Analysis of the Legal Framework on Corporate Insolvency in Nigeria Under CAMA 2020 and Companies Winding up Rules 2001

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Abstract

This article examined some aspects of the Companies and Allied Matters Act 2020 which is the principal legislation regulating corporate insolvency matters in Nigeria. The Act made some provisions that relates to the activities of actors and officers like Official Receiver, Special Manager and Liquidator who participates during winding up proceedings of an insolvent corporate entity. The paper also highlighted the appointment of these officers, restructuring mechanisms of ailing companies under CAMA and winding up procedures, which seems very technical in its operation. It discovered that there are challenges created by some of the CAMA provisions, in dealing with corporate Insolvency. Again, the Companies Winding up Rules (CWR) 2001 which complements the provisions of CAMA, provided enormous technicalities which obviously affects the early rescue of corporate entities undergoing insolvency. Doctrinal research method was adopted in this work. Having analysed the relevant statutory provisions under CAMA and CWR as it relates to corporate insolvency, recommendations were made to amend some of the provisions which would ultimately save businesses instead of extinction of corporate entities arising from insolvency. Court proceedings should not be involved in the cumbersome procedure for effecting arrangement and compromise under CAMA in order to rapidly revive financially distressed insolvent company.

Keywords: Legal framework, CAMA, Jurisdiction, Arrangement and Compromise, Companies Winding up Rules.

Introduction

In any nation, corporate entities constitute one of the Pillars on which the economy can be created. It is a way important vehicle for economic growth. Thus when there is corporate collapse, the economy is worst of. Quite often mismanagement of corporations put shareholders,

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investors and creditors funds into jeopardy requiring legislative intervention.

The objective of this paper is to analyse the relevant provisions of the Companies and Allied Matters Acts 2020 (CAMA) and the companies winding up rules 2001 in dealing with the challenge of Corporate Insolvency in Nigeria.

The basic and principal legislation in Nigeria that regulates corporate insolvency proceedings is the Companies and Allied Matters Act, 2020.[1] Thus, it is important to state here that all legal framework should be focused towards reviving a corporate entity in distress and possible extinction. However, it is not every ailing company that can be rescued. Companies that are economically unviable should be allowed to collapse and be liquidated. A company which is financially distressed is one which has a potentially valuable business concept but unable to generate adequate returns to meet its expenditures and make profits. The issue of rescue versus extinction of companies has been the theme of various discuss by insolvency practitioners. Financially distressed companies are the proper candidates for rescue because they have potential business ideas.[2]

The paper will expose some of the relevant provisions and the principal actors in corporate insolvency under Companies and Allied Matters Act. Those principal actors in the corporate insolvency are the officers of court vested with investigative and information gathering powers at the commencement of Insolvency in a winding up by the court. The legislation and actors in corporate insolvency proceeding highlighted in this work includes Companies and Allied Matters Act (CAMA) which its provisions are not mostly corporate rescue friendly. The CAMA aims at liquidation of companies in financial distress. Jurisdiction of courts in Insolvency proceedings is very paramount as where proceedings are being undertaken in a court other than Federal High Court, the proceedings would be struck out. Receivers and Liquidators are two important officers that play prominent roles in winding up proceedings. While the Official Receiver commences his role from the commencement of proceedings, the Liquidator is

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1 CAMA 2020

2 Idornigie, P. *Roundtable on Reform of Insolvency Laws in Nigeria* at http://www.nials-nigeria.org//roundable. (Accessed on 18th June 2014)1

appointed upon making of winding up order or presentation of petition for winding up if there is a provisional Liquidator.

Arrangement and compromise are forms of Corporate restructuring which may lead to rescue. The Companies winding up Rules regulate the proceedings in winding of a company in Nigeria, while the winding up procedure is the process that leads to liquidation of the company in distress.

Companies and Allied Matters Act (CAMA) 2020

The Legal frameworks are the laws that regulate the activities in corporate insolvency in Nigeria. One of such laws is the Companies and Allied Matters Act 2020. Historically, the Companies and Allied Matters Act was a product of several debates and consultations by the Nigerian Law Reform Commission. Thus, in March 1987, the then Attorney General of the Federation and Minister for Justice directed the Nigerian Law Reform Commission to review the Nigerian Company Law.[3] The Commission was expected to discover and eliminate loopholes in the existing company law, streamline all procedures and design Nigerian Company Law for the benefit and protection of all stakeholders.[4] The Law reform Committee eventually came out with a comprehensive Nigerian Company Law that was designed to facilitate business activities in the Country and to protect the interests of investors, the public and the country as a whole.[5] The Companies and Allied Matters Decree 1990 is described as a landmark Company Legislation in Nigeria.[6] It was subsequently designated as an Act which was later modified in 2004 and known as Companies and Allied Matters Act 2004.

The Companies and Allied Matters Act 2004 is divided into three parts. Part 'A' deals with Incorporation of Companies, Part 'B' covers registration of Business Names while Part 'C' deals with Incorporated Trustees. The Act is the most comprehensive and was able to address

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3 Adebola, B. *The Nigerian Business Rescue Model* (NIAL International Journal of Legal Studies) 35, 43

4 Idigbe, A. Using existing Insolvency Framework to drive business recovery in Nigeria: The Rule of judges. Being Paper Presented at the Federal High Court Judges Conference held at Senkuyu, Sokoto on the 11th day of October, 2015. 39

5 Akanki, *Company Law Development through the 1990 Legislation* in Obilade. "A Blue print for Nigeria Law: A Collection of Critical Essays written in commemoration of the thirteenth anniversary of the establishment of Faculty of Law, University of Law" (Faculty of Law University of Lagos. 1995)

6 Akanki (n5)

some of the problems noticed in the repealed Companies Decree of 1968. For instance, the Act codified most of the principles of Association, Common law on Company law as well as many of the general principles hitherto left in the Articles of Association and thus ensures greater certainty of the law.[7] New concepts and procedures were introduced, while existing procedures were streamlined.[8] Among other innovations introduced by the Act is the establishment of a regulatory body known as the Corporate Affairs Commission. The Commission is a body corporate with a perpetual succession and capable of suing and being sued in its corporate name. The headquarters of the Commission is situated in the Federal Capital Territory Abuja with establishments of state offices to facilitate the ease of doing business in Nigeria. The CAMA, being the principal legislation that regulates corporate insolvency in Nigeria, is a work in progress as it will continue to undergo amendments to accommodate changes that may arise as a result of circumstances of today in Corporate Insolvency proceedings.

Flowing from the issue of CAMA being a work in progress, the CAMA 2004 was repealed and new CAMA enacted in what is now known as Companies and Allied Matters Act 2020. The current CAMA is divided into Seven parts, which are Part A dealing with Corporate Affairs Commission (CAC), Part B deals with Incorporation of Companies and Incidental matters, Part C deals with the Limited Liability Partnership, Part D deals with the Limited Partnership, Part E addresses Business Names, Part F deals with Incorporated Trustees, while Part G is General Provisions. Thus, Companies and Allied Matters Act 2020 is the extant legislation that repealed CAMA 2004 as amended.

The major gap noticed in CAMA is that under section 564 of CAMA, a company incorporated in Nigeria can be wound up or liquidated. This is clearly not in tune with the current trend of business rescue of ailing or distressed companies which is a global practice aimed at preventing job losses. It is therefore pertinent to introduce corporate entity rescue and insolvency legal regime that is not focused on a company's extinction, but on rescuing companies from Insolvency through viable insolvency legal framework. An effective legal regime or framework in Nigeria must be one that is designed to save viable

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7 Amupitan, J. O. *Principles of Company Law in Nigeria.* (Jos University Press Ltd, 2013) 29

8 For example, new provisions on Unit Trusts, Mergers, Take-overs and Insider Trading were introduced to the Nigerian Company Law.

businesses and to ensure that non-viable businesses can quickly disappear from market, in order to allow deployment of resources and to more productive ventures.

Jurisdiction of Court

Black's Law Dictionary defines jurisdiction as court's power to decide a case or issue a decree.[9] Thus in the context of this work, jurisdiction of court is used to show the court that has the power or competence in deciding issues emanating from the legislations governing corporate insolvency matters. It is without doubt that the existence of an efficient court system or judicial machinery is essential to the success of any legal regime. In Nigeria, corporate insolvency cases are first handled by the Federal High Court which is by virtue of the provision of Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999. The Federal High Court is vested with the exclusive jurisdiction to handle insolvency matters. Appeals may be made to the Court of Appeal and thereafter to the Supreme Court of Nigeria.

Regrettably, our courts have not thrived so much in terms of judicial experience in this area of practice and this is evidenced by the dearth of local case law(s) on receivership in Nigeria decided upon by the Supreme Court. Since most insolvency cases arise from the issue of unpaid debts, both our legal practitioners and our courts treat them as being akin to debt recovery cases. This position has made Akinwunmi & Busari[10] to state thus:

This is no doubt consequent upon a paucity of knowledge on the part of our practitioners and judicial officers on technical issues relating to insolvency as they do not have access to regular international insolvency publications (there are quite a few of them) and sources of information such as the J-Base which is an electronic database of International insolvency material.

With regard to winding up of Companies under CAMA, it is imperative to note that the Federal High Courts exercise jurisdiction in this aspect of insolvency proceedings where the courts have shown considerable experience. The Federal High Court that would exercise

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9 Bryan, A.G. *Black's Law Dictionary.* (Ninth Edition) 927

10 Akinwunmi & Busari *Insolvency Practice in Africa–The Nigerian Experience.* http://akinwunmibusari.com. Accessed on 12th January, 2014.

jurisdiction in winding up, should be situated within the judicial division of the registered office or head office of the company. For the purpose of winding up proceedings, registered office or head office means the place which has longest been the registered office or head office of the company during the six (6) months immediately preceding the presentation of the petition for winding up.[11]

The issue of jurisdiction came up in the case of *Medicore (Nigeria) Ltd v Labwares (Nigeria) Ltd*[12] where a company's registered office was located at Ilorin but the winding up proceeding was brought at Federal High Court Lagos. It was held that on the basis of Section 407 (1) of CAMA 2004, the court that had jurisdiction to wind up the company is the court within whose area of jurisdiction the registered office or head office of the company is situated; in this case Ilorin, Kwara State. Also *in IMB Nigeria Ltd v Lomay Nigeria Ltd*,[13] a winding up petition was brought in Lagos in respect of a company with registered office or head office of the company in Jos, Plateau State. The Petition was struck out on the same ground of lack of jurisdiction.

Under the Investment and Securities Act, 2007 the Federal High Court also exercises jurisdiction to wind up the business of capital market operators upon an Order of Securities and Exchange Commission revoking the registration of a capital market operator and requiring the business of that Capital market operator to be wound up.[14] Having stated that both CAMA and Investment and Securities Act confers jurisdiction on the Federal High Courts to wind up corporate entities and business of capital market operators. It is the view of this researcher that limiting jurisdiction of Federal High Courts in insolvency proceedings to only where the registered office or head office of the ailing company is situate is inappropriate as the company may have subsidiaries in other major cities in Nigeria. The company, for instance may have its head office in Jos, Plateau State, but has many other states in Nigeria where it has more of its operations than Jos Plateau State. In that case, it will be appropriate to institute proceedings in any of the states where its major business concern could be located and more convenient for the conduct of the proceedings. From the

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11 See section 570 (1) (2) CAMA 2020 and s.7(1) (C) (G) Federal High Court Act.

12 (1985) FHCR 240 cited in Amupitan, J.O. (n7) 376

13 (1986) FHCR 28 cited in Amupitan, J.O (n12) 377

14 See S. 53(1) Investment and Securities (ISA) Act.

foregoing, it is obvious that Federal High Courts exercises jurisdiction over companies and businesses established under a Federal Legislation.

Appointment of Official Receivers and Liquidators

The three important officers and Corporate Insolvency Practitioners who play major roles in winding up of a Company are the Official Receivers, Provisional Liquidators and Liquidators. It is now settled that where corporate insolvency does not lead to rescue of a company, it will ultimately result to winding up of the company.

By section 704 of CAMA 2020, a person acts as an Insolvency Practitioner in relation to a company by acting as its-

a.) Liquidator, Provisional Liquidator or Official Receiver
b.) Administrator or Administrative Receiver; or
c.) Receiver and manager, or as nominee or supervisor of a company's voluntary arrangement.

An official receiver is an officer of the Federal High Court. According to Section 582 of CAMA,[15] and so far as it relates to the winding up of Companies by the court "Official Receiver" means the deputy Chief Registrar of the Federal High Court or an officer designated for the purpose by the Chief Judge of the Court. The CAMA, under section 583 further provides that where the court has made a winding up order or appointed a provisional Liquidator, there shall, unless the court thinks fit to order otherwise and so orders, be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and showing the particulars of its assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, the list of members and the list of charges and such further or other information as may be prescribed or as the official receiver may require.

Furthermore, the statement shall be submitted and verified by one or more of the person who are at the relevant date the directors and the person who is at that date the Secretary of the company or by such of the persons mentioned in this subsection as the Official Receiver, subject to the direction of the court, may require to submit and verify the statement, that is to say persons who –

[15] CAMA 2020.

a.) Are or have been officers of the company;
b.) Have taken part in the formation of the company at any time within one year before the relevant date;
c.) Have been or are in the employment of the company within the said year, and are in the opinion of the official receiver capable of giving the information required;
d.) Are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

The statement shall be submitted within 14 days from the relevant date or within such extended time as the official receiver or the court may for special reasons appoint.

As regards a Liquidator, in the context of winding up by the court, a Liquidator is a person who is appointed by the court to wind up the affairs of a company and to distribute its assets, if any, among creditors and contributories in accordance with the articles.[16] By section 557(1) of the Act,[17] a receiver or manager of any property or undertaking of a company is personally liable on any contract entered into by him except in so far as the contract otherwise expressly provides. If it is a contract entered into by a receiver or manager in the proper performance of his functions, such Receiver or Manager is subject to the rights of any prior encumbrance, entitled to an indemnity in respect of liability thereon out of the property over which he has been appointed to act as a receiver or manager.

Under section 585 of CAMA,[18] the court may appoint a Liquidator or Liquidators for the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose and where there is a vacancy, the official receiver shall by virtue of his office, act as Liquidator until such time as the vacancy is filled. 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. If a provisional Liquidator is to be appointed before the making of a winding

16 Idigbe, A. (n14)18
17 CAMA 2020
18 CAMA 2020.

up Order, the official receiver or any other fit person, may be so appointed. On the making of a winding-up Order, if no Liquidator is appointed, the official receiver shall by virtue of his office become the Liquidator. The Official Receiver in his capacity as provisional Liquidator shall, and in any other case may, summon meetings of creditors and contributories of the company to be held separately for the purpose of determining whether or not an application is to be made to the court for appointing a Liquidator in place of the Official Receiver. If a person other than the Official Receiver is appointed Liquidator, he shall not be capable of acting in that capacity until he has notified his appointment to the Commission and given security in the prescribed manner to the satisfaction of the court.

According to section 585(4) and (5) of CAMA, if more than one Liquidator of a company is appointed by the court, the court shall declare whether anything by the Act required or authorized to be done by a Liquidator is to be done by all or anyone or more of them. A Liquidator appointed by the court may resign, or, on cause shown, be removed by the court; and any vacancy in the office of a Liquidator so appointed shall be filled by the court. From the foregoing, it is evidently clear that by the provisions of sections 582, 583 and 585 of CAMA, it is the court that appoints both an Official Receiver and a Liquidator in winding up of a company. The Official Receiver is a "provisional" Liquidator where appointed by the court before an order of winding up is made. Where no specific order of court was made by the Court for the appointment of a provisional Liquidator, the Official Receiver of the Federal High Court by virtue of his office is statutorily deemed to be the Liquidator and thus can exercise the powers available to a Liquidator under CAMA.

Beyond the appointment of official receivers and Liquidators by the court, the CAMA empowers the Corporate Affairs Commission to regulate practice of Insolvency Practitioners. Section 705(1) of CAMA provides the qualification to be met before a person can be appointed as official receiver, provisional Liquidator or Liquidator. By the provision of section 705(1), A person is only qualified to act as Insolvency Practitioner where he-

a. Has obtained a degree in law, accountancy or such other relevant discipline from any recognized university or polytechnic;
b. Has a minimum of five years post qualification experience in matters relating to Insolvency;

c. Is authorized to so act by virtue of a certificate of membership issued by Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), or his membership of any other professional body recognized by the commission, being permitted to act by or under the rules of that body; and
d. Holds an authorization granted by the Commission

(2) The Commission may prescribe in its regulations such other additional qualifications as may be considered necessary.

However, by Section 676 of CAMA,[19] there are categories of persons disqualified for appointment as Liquidators. They include:

a.) Infant;
b.) Anyone found by the court to be of unsound mind;
c.) A body Corporate
d.) An undischarged Bankrupt
e.) Any director of company under liquidation
f.) Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and in respect of whom there is a subsisting order under section 672 and 280 of CAMA.

Any appointment made in contravention of the provisions of subsection (1) above shall be void and if any of the persons named in paragraphs (c), (d), (e) and (f) above, shall act as a Liquidator of the company, he shall be guilty of an offence and liable to a fine as prescribed by the Commission in the Regulations in the case of a body corporate, or in the case of an individual, to imprisonment for a term not exceeding six months or to a fine as the court deems fit or both such imprisonment and fine. It is the opinion of this researcher that Official Receivers and Liquidators should have a certain degree of knowledge and experience to effectively discharge the functions inherent in winding up proceedings which is of technical nature. The degree of knowledge and experience required for a person to be appointed as official Receiver or Liquidator is such that should have been derived from evidence of doing similar assignments for a certain statutory period or that such appointee must belong to a professional body known to be Insolvency Practitioners.

[19] CAMA 2020

However, the provision of section 705(1)(b) as regards post qualification experience in matters relating to insolvency appears to be nebulous, as it did not address those who may have less than 5years experience but are qualified under section 705(a)(c)(d) and (2) in addition to being in active practice more than a person who may have above 5 years' experience but redundant in practice and thus lacking current experience in practice and procedures of Insolvency matters. Also, the Act limits the qualification body of Insolvency Practitioners to the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), although certain other professional bodies may be recognized by the CAC. The particular mention of BRIPAN in the provision may be seen as an attempt to usurp the legislative power which may lead to unhealthy rivalry between BRIPAN and other bodies not mentioned in the legislation.

Arrangement and Compromise

Arrangements and Compromise are forms of corporate restructuring. Where a company is undergoing financial difficulties that may lead to its winding up, it may resort to restructure its outlook as a way of rescuing the company from extinction. Economic realities have always impacted on the growth and ability of a company to honour its obligations to creditors. In the midst of such difficulties, a company which opts to stay afloat must design and embark on legally acceptable survival options, many of which are available under the Nigerian Corporate and Investment Law and Practice.[20] Arrangements and Compromise are used interchangeably. It can be arrangement on sale of company's property under section 714 of CAMA 2020 or power to compromise with creditor and member under section 715 of CAMA 2020. Thus, under section 710 of CAMA,[21] the expression "arrangement" means any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of CAMA or by the unanimous agreement of all parties affected thereby.

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20 Ogbuanya, N.C.S. *Essentials of Corporate Law Practice in Nigeria.* (Novena Publishers Limited 2013) 579.

21 CAMA 2020

A company, that intends to effect any arrangement may by special resolution resolve that the company be put into members' voluntary winding up and that the Liquidators be authorized to sell the whole or part of its undertaking or assets to another body corporate in consideration or part consideration of fully paid shares, and distribute the same in specie among the members of the company in accordance with the rights in the liquidation. Any sale or distribution in pursuance of a special resolution under this section shall be binding on the company and all members thereof and each member shall be deemed to have agreed with the transferee company to accept the fully paid shares, debentures, policies, cash or other like interests to which he is entitled under such distribution.[22]

Under section 715 of CAMA,[23] which boarders on power of a company to compromise with creditors and members, where a compromise or arrangement is proposed between a company and its creditors or any class of them, court may, on the application, in a summary way, of the company or any of its creditors or members or, in the case of a company being wound up, of the Liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such a manner as the court directs. If a majority representing not less than three-quarters in value of the shares of members or class of members, or of the interest of creditors or class of creditors, as the case may be, being present and voting, either in person or by proxy at the meeting in support of the compromise or arrangement, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to the court within a time specified by the court. If the court is satisfied as to the fairness of the compromise or arrangement it will be sanctioned and shall thereafter be binding on all the creditors or class of creditors or on the members.

A distinction can be drawn in respect of Arrangements and Compromise under sections 714 and 715 of CAMA. While Arrangements and Compromise under section 714 of CAMA portends sale of company's property during winding up, thereby bringing an end

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22 Section 714 (1) CAMA 2020

23 CAMA 2020.

to the existence of the company, Arrangement and Compromise under section 715 of CAMA is a corporate restructuring which will ordinarily result in the rescue of the company from extinction as the restructured company will bounce back to life in form of a new company. Winding up for liquidation of the company under section 714 of CAMA brings an end to the company since the assets are distributed to those entitled under the rules of assets distribution when a company is dissolved.

It appears to this researcher that procedures for Arrangements and Compromise under sections 714 and 715 of CAMA are cumbersome and complex to apply for ailing company that requires restructuring to rescue it to continue doing business. There are three different procedures to follow, the convening of the meetings, the approval or investigation by the Securities and Exchange Commission and the petition to the court for the sanctioning of the scheme as approved by majorities during their meetings. The CAMA provisions is similar to part 26 of Companies Act of England which requires a majority in number representing 75 percent in value of each class of creditors and each class of members present and voting either in person or by proxy,[24] for a scheme of arrangement. The said Companies Act provision also involves obtaining the sanction of the court to the scheme approved by the requisite majority of creditors of each class at separately convened meetings ordered by the court.[25]

However, the English Insolvency Act 1986 introduced a much simpler procedure known as the Company Voluntary Arrangement (CVA) by which distressed companies could negotiate simple compromises or schemes of arrangements with their creditors.[26]

Under section 434 (1) of the Act[27] a company's Board of Directors is empowered to arrange a composition of a company's debts with its creditors to enable it to vary the terms of its loans and enable the company pay over an extended period to ensure its survival. The Act refers to this as voluntary arrangement. It can also be called Company Voluntary arrangement which is similar to the practice in England under the English Insolvency Act 1986. This rescue mechanism enables an Insolvent corporate entity to continue to carry on its business.

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24 Companies Act 2006, S.899 13

25 Goode, R. *Principles of Corporate Insolvency Law* (Sweet & Maxwell 1997)2

26 Adebola, B. (n3) 54

27 CAMA 2020

While commending the intention of Arrangement and Compromise as a form of restructuring corporate entities in financial distress, this researcher has observed that the procedures for effecting such Arrangement and Compromise under sections 714 and 715 of CAMA are cumbersome and complex to apply for ailing company that requires restructuring for rescue in order to continue doing business. The above mentioned provisions of CAMA involves petition to court to sanction the scheme. This may cause delay in effecting the Arrangement and Compromise.

The Companies Winding Up Rules 2001 (CWR)

The Companies Winding up Rules 2001 governs the proceedings in winding up of a company in Nigeria. The Companies Winding up Rules 2001 replaced that of 1983. The 2001 rules applies to all proceedings in every winding-up under the CAMA and the forms in the appendix, where applicable shall be used,[28] provided that the Chief Judge of the Court may from time to time, alter any forms specified in the appendix hereto or substitute new forms in lieu thereof. Where the Chief Judge alters any form or substitutes any new form in lieu of a form prescribed by these Rules, such altered or substituted form shall be published in the Gazette. It is imperative to state here that where no provision is made in the Companies Winding Up Rules, the Federal High Court (Civil Procedure) Rules, 2009 becomes applicable by virtue of Rule 183 of Companies Winding Up Rules, 2001 which provides that in any proceedings in or before the court, where no provision is made by these Rules, the Court's (Civil Procedure) Rules shall apply.[29] Interestingly, there are three insolvency office holders who have duty to render account of their activities during winding up proceedings.

There are several rules provided by the Companies Winding up Rules 2001, aimed at checking insolvency office holders where winding up is by the court. The insolvency office holders include Special Manager, Official Receiver and Liquidators. The duty to render account of stewardship is very vital in insolvency proceedings. Thus, Rule 33[30] empowers the official receiver to bring application to the Federal High Court for the appointment of a Special Manager. Such an application

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28 Rule 2 of Companies Winding up Rules 2001

29 Rule 183 of Companies Winding Up Rules 2001

30 Companies Winding up Rules 2001

shall be supported by an affidavit and a report by the Official Receiver which report shall either recommend amount of remuneration payable to special manager or request the court to fix one. Every special manager shall submit accounts to the Official Receiver and the Special Manager's account shall be verified by affidavit, in form 18 in the Appendix with such variation as circumstances may require and when approved by the Official Receiver, the total of the receipts and payments shall be added by the official receiver to his accounts. Liquidators and Special Managers shall give security upon appointment other than Official Receiver.[31] If a Liquidator or Special Manager fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the Official Receiver shall report such failure to the court who may thereupon rescind the order appointing the Liquidator or Special Manager.[32] A Liquidator is obliged to have given the security upon appointment before all property is handed over by the Official Receiver.[33]

A critical look at applications to be filed by the Official Receiver or even verification of account requires an affidavit. It can be argued that where an application for verification is not supported by the affidavit as required by the Companies Winding up Rules 2001, such application becomes incompetent and will be struck out. However, by Rule 182 of the Rules,[34] no proceedings under the Act and these Rules shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding, is of the opinion that injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court. This provision gives the Court discretionary power to form an opinion as to when an injustice has been occasioned in the event of any defects or irregularity, in that case the court may remedy the defect or irregularity in the interest of justice. Rule 182 of the Rules which reserves to the court the right to form an opinion as to when injustice has been occasioned by an irregularity is inappropriate. This provision may turn out to be a clog in the wheel of justice. There are no criteria to follow by the court in determining whether injustice has been done by the irregularity of an application not supported by an affidavit filed by the

31 Rule 42 of Companies Winding up Rules 2001
32 Rule 43 Companies Winding Up Rules 2001
33 Rule 149 Companies Winding Up Rules 2001
34 Companies Winding up Rules 2001

Official Receiver. The defect created in the rules by allowing the court to form an opinion as to when injustice has been occasioned by the irregularity is that the court might exercise the discretion wrongly and only according to his sense of what amounts to justice. There is no standard provision to follow by the court in determining whether injustice has been done by the irregularity of an application not supported by affidavit filed by the Official Receiver.

Winding up Procedures

A Company's life time can be brought to an end through this process known as winding up. Unlike other business and non-business organizations, only companies undergo both winding up and dissolution processes, others such as partnership, Business Name and Incorporated Trustees only get dissolved. A statutory corporation is not subject to winding up except as provided by the statute creating it or be dissolved by a statute.[35] In Kwara Investments Co. Ltd v Garuba,[36] the Court held that where a corporation is a creation of statute, only a statute can bring to an end its existence.

Black's Law Dictionary[37] defines Winding up as: "Process of settling the accounts and liquidating the assets of a partnership or corporation, for the purpose of making distribution of net assets to shareholders or partners and dissolving the concern."

Winding up does not mean the end of a company but a process of bringing the life span of the company to an end. The Company would remain a corporate entity; but the running of the company will be bestowed on the Liquidator who manages and administers the company pending the ultimate dissolution of the company, by which time it will no more be in existence. Therefore, winding up is merely a process to end the company. In Tate Industries Plc v Devcom M.B Ltd,[38] it was stated that: "A winding up proceeding is signing the death warrant of a company or pronouncement of the death of the company. It is very serious matter"

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35 Ogbuanya, N.C.S. *Essentials of Corporate Law Practice in Nigeria* (Noverna Publishers Limited 2013)661

36 (2000) 10 NWLR (Pt. 674) CA 25-40 cited in Ogbuanya N.C.S

37 *Black's Law Dictionary.* 6th Ed. 1601

38 (2004) 17 NWLR (Pt. 901) CA 182 @ 225, paras E-G

Ogbuanya[39] defines winding up as: "The process by which a company is liquidated and dissolved (dead) and its assets (if any) distributed in accordance with certain rules of priority, for the benefit of its creditors, members and the employees"

Apart from winding up as a process through which a company's life can be brought to an end, by the provision of section 8(a) (i) of CAMA,[40] the life of a company incorporated under the Act can also be brought to an end by its name being struck off the register of Companies and the Company shall be dissolved. A company can also be wound up in accordance with the provisions of CAMA. Under CAMA,[41] the winding up of a company may be carried out through three methods to wit – by the court; or voluntarily; or subject to the supervision of the court. It has been held that by virtue of section 401 (1) of repealed CAMA, Companies in Nigeria can only be wound up through those three above mentioned ways.[42] A company dies once the court orders the dissolution of the company and not when it is being wound up or the company can also die as provided under sections 8 (a) (i) and 692 of CAMA 2020.[43]

The question that arises here is what are the statutorily required winding up procedures which can bring the company's life to an end? By the provision of section 573 (1) of the Act,[44] a winding up Petition may be presented to the court for the winding up of a company either by any of the following:

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;
e.) A trustee in Bankruptcy to, or a personal representative of a creditor or contributory;
f.) The Commission under section 366 of this Act;

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39 Ogbuanya, N.C.S. (n35)
40 See section 8 (a) (i) of CAMA 2020.
41 See section 564 of CAMA 2020.
42 See repealed CAMA, CAP C20 LFN 2004, decided in the case of Corporate Affairs Commission v Davies (2000) 3 NWLR (Pt.647) 65
43 The Corporate Affairs Commission may strike off the name of a company from the register of Companies.
44 CAMA 2020

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.

In Nigeria, the Federal High Court is vested with the jurisdiction to hear and determine every winding up Petition. Therefore, a petition can only be validly presented when same is filed at the registry of the Federal High Court located within the area of jurisdiction of the registered office or head office of the company. Under Rule 18 of Companies Winding Up Rules 2001, it is mandatory that every petition must be verified by an affidavit referring to the petition and such affidavit shall be made by the Petitioner, or by one of the petitioners, if more than one or, in case the petition is presented by a company by some director, secretary, or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition.

A critical look at the provision of Rule 18 of Companies Winding up Rules, shows that there must be a verifying affidavit in support of the petition. However, the verifying affidavit which shall be deposed to by either the petitioner or specific principal officers of the company, shall be sworn to, and filed within four days after the petition is presented. Thus, it means that the affidavit should not necessarily accompany the petition but must be filed within four days after the petition had been presented in court. It is submitted here that where the verifying affidavit is filed with the petition at the same time, it will make the petition incompetent, and this will result to striking out of the petition.

The verifying affidavit must also verify the petition, otherwise, the petition will be struck out. In Farmat Shipping Line Ltd v Establishment De Commerce General,[45] notwithstanding the fact that verifying affidavit was filed, the Supreme Court held that the verifying affidavit did not refer to the petition but contains generally paragraphs of an affidavit and the Supreme Court struck out the petition on that basis.

Upon the presentation of the petition and verifying affidavit, same is to be served on the company, unless presented by the company, at the company's registered office, if any and if there is no registered office

[45] (1971) A.N.L.R 250 cited in Amupitan, J.O. (n13). 18

thereat, the principal or last known principal place of business of the company, if such cannot be found, by leaving a copy with any member, officer, servant of the company or in case no such member, officer or servant can be found there, then by leaving a copy at such registered office or registered place of business or by serving it on such member, officer or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the Liquidator (if any), appointed for the purpose of winding-up the affairs of the company.[46] There shall be affidavit of service of any of such petition as stated in form 5 and 6 in the Appendix. Service of process in any winding-up matters shall be in accordance with the procedure laid down for the service of civil processes in the court under the Court's (Civil Procedure) Rules.[47]

After the petition has been filed at the court, a court order is required for the advertisement of the petition. The petition shall be advertised fifteen clear days before the hearing. The advertisement of the petition shall be once or as many times as the court may direct, in the Gazette and in one National Daily Newspaper and one other newspaper circulating in the state where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the court.[48] The advertisement shall also state the day and date on which the petition was presented; the name and address of the petitioner; the name and address of the petitioner's solicitor; and a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitor, within the time and manner prescribed by the Rules and any advertisement of a petition for winding up of a company by the court which does not contain such note shall be deemed irregular. The advertisement of the petition shall be in form 9 or 10 as prescribed by the Companies winding-up Rules 2001 with variations as circumstances may require.[49]

It is important to state that though, by rule 19(2) (c), any advertisement of a petition for winding up of a company by the court not in compliance with provisions of the said Rule shall be deemed

[46] Rule 17 Companies Winding Up Rules 2001
[47] Rule 12 Companies Winding Up Rules 2001
[48] Rule 19 (2) (b) of the Companies Winding Up Rules 2001
[49] Rule 17 (2) (c) and Rule 19 (4) of the CWR 2001

irregular. Rule 182(1) of the Rules, however is to the effect that not every irregularity or defect will invalidate a winding up proceeding particularly where no injustice has been occasioned thereby. The court has the discretion to determine whether injustice has been occasioned by such defect or irregularity and where such injustice cannot be remedied by an order of court, then such irregularity may invalidate the proceedings. After the advertisement of the petition for 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 ground for the appointment of a provisional Liquidator, the court may appoint a provisional Liquidator upon such terms as in the opinion of the court shall be just and necessary.[50] Basically, the purpose of appointing a provisional Liquidator is to preserve the assets of the company pending the determination of the winding up proceedings, especially where the assets of the company could easily be tampered or wasted by the principal officers of the company. The powers of the directors of a company also cease to exist even with the appointment of the provisional Liquidator.[51]

Under Rule 22 of Companies Winding Up Rules, after the hearing at which the order to advertise the petition was made by the court, the petitioner or his solicitor must on the next adjourned date satisfy the court that the petition has been duly advertised, and affidavit verifying the petition and affidavit of service if any are duly filed. Every person who intends to appear on the hearing of a petition must give to the petitioner notice of his intention to appear which must contain his address and be signed by him or his solicitor.[52] Prior to the date fixed by the court for hearing of the petition, the petitioner or his solicitor must prepare and file in the court's registry, list of the names and addresses of persons who intends to appear on the hearing of the petition and of their respective solicitors,[53] and the petitioner or his solicitor shall file the list in the court registry prior to the hearing of the petition on the day appointed for hearing.[54]

Upon the service of the petition, the respondent is required to file an affidavit in opposition to the petition within ten days of the service of

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50 Rule 21 (1) of the Companies Winding Up Rules 2001
51 Section 585 (9) of CAMA 2020
52 Rule 23 of the Companies Winding Up Rules 2001
53 Rule 24 (1) of the Companies Winding Up Rules 2001
54 Rule 24 (2) of the Companies Winding Up Rules 2001

the petition, or in the case of any other party within fifteen (15) days of the date of advertisement of the petition and notice of filing of the affidavit must be given to the petitioner or his solicitor on the day on which the affidavit is filed.[55] The Petitioner has five (5) days within which to file his reply to the affidavit in opposition to the petition from the date of receipt of such affidavit in opposition.[56] After hearing the petition for winding up of a company, the court may either by its order, dismiss the petition or order that the company be wound up. Where the court makes an order for the winding up of a company, a copy of the winding up order is forwarded to the Corporate Affairs Commission by the company or as may be prescribed by the court and the Corporate Affairs Commission shall make a minute thereof in its books relating to the company.[57]

Winding up is a collective proceeding. There are also non-collective proceedings. The two terms are normally used to differentiate corporate insolvency procedures internationally. While collective proceedings deals with formal reorganizations of companies, like Mergers & Acquisitions, Winding up and Arrangement & Compromises which are procedures available to creditors and stakeholders in the company, non-collective proceedings involves informal reorganizations, like private arrangements and compromises with creditors. The Companies and Allied Matters Act does not have provision for private arrangements and compromises, but provides for receivership as a non-collective proceeding. The court takes total control of all the assets of the company in collective proceedings,[58] as seen in receivership.

It is very imperative to state here that the procedures of winding up of a company as stated above only brings the operational activities of the company to an end, after which liquidation of the company follows with the appointment of a Liquidator who will collect the assets of the company for distribution to creditors in order of priority. Any surplus funds shall be distributed to shareholders before the company will finally and formally be dissolved. A copy of the order of dissolution made by the court will then be forwarded by the Liquidator to the Corporate Affairs Commission within fourteen (14) days of making of

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55 Rule 25 (1) of Companies Winding Up Rules 2001
56 Rule 25 (2) of Companies Winding Up Rules 2001
57 Section 579 of CAMA 2020.
58 Idigbe, A. (n16) 8

the order.[59] The process of winding up a company in the opinion of this researcher is very technical and cumbersome. Thus, it appears that if half of the efforts put in winding up a company are deployed to rescue the business of the company by way of restructuring through arrangement and compromise, the interest and wellbeing of the company, creditors, contributories and shareholders of the company will be better served. This will be in line with the international best practices aimed at reviving ailing business of corporate entities instead of liquidation of the companies.

This researcher has observed the unnecessary technicalities in the rules which makes winding up proceedings difficult. For instance, it is required under Rule 18 of Companies Winding up Rules that the verifying affidavit in support of the petition must be filed within four days after presentation of the petition, otherwise the petition becomes incompetent if filed the same time with the petition. There is nothing wrong in filing the petition with verifying affidavit the same time as both are processes that should go together in the proceedings. Again, the requirement by rules that an order of court is required for the advertisement of the petition after it has been filed is unnecessary. It means that the petition must have been filed before another application is made to the court for an order for advertisement of the petition. This will definitely occasion unnecessary delay in the proceedings, having regards to the snail pace nature of judicial proceedings in Nigeria. While this researcher is not averse to publication or advertisement of the petition as required by the Rules, it would be better to include the application for order of court for the advertisement of the petition, the same time with filing of the petition.

Conclusion and Recommendations

The adverse impact of insolvency on corporate entities cannot be overestimated. The increase incidence of corporate collapse is majorly attributed to it. Thus, these challenges requires legislative intervention. Companies must rise up to the challenges posed by corporate insolvency. It is therefore recommended that:

1. Section 564 of CAMA which expressly provides for winding up of company, be amended to reflect or look rescue friendly for companies undergoing insolvency. Except in extreme cases where

[59] Section 617 (2) CAMA 2020.

a corporate entity cannot be salvaged, legislation should encourage saving of viable business.

2. The exercise of jurisdiction of Federal High Court under S. 570 of CAMA in winding up of corporate entities, should be amended to include where the company has subsidiary or operational activities being carried out, as against only the head or registered office or the company.
3. Amendment of Section 705(1)(b) for a person to be qualified to act as insolvency practitioner, to include five years post qualification experience with ascertainment of being in active practice in matters relating to insolvency. A person may have five years post qualification experience but redundant for years. In that case, his experience may not be in tune with current practice and procedures in insolvency matters.
4. Elimination of courts involvement in the cumbersome procedure for effecting arrangement and compromise under sections 714 and 715 of CAMA. This will hasten the procedure if court proceedings is not involved.
5. There should be amendment of section 182 of the winding up rules which allow a court to exercise discretion to form an opinion as to when injustice has been occasioned in application before the court; to provide a standard or criteria in determination of whether injustice has been done by the irregularity of such application not supported by an affidavit filed by the official receiver. A criteria to be followed up by a judge is necessary in the proceedings.
6. It is also recommended that the unnecessary technicality under section 18 of the winding up Rules filing of verifying affidavit within four days after presentation of the petition, otherwise the application becomes incompetent; be amended to read that both the verifying affidavit and petition can be filed concurrently, as both are processes in the winding up proceedings.