

THE ASSET MANAGEMENT CORPORATION OF NIGERIA ACT 2010 AS AMENDED AND THE NEW PARADIGM FOR WINDING UP AND BANKRUPTCY PROCEEDINGS AS TOOLS FOR DEBT RECOVERY IN NIGERIA*

Abstract

Debt repayment is the major objective of lending with debt recovery as the fail-safe for ensuring repayment. Among the various recovery mechanisms open to creditors are winding up and bankruptcy, which had over the years made them become less attractive to creditors as tools for debt recovery due to the complex and cumbersome legal process. The 2019 amendment to the AMCON Act introduced a different regime for winding up and bankruptcy proceedings. This article examined the legal framework for winding up and bankruptcy under the AMCON Act and their impacts on AMCON debt recovery. The article employed the doctrinal method to evaluate the legal regime established by the AMCON Act. It observed that while the AMCON Act made no significant alteration to winding up proceedings under the general framework, it fundamentally revolutionized bankruptcy proceedings by making it a formidable debt recovery mechanism albeit for only AMCON debts. It concludes that it is imperative for a more elaborate and efficient procedure for winding up through amendment of the AMCON Act, but advocating the adoption of the AMCON model with regards to bankruptcy to have general application in Nigeria.

Keywords: Winding Up, Bankruptcy, Debt Recovery, Proceedings, Asset and Management.

1. Introduction

Winding-up and Bankruptcy Proceedings are generally tools for debt recovery against corporate entities and individuals respectively. When a company is unable to meet its liabilities, it is classified as insolvent, thus a ground for winding up of the said company. Accordingly, where an individual's liabilities outweighs his/her assets, the person is classified as bankrupt.¹ Winding up is the formal process of bringing the life of a company to an end and one of the grounds for winding up is the inability of the company to pay its debt. In the same manner, bankruptcy is an enforcement of judgement tool open to a creditor to recover a judgement debt owed by an individual (natural person) judgment creditor. There are formal statutory provisions for winding up of a company which will eventually end with the dissolution of same likewise for with bankruptcy proceedings

***Alheri B. Nyako**, Senior Lecturer Baze University, Abuja & Former Board Secretary/Director Legal, NDIC, Baze University, Plot 686, Cadastral Zone C 00, Jabi Airport Road Bypass (Ring Road), Behind National Judicial Institute, ABUJA, FCT, Nigeria; Phone: 08033016380; Email: alheri71@gmail.com

¹Companies and Allied Matters Act 2020 (CAMA 2020), section 43(1).

which terminates with the declaration of bankruptcy. However, the complexities of the procedure of recovering debt either through winding up or bankruptcy as the case may be has made it less attractive for creditors. It is more cumbersome in the case of bankruptcy proceedings as a creditor will have to obtain judgement and levy execution before resorting to bankruptcy proceedings as the last option.

The AMCON Act has however, introduced a new legal procedure for winding up and bankruptcy proceedings. These procedures are applicable to AMCON Eligible Bank Assets (EBAs) limiting the scope of application to only AMCON debtors. The procedure under the AMCON Act are a departure from the general procedure under the Companies and Allied Matters Act and the Bankruptcy Act for winding up and bankruptcy respectively. This article will examine the AMCON regime of winding up and bankruptcy. It intends to give an overview of the winding up process and bankruptcy proceedings in general as provided for under CAMA and the Bankruptcy Act respectively before analysing the special provisions for winding up and bankruptcy under the AMCON Act. The article is structured into four sections, to wit: the Introduction; Winding up under CAMA as well as Winding up under the AMCON Act; Bankruptcy Proceedings under the Bankruptcy Act as well as under the AMCON Act and the Conclusion/Recommendation.²

2. Winding-Up under the Companies and Allied Matters Act (CAMA), 2020

One of the incidences of incorporation is that a company acquires all powers of a natural person of full capacity, which includes the power to borrow money, to charge property and to issue debentures.³ The process of removing the corporate personality of a company thereby bringing its life as a juristic person to an end is known as winding up or liquidation. Generally, winding up is the process of bringing the life of a company to an orderly end and administering its assets for the benefits of its creditors and shareholders. Olakanmi⁴ defined winding up as ‘the liquidation or winding-up of a company or the process whereby its life is ended and its property administered for the benefit of its creditors and members’.

Winding-up under the Nigerian legal regime is generally governed by:

- (i) Companies and Allied Matters Act, 2020 (CAMA)
- (ii) Companies Proceedings Rules
- (iii) Companies Winding-Up Rules

² *Ibid* (n 1)

³ CAMA 2020, s 191

⁴ J. Olakanmi, *Companies and Allied Matters Act 2004 and Investment and Securities Act 2007: Synoptic Guide* (2nd Edition, Law Lords Publication).

- (iv) Banks and Other Financial Institutions Act 2020
- (v) Nigeria Deposit Insurance Corporation Act 2023
- (vi) Federal High Court (Civil Procedure) Rules and Act
- (vii) The AMCON Act 2010 as amended.

The general legal framework for winding up of companies are provided for in Part B Chapters 20 - 24 of the CAMA where it provides for three modes of winding up, namely:⁵

- (a) Winding up by the Court (which, for the purpose of this article, shall be discussed after the two modes discussed hereunder)
- (b) Voluntary winding up, and
- (c) Winding up subject to the supervision of the court.

2.1 Voluntary Winding-Up

This usually occurs when members of the company by way of a special resolution decide that the company be wound up;⁶ or when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.⁷ It is important to note that for a successful voluntary winding up, the directors of the company or, in a case of a company having more than two directors, the majority of the directors, may at a meeting of the directors make a statutory declaration to the effect that they have made full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding 12 months from the commencement of the winding up, as is specified in the declaration.⁸ It is to be noted that a declaration does not have effect unless it is made within the five weeks immediately preceding the date of the passing of the resolution for winding-up the company and the statutory declaration and resolution are delivered to the Commission for registration within 15 days after passing the resolution.⁹ Furthermore, section 625 (4) of the CAMA provides that a voluntary winding-up where a declaration has been made in accordance to this section shall be referred to as ‘members voluntary winding-up’ and where a declaration has not been made and delivered it shall be referred as ‘a creditors’ voluntary winding-up. Thus, a voluntary winding up can only occur where

⁵Companies and Allied Matters Act (CAMA) 2020, section 564.

⁶*Ibid.*, (n 5), section 620 (b).

⁷*Ibid.*, (n 5) section 620 (a).

⁸*Ibid.*, (n 5) section 625 (1).

⁹*Ibid.*, (n 5), section 625 (2).

the company is solvent. Furthermore, a voluntary winding up according to section 622 of the CAMA is deemed to have commenced at the time of the passing of the resolution for voluntary winding up. The members in a voluntary winding up shall in a general meeting appoint Liquidator(s) for the purpose of winding up the affairs and distribution of the assets of the company.¹⁰

2.2 Winding Up Subject to the Supervision of the Court

This is when a company passes a resolution for voluntary winding-up, the court may on petition order that the voluntary winding up shall continue but subject to such supervision of the court, and with such liberty for creditors, contributories, or others to apply to the court, and generally on such terms and conditions as the court thinks fit.¹¹ It should be noted that this type of winding-up usually starts as a voluntary winding-up where members pass a special resolution in a general meeting for the company to be wound-up, and later, an application is made to the court after the commencement of the voluntary winding-up, for the court to supervise and direct the winding-up as it thinks fit.

A petition for winding-up subject to the supervision of the court will usually succeed if the petitioner(s) are able to show special circumstance why the court should take over and supervise the winding-up; such special circumstance will include where the voluntary winding up has been obtained by fraud or by an inequitable overbearing on the right of a dissentient minority by improper influence.¹²

2.3 Winding Up by the Court

Winding Up by the Court usually commences when a petition for winding-up is presented to the court for any of the following grounds:

- (a) the company has by a special resolution resolved that the company be wound up by the court;
- (b) default is made in delivering the statutory report to the Commission (CAC) or in holding the statutory meeting;
- (c) the number of members is reduced below two in the case of companies with more than one shareholder;
- (d) the company is unable to pay its debts;
- (e) the condition precedent to the operation of the company has ceased to exist; or

¹⁰*Ibid.*, (n 5), section 627.

¹¹*Ibid.*, (n 5), section 649.

¹²*Re London & Mercantile Discount Co.* (1867) 1 Eq 277

(f) the Court is of the opinion that it is just and equitable that the company should be wound up.¹³

It is significant to note that under the provisions of CAMA¹⁴ an application to the court for the winding up of a company shall be by petition and the persons eligible to bring up the petition are:

- (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 CAMA;
- (g) a receiver, if authorised by the instrument under which he was appointed; or
- (h) by all or any of those parties, together or separately.

Thus, one of the consequences of a company's inability to settle its debts is winding up while others include appointment of a receiver/manager, enforcement on the security (if any), debt recovery action, etc. A creditor desirous of petitioning for the winding up of a debtor company on the basis of the debt owed must take note of section 572 of CAMA which provides the circumstances in which a company is deemed to be unable to pay its debts.

Furthermore, winding up by the Court is deemed to commence at the time of the presentation of the petition for the winding-up¹⁵ except where a resolution has been passed by the company, the winding up shall be deemed to have commenced at the time of passing the resolution.¹⁶ Furthermore, the court having jurisdiction to wind up a company is the Federal High Court within whose area of jurisdiction the registered office or head office of the company is situate.¹⁷ The 'registered office' or 'head office' means the place which has longest been the principal place of business of the company during the six months immediately preceding the presentation of the petition for winding up.¹⁸

It is significant to note that the winding up proceedings under CAMA are further governed by detailed procedures contained in the Companies Winding Up Rules, which

¹³Companies and Allied Matters Act (CAMA) 2020, section 571.

¹⁴*Ibid.*, (n 5), section 573.

¹⁵*Ibid.*, (n 5), section 578 (2).

¹⁶*Ibid.*, (n 5), section 578 (1).

¹⁷*Ibid.*, (n 5), section 570 (1).

¹⁸*Ibid.*, (n 5), section 570 (2).

sometimes operate as a bottle neck to speedy conclusion of the proceedings as shown by the experience of NDIC in handling the winding up of failed banks. Consequent upon this, it succeeded in getting a legislative intervention to suspend the application of the Winding up Rules to the winding up of failed banks.

Nevertheless, a successful winding up petition culminates in the making of a winding up order and the appointment of a liquidator by the Court. The liquidator so appointed is empowered to take into his custody or control all the properties of the debtor company which is now effectively in liquidation.¹⁹ The powers of the liquidator are provided for in section 588 of CAMA.

It is through the administration of the estate of the company in liquidation by the liquidator that the creditors receive payment for debts owed to them by way of dividend as may be declared by the liquidator from time to time. Another important feature of winding up is the fact that once winding up proceedings had commenced, the assets of the debtor company are protected against any individual enforcement action by other creditors except against a fixed charge or any other validly created and perfected security interest other than a floating charge.²⁰ Furthermore any fraudulent dissipation of assets of a debtor company by its erstwhile directors are prohibited.²¹

Upon the conclusion of the winding up process, a formal termination of liquidation is ordered, a dissolution order would be made by the court and the company shall be dissolved accordingly from the date of the order.²² The status of the company as a legal entity also comes to an end with the delisting of the name from the register of companies by the Corporate Affairs Commission.

3. Winding Up under the AMCON Act

As stated earlier, the inability to pay debt is a ground for winding up.²³ It should be noted that though there is no express definition of what constitutes a debt in the CAMA however, the AMCON Act defines debt to mean any credit facility, loan, risk asset, whether performing or non-performing, including interest thereon.²⁴ Thus, going by the AMCON Act whether or not an asset is performing it constitutes a debt and thus a ground

¹⁹*Ibid.*, (n 5), section 586.

²⁰*Ibid.*, (n 5), sections 577 and 666.

²¹*Ibid.*, (n 5), sections 577, 658, 666, 667, and 668.

²²*Ibid.*, (n 5), section 617.

²³Companies and Allied Matters Act 2020, section 625 (1).

²⁴ Asset Management Corporation of Nigeria 2010 (hereinafter referred to as AMCON Act 2010), section 61.

for winding up the company to recover the debt once a demand for payment is not heeded to.

The AMCON Act in section 52 provides thus:

where a debtor that is a body corporate fails to comply in full, within 30 days, with a written demand notice issued by the Corporation requiring the body corporate debtor to pay a liquidated sum to the Corporation which the Corporation certifies on the face of the demand notice as being owed by the body corporate debtor to the Corporation in connection with an eligible bank asset acquired by the Corporation, the Court shall, on the application of the Corporation made by way of originating motion, make a winding up order against the body corporate debtor, except where, at the hearing of the application, the body corporate debtor proves to the satisfaction of the Court that it does not owe any liquidated sum at all to the Corporation or that it has a counter-claim, set-off or cross-demand which equals or exceeds the liquidated sum owed to the Corporation.

From the foregoing, it is clear that the type of winding-up contemplated by the AMCON Act is Winding-up by the Court. This is more so that the general provision for winding-up as provided by the CAMA only sanctions winding-up by the Court due to inability to pay debts. It is pertinent to also state that the condition precedent for the Corporation to trigger winding up to recover its debt as provided for under the AMCON Act is first, it has to issue a written demand notice for a liquidated sum to the debtor company and the debtor company fails and/or neglects to comply in full with the notice within 30 days.²⁵ This is substantially the same with section 572(a) of CAMA except that the period of repayment after demand notice under CAMA is three weeks and the minimum amount that can be subject to winding up proceedings is stated at ₦200,000. Thus, where there is a failure to issue a demand notice or to wait for a period of 30 days after a demand notice with non-compliance from the debtor company, an application cannot be made to the Court for the winding up of the debtor company. It should also be noted that the demand notice must be for a liquidated sum that is a sum certain. However, where the debtor company is able to prove to the satisfaction of the Court that it does not owe any liquidated sum at all or that it has a counter-claim, set-off or cross-demand which equals or exceeds the liquidated sum owed to the Corporation, the Court will decline to make the winding up order. It is important to point out that the AMCON Act provided that an

²⁵A similar condition is also required in the CAMA, 2020. Section 572 (a) requires a demand notice to be issued and a failure to comply with such notice within three weeks.

application to Court for winding-up a debtor company shall be by way of an Originating Motion.

Although the 2019 amendment to the AMCON Act define Court as ‘the Federal High Court, the High Court of a State or the High Court of the Federal Capital Territory or the superior court exercising original jurisdiction as may be applicable, save that for the purposes of sections 49 and 50 (1) of this Act, the ‘Court’ means the Federal High Court.’²⁶ However in view of the provision of section 251 of the 1999 Constitution where the Federal High Court is granted exclusive jurisdiction and section 570 (1) of the CAMA, which specifically gave the Federal High Court jurisdiction, it is safe to state that the Federal High Court is the Court to entertain an application for winding-up a company under Section 52 of the AMCON Act.

It is pertinent to state as it were, that the real intendment of section 52 of the AMCON Act on winding up proceedings is the recovery of the AMCON debts. It must however be observed, that as far reaching as section 52 could be, it should be expected that its impact will be limited as it doesn’t appear to be comprehensive enough. The first obvious effect of section 52 is that AMCON has been added to the list of stakeholders that could initiate winding up proceedings against debtor companies that are indebted to AMCON. Although, AMCON as creditor is already qualified to file a petition for winding up of its debtor companies under the provisions of CAMA, section 52 of AMCON Act gives AMCON separate right to initiate winding up proceedings against its debtor companies independent of the option available under CAMA.

Secondly, while the method of commencing winding up proceedings under CAMA is by way of petition as well as elaborate procedural guidelines prescribed by the Winding up Rules, the AMCON Act prescribed Originating motion as the procedure for initiating winding up proceedings by AMCON. Incidentally, the AMCON Act did not go further to reconcile the relationship between the originating motion and the extensive provisions of CAMA and the winding up rules on winding up proceedings. It may however, be assumed that being an originating motion, it will be supported by affidavit, a written address and other supporting documents. It could be safely argued that by implications, not being a winding up petition, the winding up rules will be inapplicable.

The AMCON Amended Act did not expressly exclude the application of some sections of the CAMA and the winding up rules, as the NDIC Act²⁷ did with regard to winding up

²⁶AMCON Act, section 61.

²⁷ Nigeria Deposit Insurance Corporation 2023 (NDIC Act 2023), section 56 (1).

petitions against failed banks. Furthermore, the AMCON Act should have either generally or specifically, with regard to its enforcement provisions, included a supremacy clause over CAMA in case of inconsistency as the BOFIA and NDIC Act did.²⁸ As it stands, there is a conflict between the provisions of AMCON Act and those of CAMA with regard to winding up giving rise to the complicated process of application of rules of interpretation.

Some of the lacuna arising that may arise where a winding up order is granted pursuant to Section 52 of the AMCON Act are: Who and how would a liquidator be appointed, what powers will he exercise, how will dividends be declared and how would the general administration of the winding up proceedings be conducted? Will it be in line with the provisions of CAMA? Will the winding up rules be applicable at this point? With such a vacuum, the only logical conclusion would be that upon the making of a winding up order pursuant to Section 52 of the AMCON Act, all other incidents of winding up will be determined by the provisions of CAMA.

It is also significant to note that the AMCON Act accommodate possible dispute by the debtor on its indebtedness during the winding up proceedings. This implies that just as in the case of winding up proceedings under CAMA, the court will have to conduct a trial on the indebtedness and must be satisfied that the debtor is indeed owing before a winding up order will be made. Indeed, it appears quite settled that where a debt is disputed bona fide or on substantial grounds, a petition or a motion for winding up of a debtor company may not succeed. However, in *Unifam Industries Ltd v. Oceanic Bank International Ltd*,²⁹ the Court of Appeal also held as follows: ‘...moreover, it seems to me that it would be in many cases, be quite unjust to refuse a winding up order to a petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owing.’ Similarly in *Ado Ibrahim & Co. v BCC Ltd*,³⁰ the Supreme Court held that ‘...a court will not decline to entertain a petition from a creditor for winding up a company that is unable to pay its debt because there is a mere dispute as to how much the company is owing the Creditor.’ With these pronouncements, it is envisaged that the debtors will not be allowed to unduly frustrate the grant of

²⁸Section 53 (1) of BOFIA, 2020 provides for supremacy of BOFIA over CAMA, NDIC Act, Federal Competition and Consumer Protection Act, NFIU Act, Federal Mortgage Bank Act, Mortgage Institution Act, Nigeria Export-Import Bank Act, and other applicable laws, in so far as they relate to banks, other financial institutions and specialised banks. Thus, section 75 of the NDIC Act gives the NDIC Act supremacy over other laws (including CAMA) save for BOFIA.

²⁹[2005]3 NWLR [Pt 911] 83.

³⁰[2007] 15 NWLR [Pt 1058] 538.

winding up orders on the basis of any dispute on the exact figures of the amounts owed, which forms the bulk of the contentions in debt recovery litigation.

On the whole, the major contribution by the AMCON Act to the winding up legal regime is the simplification of winding up proceedings by taking it away from the Petition model and by implication the application of winding up rules, to the option of using originating motion, making it easier to prove the debt and in the same proceedings obtain a winding up order. Notably AMCON did not seem to have been interested in being appointed as the liquidator of the debtor companies which would have enabled it to take greater control of the winding up process. Hopefully, it will still have influence in the selection of the persons that would be appointed as liquidator where the winding up proceedings become successful. The above represents a significant improvement over the *status quo* under CAMA but perhaps not far reaching enough to be a game changer as is the case with the reform on Bankruptcy proceedings.

4. Bankruptcy

4.1 Bankruptcy under the Bankruptcy Act 1979

General bankruptcy is a tool for debt recovery and primarily governed by the Bankruptcy Act of 1979 and the Bankruptcy Rules 1990. Under the Bankruptcy Act, bankruptcy proceedings may be initiated by either the creditor to enforce payment of outstanding debt or by the debtor himself where he finds himself insolvent or otherwise unable to discharge his liabilities and would prefer a judicial administration of his estate.

It is significant to note that under the general bankruptcy proceedings, unless initiated by the debtor, it can only be used to enforce the payment of debts and not to establish the debt. Consequently, in creditor driven bankruptcy proceedings, the indebtedness of the debtor must be conclusively ascertained through a separate prior judicial process. That is why typically, a bankruptcy proceeding will only be initiated by a creditor who has obtained a final judgment for payment of debt against a debtor. Furthermore, Bankruptcy proceedings are directed at natural persons or Partnerships or other unincorporated entities and not against corporate debtors where winding up proceedings serves as the equivalent procedure. Under the general legal framework, bankruptcy proceedings are commenced by way of petition, which must be in the manner prescribed by the Bankruptcy Rules of 1990.

4.2 Conditions Precedent to Commencement of Bankruptcy Proceedings

4.2.1 Acts of Bankruptcy

The Creditor who is desirous of commencing bankruptcy proceedings against a debtor must first ensure that an act of bankruptcy has been committed.³¹ The following are the acts of bankruptcy recognised by law:

- (a) That the Creditor/Applicant has obtained a final judgment or order for payment of money against the debtor/respondent.
- (b) The judgment creditor/Applicant had levied execution of a final judgment or order against the debtor/respondent.
- (c) The debtor had made a declaration of his inability to pay the debt owed to Creditor/Applicant.
- (d) The debtor had presented bankruptcy proceedings against himself.

4.2.2 Other Conditions for Bankruptcy Proceedings

The Creditor/Applicant must ensure that:

- (a) The act of bankruptcy must have occurred three months preceding the presentation of the petition.³²
- (b) The debt being the subject of the bankruptcy proceedings must be a liquidated sum, due and payable and not below ₦2000.00.³³
- (c) The debtor must have within the past one year preceding the presentation of the petition been resident in Nigeria or owned a dwelling house or place of business in Nigeria or had conducted business in Nigeria or been a member of a firm or partnership having business in Nigeria.³⁴

Owing to the strict procedural rules in bankruptcy proceedings, failure to observe the guidelines or preconditions would be fatal to the proceedings.³⁵

4.3 The Notice of Bankruptcy

Bankruptcy proceedings is usually commenced by the judgment creditor/applicant applying to the Registrar of Federal High Court which has exclusive jurisdiction to handle bankruptcy proceedings for issuance of Notice of Bankruptcy, attaching thereto, a certified copy of the money judgment obtained against the judgment debtor. The bailiff will have to support the application with an affidavit certifying that the judgement had been executed on the goods of the judgement debtor and were insufficient to liquidate the

³¹Bankruptcy Act, Cap B2 LFN 2004 (Bankruptcy Act), section 1.

³² Bankruptcy Act, section 4(1)(c).

³³Bankruptcy Act, section 4(1)(a)&(b).

³⁴ Bankruptcy Act, section 4(1)(d).

³⁵*Omananyi v. Majekodunmi* (Suit No FHC/L/BK/1/92) Unreported.

debt owed or the goods of the judgment debtor had not sold over a period of 21 days since the attachment. Where the Notice of Bankruptcy is issued, it will require the judgment debtor to pay the outstanding debt stated in the notice within a specified period otherwise he is deemed to have committed an act of bankruptcy on which a bankruptcy proceeding may be taken against him.

4.4 Making of Receiving Order/Implications

After the expiration of the date specified for payment of outstanding debt as conveyed in the Notice of Bankruptcy, the judgment creditor will apply to the Federal High Court for a Receiving Order. The order if issued authorizes the creditor to take possession or custody of the debtors' properties. The order will direct the judgment debtor to appear before the Official Receiver (usually the Court Registrar). The receiving order is published both in the Federal Government official gazette as well as in a national newspaper.³⁶ After the issue of Receiving Order, but within 14 days, the debtor must furnish the Official Receiver an affidavit showing particulars of his assets and liabilities both locally and abroad as well as particulars of securities held by him or his family.³⁷

A meeting of creditors is then convened to discuss proposals for settlement by the debtor if any and in any case agree on the mode of distribution of debtors' assets among the creditors should an order of bankruptcy be made by the Court. Opportunity is given for the public examination of the debtor on oath with regard to how he conducted his affairs and more especially investigate the correct status of debtors' assets and the documentation thereof.

4.5 Adjudication of Bankruptcy and Implications

The Court could declare the debtor bankrupt anytime from 14 days after the creditors' meeting except where the debtor pays off by then or otherwise was able to negotiate a compromise or settlement with the Creditors in which case the Bankruptcy order will not be made. Where the Court has adjudged the debtor bankrupt, the adjudication order which contains the name of the debtor (bankrupt), his address and other essential details etc. will be published in the Federal Government gazette and advertised in at least two national news papers.

A trustee of the bankrupt is appointed usually by the creditors or the Court as the case may be, who becomes legally vested with title to all the identified assets of the debtor which have been verified since the making of Receiving Order. The Creditors will also

³⁶ Bankruptcy Rules 1990, Rule 84.

³⁷ Bankruptcy Act, section 16.

appoint from among themselves a Committee of between 3 and 5 members as Inspectors to oversee the administration of the bankruptcy proceedings being conducted by the Trustee.

4.6 Consequences of Bankruptcy Order

(a) Attachment of Debtors' Properties

Once a debtor has been declared bankrupt, there arises some consequences with regard to the debtors' assets. Firstly, the debtor/bankrupt is under obligation to provide an inventory of his assets, provide a list of his creditors and debtors as well as all debts owed or due to him. Any list of properties of creditors in the hands of the bankrupt is subject to scrutiny by the Committee of Creditors or by the Court. He is under obligation to attend meetings as may be summoned by his creditors. He must execute such conveyances, deeds or other instruments required of him by the official receiver or trustee in bankruptcy and do all such other things conducive to the administration of the bankruptcy proceedings as may be required of him. The failure by the bankrupt to carry out the instructions required of him could constitute an offence under the Bankruptcy Act.³⁸

(b) Disqualification from holding public Office

Section 126 (1) of the Bankruptcy Act provides that where a person is adjudged bankrupt under the Act, he shall be disqualified from:

- (i) being elected to the office of President or Vice President, Governor or Deputy Governor;
- (ii) being elected to or sitting or voting in the Senate, House of Representatives or the State House of Assembly;
- (iii) being elected to, or sitting or voting in, any local government council in any State of the Federation or the Federal Capital Territory, Abuja;
- (iv) being appointed to or sitting or voting in, any government board (howsoever known or described) of any statutory corporation or any other statutory body (whether corporate or unincorporated) or, as provided by section 253 (section 279 under CAMA, 2020) of the Act;
- (v) being appointed to, or acting as a justice of the Peace;
- (vi) being appointed or acting as a trustee of a trust estate; and
- (vii) being admitted to practice any profession for the time being regulated by law on his own or in partnership or in any other form of association [other than as an employee] with any other person.

³⁸ Bankruptcy Act 1979, section 129.

(c) Removal from Office

It is also significant to note, that being adjudged bankrupt does not only have a disqualifying effect on appointment but also has removal effect on those on the specified positions at the time of being declared bankrupt. In this regard, section 127 of the Bankruptcy Act provides that if any person is adjudged bankrupt while holding any of the offices or appointments mentioned in paragraphs (a) to (f) of section 126(1), his office or appointment shall automatically become vacant and if he was practicing any of the professions covered by paragraph (g) of section 126(1), he shall cease to be entitled to practice.

(c) Criminal Liability for Violation of Bankruptcy Rules

Furthermore, any person adjudged to be bankrupt who knowingly continue to hold the offices and appointments covered by section 126(1) commits a criminal offence and liable upon conviction to a fine or a term of imprisonment or both.³⁹

From the foregoing, it is evident that bankruptcy proceedings do not merely directly target the assets of the debtor for repayment of outstanding debts, but carries with it, far-reaching consequences beyond the immediate issue of debt repayment. The implication of the disqualifications attached to bankruptcy proceedings is indeed more lethal than the immediate issue of attachment of the properties of the bankrupt.

5. Bankruptcy Proceedings under the AMCON Act

Bankruptcy proceedings under the provisions of the Bankruptcy Act 1979 and the Bankruptcy Rules 1990 has not been an effective tool for debt recovery due to two main reasons. Firstly, and perhaps the most challenging shortcoming is the fact that it is an ancillary or secondary if not a third-tier recovery process, in view of the fact that the issue of the indebtedness of the debtor must be judicially resolved through a usually cumbersome and tortious litigation culminating in obtaining a final judgment which is a prerequisite for commencing bankruptcy proceedings. Indeed, after obtaining judgment, it is expected that attempts must be made to execute the judgment before recourse to bankruptcy proceedings where part of the debt remain outstanding. There is a general mind-set among creditors that the only possible outcome of bankruptcy proceedings having exhausted the regular options is the shaming of the bankrupt with practically no prospect of recovery which makes it a case of throwing good money in pursuit of bad money. Secondly, the procedure for Bankruptcy as detailed in the Bankruptcy Rules did not help in attracting creditors to that procedure because it imposes a lot of procedural burden on litigants.

³⁹ Bankruptcy Act, section 127.

The above challenges informed the intervention of the AMCON Act in 2019 which aimed at deriving the full potentials of bankruptcy proceedings but devoid of the anomalies. In this regard section 51(1) of the AMCON Act as amended in 2019 provides as follows:

Where a debtor fails to comply in full within 90 days with a written demand notice issued by the Corporation requiring the debtor to pay a liquidated sum to the corporation which the Corporation certifies on the face of the demand notice as being owed by the debtor to the Corporation in connection with an eligible bank asset acquired by the Corporation the Court shall on the application of the Corporation made by way of originating motion, make a receiving order against the debtor, except where at the hearing of the application, the debtor proves to the satisfaction of the Court that he does not owe any liquidated sum at all to the Corporation or that he has a counter claim, set-off or cross demand which equals or exceeds the liquidated sum owed to the Corporation.

The significance of the above provision is that AMCON has been relieved of the burden of having to obtain a final judgment against a debtor before recourse to bankruptcy proceedings as the issue of the indebtedness of the debtor will be resolved through the bankruptcy proceedings. This is a major breakthrough and a game changer which has catapulted Bankruptcy proceedings as a very viable tool for debt recovery and indeed the most recommended in handling the debts of politically exposed debtors. The naming and shaming content of bankruptcy proceedings and the disqualifications from holding public offices or practising ones chosen profession are very heavy sticks that will compel effective response to debt obligations of those concerned. The amendment has also short circuited some of the long procedures prescribed by the bankruptcy rules. Although there could still be long drawn contest on the indebtedness of the debtors during bankruptcy proceedings, the stakes are high and resolution with debtors is expected to be faster and more quantitative in the amount of recoveries expected.

The bankruptcy proceedings are also an effective tool against directors of debtor companies who are considered jointly liable with their companies under the AMCON Act. Thus, where the debtor company is not forth coming in the payment of their debts or where the company's assets are not easily traceable, bankruptcy proceedings could be pursued against the directors. In *NDIC -ACB Plc v. Bellstow Finance & Securities Ltd*⁴⁰ the Plaintiff obtained judgement against the defendants at the Failed Banks Tribunal for the sum of N17.4 million but the judgement could not be executed because the defendant

⁴⁰ SUIT NO FHC/L/FBC/330/2001 (unreported).

company had become moribund and had no visible assets, while the directors who were traced refused to cooperate in tracing their companies' properties. The plaintiffs then applied to the Federal High Court to lift the veil of incorporation to hold the directors liable for the debt pursuant to section 290 of CAMA as there was evidence of diversion of the loans taken from the plaintiffs. Upon the grant of the order, execution was levied against the directors. However, as the debt was yet to be fully liquidated, bankruptcy proceedings was commenced against the directors.

Consequently, notwithstanding the fact that bankruptcy proceedings cannot be commenced against corporate debtors, the possibility of extending it to the directors is available more so, in the case of AMCON, directors of debtor companies are also regarded as debtors, hence subject to the application of bankruptcy proceedings.

Furthermore, the opportunity for the appointment of AMCON as Trustee of the debtor declared bankrupt as provided in the amendment is also important as it will also give the Corporation more direct involvement in managing the debtors' assets more efficiently. Unlike the amendment relating to winding up proceedings, that of bankruptcy proceedings had neatly harmonized the process. In effect, while removing the bottlenecks attached to general bankruptcy proceedings, it also keyed into the benefits available.

5.1 Discharge of the Bankrupt

A person adjudged as bankrupt is entitled to be discharged as soon as he settles all outstanding debts upon which the bankruptcy order was issued. Furthermore, by law, bankruptcy proceedings should not span over a period of five years. Consequently, upon the expiration of five years following the date of issuance of the receiving order, the bankrupt is entitled to a discharge irrespective of whether the debts had been paid or not, although upon such discharge certain debts are not discharged but remain outstanding such as; debts owed to government, or liabilities derived from fraud or fraudulent breach of trust. In effect, debts owed to AMCON being a government agency debt, will not be extinguished merely by the discharge of the bankrupt due to effluxion of time. Where a bankrupt has been discharged, all the disqualifications to which he was subjected to will be removed. The same applies if the bankruptcy order is voided by judicial process.

6. Conclusion/Recommendation

It is evident, from the foregoing, that winding up of insolvent corporate entities remain largely regulated by the provisions of CAMA while bankruptcy proceedings are governed by the Bankruptcy Act 1979. While a substantial number of winding up proceedings are being conducted pursuant to the provisions of CAMA, which has achieved modest success as a vehicle for debt recovery, bankruptcy proceedings, pursuant to the

bankruptcy Act and the bankruptcy rules, have recorded less success as tool for debt recovery because of the cumbersome process of having to secure a judgment before recourse to the bankruptcy process. The dissatisfaction with the framework provided by CAMA and the Bankruptcy Act informed the agitation for a review by certain Regulatory/Supervisory bodies that were conferred with debt recovery functions by their enabling statutes. The NDIC Act and BOFIA altered the legal regime for winding up under CAMA as far as banking institutions are concerned. Similarly, the AMCON Act introduced changes to the winding up framework and bankruptcy proceedings as it relates to the eligible bank assets under its portfolio. Consequently, bankruptcy process is now positioned to emerge as a potent debt recovery tool for debts owed by individual debtors of AMCON. It is particularly suitable for politically exposed debtors and other high-profile debtors who have the means to pay but unwilling to do so. It will also be effective in holding directors of debtor companies who are regarded as debtors in their own rights. Thus, even where bankruptcy cannot lie against their companies, the directors are liable to be pursued through the mechanism of bankruptcy proceedings. Nevertheless, the new reforms with regard to winding up and bankruptcy proceedings have limited application, and time has come for the generalization of the reforms. Furthermore, there is a need for an amendment of the AMCON Act to provide for a more elaborate and efficient procedure for winding up as the procedure currently is not as elaborate and efficient as that of bankruptcy giving room for resort to the Winding-up Rules to fill in gaps.