, he is not a true agent in that he controls the actions of his so-called principal, the company.¹⁰

(c) As Officer: The liquidator is not named as an officer of the company in the interpretation section of the CAMA¹¹ but he is named in section 507 of the CAMA as one of the persons against whom proceedings may be taken for misfeasance. Neither is it certain that he is entitled to the protection of the Companies Act 1985 whereby the court can relieve any officer who, though negligent or in breach of trust, has acted honestly and reasonably and ought to be relieved.

Orojo seems to capture the intricate nature of the position of the liquidator in a compulsory winding-up when he stated as follows:

The liquidator is not only an officer of the Court, he is also an agent of the company for the purpose of winding-up the company and although he is in a fiduciary position, he is not a trustee for the individual creditors or contributories and so an action for damages will not lie against him, e.g. for delay, unless he is guilty of fraud, bad faith or personal misconduct.¹²

However, a liquidator in a voluntary winding-up carries out his functions as an agent of the company¹³

¹ A.J. Boyle, ed. *Boyle & Bird's Company Law* 4th edn. (Bristol: Jordan Publishing Ltd, 2002) p. 672.

² CAMA, s. 440. See also *Birds et al. Op. Cit.* p. 672, where the learned authors state that the House of Lords has confirmed that the liquidator is not a trustee in the strict sense.

³ Winding-up Rules, Rule 144 provides that "Neither the Liquidator, nor any member of the Committee of Inspection of a company shall, while acting as Liquidator or member of such Committee, except by leave of Court, either directly or indirectly, by himself or any employer, clerk, agent or servant, become purchaser of any part of Ac company's assets; and any purchase made contrary to the provisions of this Rule may be set aside by the Court on the application of the Ministry in a winding-up by the Court or of any creditor or contributory in any winding-up, and the Court may make such order as to costs as the court shall think fit".

⁴ (1929) All ER 231,

⁵ (1929) 1 Ch. 151.

⁶ Pennington's *Company Law*, 4th ed., p. 735 quoted in A. Emiola, *Nigerian Company Law* (Ogbomosho: Emiola Publishers, 2007) pp. 578 – 579.

⁷ CAMA, s. 425.

⁸ D. Keenan, *Smith & Keenan's Company Law for Students* (London: Financial Times Management, 1996) p. 490.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ CAMA, s. 567 provides that "Officer" in relation to a body corporate, includes a director, manager or secretary.

¹² J. O. Orojo, *Company Law and Practice in Nigeria* 5th edn, (Durban: LexisNexis, 2008) p. 494.

¹³ *Re: Anglo-Moravian Hungarian Junction Railway Co.* (1875) 1 ChD 130, CA; *Knowles v Scott* (1891) 1 Ch 717.

and not as an officer of the court.¹ In this respect, a voluntary liquidator's position is like that of an administrative receiver. A voluntary liquidator of a company must owe fiduciary duties to the company. However, a voluntary liquidator, unlike an administrative receiver, does not have additional liability on contracts imposed on him by statute. Members and creditors of a company in liquidation have a right to compel the company and its liquidator to administer the company's assets according to the law but they are not beneficiaries under a trust for sale of the assets.²

6. Powers and Functions of a Liquidator

The powers and functions of a liquidator are primarily contained in the CAMA, though they may also be specified in the deed of his appointment. The powers specified in the deed of appointment are complimentary to the powers specified in the CAMA.

As an officer of the court, the liquidator is subject to the control and direction of the Court. He has the right and power to apply to the court for directions as to how to perform his duties especially in the light of difficulties put in his way by some of the parties.³

By virtue of section 491(1) of the CAMA, the liquidator is mandated to publish in the gazette and in two daily newspapers and deliver to the Commission a notice of his appointment; and unless expressly restricted, he has the authority of any liquidator vis-à-vis securing the safety of the properties that would appear to belong to the company. A liquidator possesses some powers that are judicial in nature. Such powers that the Court is empowered to exercise under section 439 of the CAMA are delegated to the liquidator. Accordingly, section 439 of the CAMA must be read together with Rule 61 of the Winding-Up Rules, which provides as follows;

- (1) The duties imposed on the Court by subsection (1) of section 439 of the Act in a Winding-Up by the court with regard to the collection of the assets in discharge of the company's liabilities shall be discharged by the liquidator subject to the control of the court.
- (2) For the purpose of the discharge by the liquidator of the duties imposed by subsection (1) of section 439 of the Act, and paragraph (1) of this rule the liquidator in a winding-up by the court shall, for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the Court, and the court may on his application, enforce such acquisition or relation accordingly.

Such powers which are delegable under the foregoing provisions include the collection and distribution of assets, settlement of the list of contributories, rectification of the register of members and making of calls in respect of shares which have not yet been paid for.

A liquidator also owes a general duty to maintain an impartial attitude towards all those who have any interest in the assets of the company. It is also his duty to the whole body of creditors and shareholders and the court to make himself thoroughly acquainted with the affairs of the company and not suppress or conceal anything coming to his knowledge in the course of his investigation which is material to ascertain the exact truth in every case before the court.⁴ The principal duties of the liquidator are therefore as follows:

- (a) To take into his custody, or under his control all the property and chooses in action to which the company is or appears to be entitled⁵ and he may apply to the court to have the property vested in him.⁶
- (b) To settle the list contributories in accordance with section 439 and rules 63 and 68 of the Winding-up Rules.
- (c) To collect as an officer of the court the assets of the company and apply them in the charge of its liabilities.⁷
- (d) To make, with leave of court or sanction of the committee of inspection⁸ calls on contributories in accordance with section 422 and 69 – 79 unless the court orders that no calls be made.
- (e) To distribute surplus assets among the members according to their rights.⁹
- (f) To have regard to any directions given by resolution of the creditors or contributories or by the committee of inspection; but the directions given by the creditors or contributories at general meeting

¹ *Re: John Bateson & Co. Ltd* (1985) BCLC 259.

² *Calgary & Edmonton Land Co. Ltd. v Dobinson* (1974) Ch 102.

³ *Per Ogundare, JSC in Provisional Liquidator Tapp Ind. v Onyekwelu* (1995) 5 SCNJ 120 at 139.

⁴ Orojo, *Op. Cit.* p. 484. *Balogun v Agbaoge* (1977) 3 FRCR 122.

⁵ CAMA, s. 423.

⁶ *Ibid.*, s. 424.

⁷ CAMA, s. 439(1) Winding-up Rules, Rules 61 and 102.

⁸ *Ibid.*, s. 453(2).

⁹ *Ibid.*, s. 446; Winding-up Rules, Rule 103.

- will override those of the committee of inspection.¹
- (g) To keep proper books as required by the CAMA² and the Winding-up Rules.³
 - (h) To pay money received by him into the companies liquidation account, in such manner and at such time as the commission may direct, and the Accountant General of the Federation will give him a Certificate of receipt of payment.⁴
 - (i) To send to the Commission, at least twice a year, an account of his receipt and payments as liquidator.⁵
 - (j) To send to the Commission, at prescribed intervals, a prescribed statement within one year.⁶
 - (k) To pay into the companies liquidation account any money respecting unclaimed or undistributed assets of the company which have remained unclaimed or undistributed after six months of the receipt. On such payment, the liquidator will receive a Certificate.⁷
 - (l) To give to the official receiver such information and access to and facilities for inspecting the books and documents of the company and generally any aid required to enable him to perform his duties in relation to the liquidation.⁸

It is noteworthy that various powers are conferred on the liquidator to enable him carry out his duties. Most of the powers, in compulsory winding-up, are as set out in section 425 of the CAMA. In addition, section 453 provides that rules may be made delegating to liquidators the powers of the court in respect of the holding and conducting of meetings to ascertain the wishes of creditors and contributories, rectification of register, among others. Some of these powers may be exercised by the liquidator at his discretion and without leave, while some of the powers can only be exercised with the leave of the court.

The powers which the liquidator, in a compulsory winding-up, may exercise subject to the sanction of either the Court or Committee of Inspection include the following:

- (a) Power to bring or defending action or other legal proceedings in the name and on behalf of the company.
- (b) Power to carry on the business of the company so far as may be necessary for its beneficial winding-up.
- (c) Power to appoint a legal practitioner or any other relevant professional to assist him in the performance of his duties.
- (d) Power to pay any classes of creditors in full.
- (e) Power to make compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim against the company.
- (f) Power to compromise all calls and liabilities to calls, debts and liabilities and all claims between the company and a contributory and all questions relating to the assets of the company being wound-up.⁹

Furthermore, without the leave of the court, the liquidator in a winding-up by the court, shall have power to:

- (a) sell the property of the company of whatever nature, by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;
- (b) do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal.
- (c) prove, rank and claim in bankruptcy, insolvency or sequestration of any contributory for any balance against his estate.
- (d) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company.
- (e) raise on the security of the assets of the company any money requisite.
- (f) take out letters of administration to the estate of any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company.
- (g) appoint an agent to do any business which the liquidator is unable to do himself.
- (h) do all such other things as may be necessary for Winding-up the company and distributing its assets.

The power to rectify the register of members can only be done with the special leave of court.¹⁰

It is also important to examine the appointment and powers of the liquidator in voluntary winding-up of

¹ *Ibid.*, s. 427(1).

² *Ibid.*, s. 430.

³ Winding-up Rules, Rules 154 and 155.

⁴ CAMA, s. 428.

⁵ *Ibid.*, s. 429.

⁶ *Ibid.*, s. 516(1) and (2).

⁷ *Ibid.*, s. 516(4).

⁸ *Ibid.*, s. 426.

⁹ CAMA, s. 425(1)(a) – (f).

¹⁰ CAMA, s. 453(2). J.H. Farrar, *et. al, Farrars' Company Law* 2nd ed. (London: Butterworths, 1998) pp. 600 – 601.

companies. Thus, section 464(1) of the CAMA which relates to the appointment of a liquidator in a members' voluntary winding-up company in general meeting to appoint one or more liquidators for the purpose of winding-up the affairs and distributing the assets of the company; and the liquidator or liquidators may fix the remuneration to be paid to him or them and upon the appointment of the liquidator or liquidators, all the powers of the directors shall cease, except as sanctioned by the company in general meeting or permitted by the liquidator or liquidators.¹

In a creditors' voluntary winding-up, the creditors and the company at their respective meetings may nominate a person to be the liquidator for the purpose of winding-up the affairs and distributing the assets of the company. If the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator; and if no person is nominated by the creditors, the person, if any, nominated by the company shall be the liquidator.² Once a liquidator is appointed, the board of directors of the company shall become *functus officio*, as the liquidator takes over the exercise of its powers.

On the powers of the liquidator in voluntary winding-up, the position of the law is that the liquidator may, in case of a members' voluntary winding-up, with the sanction of a special resolution of the company, and in the case of a creditors' voluntary winding-up, with the sanction of the Committee of Inspection or if there is no such Committees, a meeting of creditors, exercise any of the powers given by paragraphs d – f of section 425 of the CAMA.³ It is also provided under the CAMA that the liquidator could settle the list of contributories, exercise the court's powers of making calls, summon the general meeting of the company for the purpose of obtaining the sanction of the company by special resolution or for any purpose he may think fit,⁴ pay the debts of the company and adjust the rights of the contributories among themselves.⁵

The liquidator's power to make compromise or arrangement with creditors, with the sanction of the court or Committee of Inspection is quite significant as it could be skillfully employed for the benefit of all interested parties in the winding-up process. Where this arrangement succeeds, it obviates the necessity of proceeding with the liquidation; as it has the effect of lifting the company out of its difficulties, by having them discharged by compounding or rendering the liabilities more manageable by the compromise.⁶

7. Control of the Liquidator

It has already been shown that the statutory powers and duties of a liquidator are enormous and susceptible to abuse. The CAMA has therefore provided several institutional and personal measures for controlling the liquidator in the exercise of his powers and performance of his duties. Thus, in order to ensure the due discharge of his duties, the liquidator is subject to the control of the court, the committee of inspection, the creditors, the contributories and the Corporate Affairs Commission.⁷

7.1 Control by the Court

The liquidator as an officer of the court is subject to the control and direction of the court. Indeed, the exercise of his powers in a compulsory winding-up is subject to the control of the court⁸ which will ensure that he "acts fairly and honourably in dealing with persons who have claims adverse to his own, and he does not merely stand on his rights at law or in equity".⁹ Therefore, the liquidator can freely apply to the court for directions in relation to any matter arising under the winding – up.¹⁰ Similarly, any creditor or contributory who is aggrieved by an act or decision of the liquidator may apply to the court for such order as it thinks just.¹¹

7.2 Control by Committee of Inspection, Creditors and Contributories

The liquidator is also controlled by the Committee of Inspection, creditors and contributories in the exercise of his powers and performance of his functions. The Committee of Inspection is usually appointed to act with and supervise the liquidator.¹² The liquidator in the administration and distribution of the assets of the company among its creditors must have regard to directions given by resolution of the creditors or contributories at any

¹ CAMA, s. 464(2).

² *Ibid.*, s. 473.

³ *Ibid.*, s. 481(1).

⁴ *Ibid.*, s. 481(2).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Orojo, 5th edn. *Op. Cit.* p 489.

⁸ CAMA, s. 425(3).

⁹ See Halsbury's "*Laws of England*", 4th edn. p. 649.

¹⁰ CAMA, s. 427(3).

¹¹ *Ibid.*, s. 427(5).

¹² CAMA, s. 433(1).

general meeting, or by the committee of inspection.^{1\}

7.3 Control by Corporate Affairs Commission

The liquidator is statutorily enjoined,² at the risk of penal sanction,³ to notify the Corporate Affairs Commission of his appointment within fourteen days of the said appointment. With regard to the issue of control over the liquidators, the CAMA provides that “The Commission shall take cognizance of the conduct of liquidators of companies which are being wound up by the Court”.⁴ If the liquidator does not perform his duties faithfully, or if any complaint is made to the Commission by any creditor or contributory about the winding-up, the Commission must inquire into the matter and take such actions as it deems fit.⁵

The Commission may also, at any time, require the liquidator answer any inquiry in relation to the winding-up in which he is engaged; and if the Commission thinks fit, it may apply to the court to examine the liquidator or any other person on oath, concerning the winding-up of the company.⁶

Where the winding-up is subject to supervision, the liquidator can perform his functions without sanction or intervention of the court or the control of the Corporate Affairs Commission. This legal proposition is supported by the provision of section 490 of the CAMA and the case of *Corporate Affairs Commission v Davis*,⁷ the facts of which are that in June 2001, the directors of Calabar Cement Company Ltd. were by special resolution authorized to present a petition for the voluntary winding-up of the company at the Federal High Court, Calabar. The petition was duly presented for the winding-up of the company subject to the supervision of the court. Upon the application of the shareholders, the respondent was appointed by the court as provisional liquidator of the company. After the affairs of the company were fully wound up, a final general meeting was held on the 16th July, 2003 in which the account of the liquidation exercise was laid before the members. Sometime in 2003, the respondent received a letter from the Corporate Affairs Commission, the appellant, intimating him of the its intention to verify the records of the liquidation exercise. On 3rd November, 2003, representatives of the appellant appeared at the respondent’s office and demanded that all the vouchers, receipts, bank statements and other books of accounts in respect of the liquidation exercise be produced for their inspection. Based on this, the respondent filed a motion on notice pursuant to Order 47 rule 5(1) of the Federal High Court Rules in which he sought for the orders of prohibition and injunction against the appellant, and the trial court granted the orders against the appellant.

Dissatisfied, the appellant appealed to the Court of Appeal, contending that the winding-up of the company was conducted under the supervision of the Corporate Affairs Commission. One of the two grounds of appeal formulated by the appellant was “whether in a winding-up process under the supervision of the court, the liquidator is subject to the control/supervision of the Corporate Affairs Commission in exercising his power under the Companies and Allied Matters Act”. The court held that for the purposes of winding-up under the Companies and Allied Matters Act, the specific provisions contained in sections 401 – 536 of the Act are to be reckoned with and not the general provisions relating to functions of the appellant/Commission as contained in section 7(1)(a) of the enactment. The court reiterated that where an issue in a statute is governed by a general provision and a specific provision, the latter will be invoked in the interpretation of the issue before the court; because the specific provision will be deemed to have anticipated the issue as against the general provision.⁸ Relying on section 490(1) of a CAMA, the court further held that the respondent being a liquidator in a winding up, subject to the supervision of the court, is not subject to any of the provisions of the CAMA enumerated in the Twelfth Schedule to the Act, and *a fortiori*, he is not subject to any of the controls in section 432 of the Act, including “the direction of a local investigation of the books and vouchers of the liquidator”. The court therefore concluded that the appellant/Commission had no power of control, as such, in the winding-up, outside the provisions of sections 427 to 432 of the CAMA, which provisions were not applicable in the instant case.

The effect of this decision is clearly that the extent to which the Corporate Affairs Commission could exercise its power of control over a liquidator in a winding-up that is subject to the courts supervision is restricted.

¹ *Ibid.*, s. 427(1).

² CAMA, s. 491(1).

³ *Ibid.* s. 491(2).

⁴ *Ibid.*, s. 432(1).

⁵ Orojo, *Op. Cit.* p. 489.

⁶ CAMA, s. 432(2).

⁷ (2008) 1 NWLR (Pt. 1067) 60.

⁸ See *The M V Panormos Bay & Ors. v Olam Nigeria Plc* (2004) 5 NWLR (Pt. 865) 1 at 13; *Schroder & Co. v Major & Co. (Nig.) Ltd.* (1989) 2 NWLR (Pt. 101) 1; *Kraus Thompason Orgainsation v National Institute for Policy and Strategic Studies (NIPSS)* (2004) 17 NWLR (Pt. 901) 44 at 65.

8. Vacation of Office by Liquidator

In a compulsory winding-up, the liquidator appointed by the court may resign or be removed in certain defined instances and such vacancy shall be filled by the court. In the case of removal, the Official Receiver summons meetings at the request of not more than 1/10 in value of the creditors and contributories.¹ In the case of resignation, separate meetings of creditors and contributories are summoned, where the liquidator's resignation is discussed and a decision taken on whether to accept the resignation or not.² If it is agreed at the meeting by ordinary resolution that the resignation should be accepted, then the liquidator files the memorandum of his resignation with the registry of the court while also notifying the official receiver.

In voluntary winding up, the death, resignation or removal of the liquidator(s) may create a vacancy. Such vacancies may be filled by appointing another liquidator by the company in general meeting,³ but sometimes after consultation with the creditors or by allowing the other liquidator(s) continue where there were more than one.

9. Conclusion and Recommendations

It is firmly settled that a liquidator may be appointed upon the presentation of a winding-up petition and not before. After the making of the winding-up order by the court, the winding-up process continues with the identification and stock-taking of the company's assets, compilation and settlement of the list of creditors and contributories and eventual distribution of the assets to all interested parties based on approved order of priority. These procedures are complex and highly technical; involving the administration of the company's property, series of meetings with creditors and contributories, applications to the court for directions and generally taking and executing instructions from the court. The performance of these functions falls primarily on the liquidator, though other officers such as the official receiver, special manager and members of the committee of inspection are often involved. We have noted that despite his enormous powers and functions, the law has provided no professional qualifications for the office of the liquidator and receiver. Accordingly, any person who is not expressly disqualified under the law can act as a liquidator. This is not appropriate as the CAMA has prescribed professional qualifications for other professionals such as company secretaries and auditors.

With regard to those who are disqualified from being appointed as liquidators, the provisions of the CAMA are clearly in conflict with those of the BOFIA and NDIC Act. Thus, while the CAMA disqualifies a body corporate from appointment as liquidators, the BOFIA and NDIC Act expressly provide for the appointment of a body corporate, namely, the NDIC, as liquidator. This conflict must be resolved by effecting the necessary amendment to the CAMA to exclude a body corporate from those who are disqualified as liquidators and receivers. It has been noted that section 55(2) of the BOFIA provides to the effect that "where any of the provisions of the Companies and Allied Matters Act is inconsistent with the provisions of the BOFIA, the provisions of the BOFIA shall prevail". However, the real issue is not which of the two Acts shall prevail in the event of conflict in provisions, but whether a body corporate is capable of acting as a liquidator?. We insist that since a body corporate could act as a liquidator of a bank, it could also act as a liquidator of any other company. However, where a company is appointed as a liquidator, the actual officers of the company charged with the responsibility of conducting the winding-up proceeding must be qualified liquidation practitioners.

The enormous and highly technical duties of the liquidators and receivers equally call for qualified and competent persons to hold these offices to ensure effective performance. Neither the CAMA nor any of the other related statutes has provided for the professional qualifications of those competent to practise as liquidators and receivers in Nigeria. It is therefore recommended that apart from providing for those who are disqualified from being appointed as liquidators and receivers, the laws should also prescribe minimum professional qualifications and number of years of relevant experience for liquidators and receivers in the same manner as it is done for company secretaries and auditors. This will enable the approved professional bodies to also monitor the conduct and practice of the liquidators and receivers, as the court alone is not in the position to provide the requisite high level of effective monitoring and control.

It is further observed that the principal criticisms of the liquidation process include procedural delays, high liquidation costs and low recoveries for general unsecured creditors.⁴ Therefore, a more efficient and less costly liquidation process will return higher dividends to creditors, thereby minimising their losses. In this direction, the practical skills of the liquidators and receivers must be strengthened through continuous training, workshops and seminars, so as to raise their performance standards and efficiency.

¹ *Ibid.*, s. 422(5) and Winding-up Rules, Rule 41(7).

² Winding-up Rules, Rule 150.

³ CAMA, s. 465.

⁴ G.E. Meyeman and G.W. Johnson, "Reforming the Insolvency System in South Africa: An Interpretative Summary" USAID, 2011.