

Security of Investors' Interest under Winding up Proceedings The Nigerian Experience

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Abstract

So many factors contribute to death of businesses globally. The economic meltdown experienced in various Countries across the world especially in 2008 brought with it; inevitable stifling and eventual folding up of businesses. The current downslide of oil prices has in no small measure added to the woe suffered by businesses. The Nigerian case is particularly pathetic owing largely to her over dependence on oil revenue for economic survival. The health of companies' operations is directly proportional to the health of its host Country's economy. When every other option for survival fails, Companies are left with no other option than to wind up its businesses. This winding up some of which are voluntarily done and some foisted often leave investors who have committed their wealth into the company's businesses in a quandary. Their (Investors) recovery or at least survival strategies are dependent on what the Laws and Government Policies have in stock for them. This seems to be the fulcrum around which this article oscillates.

Keywords: Security of Investors'; Nigeria; Company; Winding up

1. Introduction

Companies are undoubtedly designed by law to exist in perpetuity. This explains the copious provisions under the Companies and Allied Matters Act, Nigerian Investment promotion Act, Investment and Securities Act and similar legislations with a view to ensuring the devolution and transmission of interests of shareholders and investors in a company.

Section 37 of the Companies and Allied Matters Act for instance provides:

as from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as mentioned in this Act.

From the above quoted provisions of the Companies and Allied Matters Act, it is evident that companies just like natural persons are also prone to be affected by old age, natural disasters and other uncertainties in life which may necessitate the winding up of such companies. Bearing in mind that the life, existence and sustenance of companies are dependent upon contributions of investors and shareholders, it then becomes pertinent to ask the following questions:

1. What happens to the contributions of individual investors, creditors and shareholders in the event of a company being wound up?
2. Are there provisions made by law to cater for the security of the interest of these categories of persons?
3. To what extent have these persons been protected in Nigeria especially during winding up proceedings?

These questions become more probing considering the spate of liquidation of companies in Nigeria arising from various governments policies from time to time. In the banking sector for instance, the recapitalization policy of the Central Bank of Nigerian led to either the dissolution of several banks in Nigeria or various forms of merger arrangements. These issues shall become the focus of this essay; conclusions and recommendations will also be made with a view to establishing a more dynamic mechanism of protecting the interest of investors in the event a company becomes wound up.

2. Winding up

Winding up means to terminate or bring the existence or life of a company to an end. It is sometimes referred to as liquidation. A company wound up and dissolved loses its legal entity and cannot be one and the same company as before¹. It is clear that a company dies on its dissolution. The position is not the same where a company is undergoing the process of winding up². A company under a winding up proceeding has not died. It is still alive but, perhaps sick³. This may be why section 417¹ Provides that actions or proceedings against a wound up

¹ Ehidimhen V. Musa (2000) 4SC (part II) 166 at 184

² S.B.N PLC V.NDIC (2006) 9 NWLR (pt 986) 424 (pt. 755) 523 CA

³ Sasegbon's Laws of Nigerian first edition An Encyclopaedia of Nigerian Law and practice. DSC publications Lagos 2005 vol 3, P. 818; C.C.B (Nig) PLC V. Mbakwe (2002) 3 NWLR (Pt. 647) 65 C.A; J.A Dada Principles of Nigerian Company Law

company is maintainable with the leave of court. Companies winding up proceeding are governed by the provisions of the Companies and Allied Matters Act, cap C20 LFN 2004 and Companies Winding up Rules 2001². Winding up is the process by which the management of a company's affairs is taken out of its directors hands, its assets are realized 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 shareholders³. Accordingly Gower states that:

The liquidation or winding up of a company is the process whereby its life is terminated and its properties are distributed to creditors and its members. The closer analogy to what occurs is afforded by the administration of a deceased estate; an administrator called a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights Only at the end of the winding-up will the company be dissolved; administration precedes death, not vice-versa⁴.

In the winding-up of a company, the company gives up its business, sells off its assets, pays its debt (or, if it is insolvent, does so to the extent that its funds allow) and distributes whatever surplus remains amongst its shareholders or otherwise as its memorandum and articles of association⁵ allows.

3. Modes of Winding up

The Company and Allied Matters Act provides for three types of winding-up namely, winding up by the court, voluntary winding up and winding-up supervised by the court⁶.

Winding-up by the court or compulsory winding-up refers to a situation where a company is wound up by the Federal High Court under certain circumstances such as where the company has by special resolution resolved that the company be wound up by the court; default is made in delivering the statutory report to the commission or in holding the statutory meeting; the number of members is reduced below two; the company is unable to pay its debts; the court is of the opinion that it is just and equitable to wind-up a company⁷. A company may be wound up voluntarily where the period, if any, fixed for the duration of the occurrence of the company, by the articles expires, or the event if any, occurs on occurrence of which, the articles provide that that company is to be dissolved and the company in general meeting, has passed a resolution requiring the company to be wound up voluntarily; also if the company resolves by special resolution that the company be wound up⁸.

Winding up subject to the supervision of the court usually commences with a resolution by a company for voluntary winding up of the company. However upon an application, the court may order that the winding should continue but under the supervision of the court⁹.

A petition for winding up subject to supervision of the court is deemed to be a petition for winding up by the court for the purpose of giving jurisdiction to the court over the actions¹⁰. In the case of *Corporate Affairs Commission v. Davis*¹¹ the court held that winding-up subject to supervision of the court occupies a position in between winding up by the court and voluntary winding up as shown in section 490 (1) and (2) of the Companies and Allied Matters Act.

4. Winding up proceedings and its effects on the company and investors

An application to the court for the winding up of a company is by petition presented either by the company, a creditor, the official receiver, a contributory, a trustee in bankruptcy to or a personal representation of a creditor or contributory, the Corporate Affairs Commission, a receiver if authorized by the instrument under which he was appointed¹². The provisions of Section 410 of CAMA have been extended by recent enactments in the

2nd edn(Calabar: Wusen publishers 2001

¹ Companies and Allied matters Act cap C20 LFN 2004

² *Pharma –Deko PLC V. financial Derivates Co. limited* (2015) 10 NWLR (pt. 1467) 22 SC. A

³ R.R Pennington, *Company Law*, 5th edn (London: Butter wroths 1985) p.39

⁴ L.C.B Gower, *Gower's Principles of Modern Law* 4th edn. (London: Stevens & sons, 1979) P. 719; S.B Shoroye, "Reflections on Development in company Law in Nigeria since CAMA" in L. Fagbohun and B. Adewope, *Development and Reforms: Nigeria's commercial Law* (Lagos: the Law Centre, 1998) P 98

⁵ L.S Sealy, *Cases and Materials in Company Law* 3rd edn (London Butter Worths, 1985) P. 508

⁶ CAMA S. 401. See also *Corporate Affairs Commission V. Davis* (2008) INWLR (Pt. 1067) 60 at 78

⁷ See generally CAMA SS. 407 and 408 see also *Ado Ibrahim & co Ltd V. B.C.C Ltd* (2007) ALL FWLR (pt. 370) Ibrahim & Co ltd (2008) 2 NWLR (pt 805) 462 C.A

⁸ S. 457 CAMA

⁹ S. 486 CAMA

¹⁰ S. 487 CAMA

¹¹ (2008) 1 NWLR (pt. 1067) 60 at 78-79

¹² See sec 410 CAMA, see also *Ado Ibrahim & co ltd V.B.C.C ltd* (2007) all FWLR (pt. 370) 1381 SC; *C.B.D.I V COBEC (Nig) ltd* (2004) 3 NWLR (pt. 890) 376CA

BOFID particularly Section 38 thereof. This by necessary implication has enlarged the provisions of Section 410 of CAMA as regards the persons or bodies who can present for a winding up of a company which includes a Bank¹.

A company under liquidation has not yet lost its legal personality. The fact of winding-up of a company or the appointment of a liquidator does not by itself result in the death of a corporate body. It is clearly provided in Section 417 of CAMA that action or proceedings against a company under winding up for which a liquidator is appointed would be maintainable by leave of the court. A company under a winding up proceeding is not yet dead; it is still alive but perhaps sick as stated earlier. That is to say it can sue and maintain an action in court, but no action or proceeding can be brought against it except by leave of court².

By Section 418 of CAMA an order for winding up a company operates in favour of all the creditors and all the contributories of the company as if made on the joint petition of a creditor and a contributory. When a company is engaged in a winding up proceeding the court seeks to protect the interest of creditors, shareholders and others by ensuring that no one misuses corporate properties. It is the statutory right of the creditors and contributories to present petition for winding up of companies for the purpose of terminating the life of the company and distributing its assets, thereby actualizing their respective interests. The creditors and contributories have opportunities to select honest, competent and reliable persons for appointment as liquidators and members of the committee of inspection. This is shown by their being involved in the appointment of liquidator or liquidators to conduct the winding up of the company and also making recommendation for appointment of the members of the committee of inspection. The creditors and contributories are at their respective meetings entitled to recommend the person to be appointed as the liquidator of the company³.

The primary interest of the creditors of a company in liquidation is the full or substantial recovery of their debts. In the case of the contributories their interest is in the surplus assets which would be shared amongst them after the cost of winding up and debts owed to creditors have been fully settled⁴. They are concerned with all aspects of the winding up process, particularly the appointment of the liquidator, the taking in and realization of the assets of the company, proving of debts and distribution of assets of the company. Essentially their concern is in ensuring that the right decisions are taken at all stages of the winding up process; that the relevant laws and procedures have been followed; and principles of fairness and justice have been adhered to by the liquidator and other principal actors. Both the CAMA and the Winding up Rule have made adequate provisions for creditors and contributories to prove their respective claims against the company⁵. They also have a right to appeal against the decisions of the liquidator, rejecting their claim⁶. Section 480 of the CAMA provides a guideline for the liquidator to follow in carrying out his duty of distributing the company's assets in winding up proceedings.

The section provides:

Subject to the provisions of this Act as to preferential payments, the property of a company shall on its winding up, be applied in satisfaction of its liabilities *pari passu*, and subject to such application shall, unless the articles otherwise provide be distributed among the members according to their rights and interests in the company.

The application of the principles of *pari passu* in payment of debts means that all creditors would be paid equal percentage of their debts, if they cannot be paid in full.

5. Conclusion

In conclusion, the statutory provisions for prosecution of officers of the company for fraud and related acts, and the recovery of company's money and property from them are not only meant to address concerns for public interest⁷ but also specifically to protect the interest of creditors and other interested parties in the winding up

¹ See *F.M.B ltd V. NDIC suit No CA/L/247/94*; (1995) 6 N.W.L.R (pt. 400) 226 at 240-241

² *Progress Bank (Nig) PLC V.O.K contract Point ltd (2008) INWLR* at 529, 532; *Co-operative Commercial Bank (Nig) PLC V. Mbakwe (2000) NWLR (pt. 755) 523*

³ In a creditors' voluntary winding up, the creditors and the company at their respective meetings may nominate a person to be a liquidator. 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 creditor the person if any nominated by the company shall be the liquidator. S. 473 CAMA. The court may in a voluntary winding up appoint a liquidator if there is none acting. See sec 482 CAMA

⁴ Section 410 CAMA, S.410 (4) however provides that: "A contributory shall be entitled to present a winding up petition not withstand that there may not be assets available on the winding-up for distribution to contributories."

⁵ S.492 CAMA, Winding up Rules, Rules 89.

⁶ Winding up Rules Rules 91 and 98.

⁷ S. Akinwunmi, "Corporate Insolvency Law in Nigeria: need for reform" [http://www.akinwunmbusari.com images /documents/corporate....pdf](http://www.akinwunmbusari.com/images/documents/corporate....pdf) accessed 09/12/15

proceeding¹. This shows that the recovery of money and property would improve the assets of the company which would be available for distribution to interested parties. Apart from few areas of the CAMA that require amendments, adequate provisions have been made in the relevant laws for the protection of creditors during the winding up proceedings but the problem seems to lie with the implementation of the provisions in practice. Again a successful and beneficial winding up proceedings should ensure that the liquidation cost is kept at the lowest level so as to reserve the bulk of the company's assets for the satisfaction of the preferential and other debts. To achieve this, the liquidator must exhibit a high degree of managerial skill and expertise in the discharge of his duties; hence only experienced and professionally qualified persons should be appointed as liquidators.

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¹ J.O Orojo, *Company and Practice in Nigeria* 5th edn. (Durban, Lexis Nexis, 2008) p. 503