

REVIEW OF THE SECURED TRANSACTION IN MOVABLE ASSETS ACT 2017: CHALLENGES AND RECOMMENDATIONS**

Abstract

The role of small and medium scale enterprises in the economic development of Nigeria cannot be overemphasized as they are very critical to the economy. However, they face a lot of constraints especially in terms of finance. Due to the clamour for the reform of Nigeria's secured transactions' law culminated in the enactment of the Secured Transactions in Movable Assets Act to stimulate responsible lending to small and medium enterprises. In addition to its general objective of providing and developing a framework guaranteeing access to credit secured by movable assets, the specific objectives of the Collateral Registry Act include: (i) establishing a National Collateral Registry; (ii) stimulating affordable lending to SMEs; (iii) facilitating the perfection and realisation of security interests in movable assets; and (iv) enhancing financial inclusion in Nigeria. This paper seeks a critical review of the Act, outline the challenges and make recommendations as way forward.

Introduction

The role of small and medium scale enterprises in building and sustaining a Nation's economy cannot be overemphasised. Small and medium scale enterprises constitute about 80% of Nigerian businesses and therefore are very crucial to the Nigerian economy. However, small and medium scale enterprises mostly depend on credit facilities to build and sustain their businesses. It is a notorious fact that credit and financial institutions all over the globe only give out facility when the borrower has collateral to secure the loan being advanced to him by the Creditor.

Financial institutions in Nigeria over the years however prefer to give credit facilities to individuals who have immovable properties they can pledge as collateral.

The Federal Government in a bid to encourage small and medium scale businesses in Nigeria enacted the Secured Transactions in Movable Assets Act, 2017¹ (otherwise known as Collateral Registry Act).

The law as passed is meant to ultimately facilitate easy access to credit facility by micro, small and medium scale enterprises. This paper seeks to take a critical review of the Act, outline the challenges and make recommendations as way forward.

The Position Before The Act Came Into Existence

Hitherto, applications for credit facilities get rejected due to lack of proper collateral. Financial institutions only advance loans to businesses that can provide landed properties as collateral. This was an albatross to the progress of micro small and medium enterprises (MSMEs) as most of the MSMEs usually own only movable assets like cars and other equipment.

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¹This was to strengthen the effort already made by the Central Bank of Nigeria in 2014 by the introduction of the Central Collateral Registry Regulations to stimulate responsible lending to MSMEs by encouraging financial institutions to accept movable properties as security for loans.

In 2017, the Federal Government through the legislative mechanism enacted the Secured Transactions in Movable Assets Act 2017 (the Act). With the enactment of this law, MSMEs can now register their movable assets such as cars and other equipment and accounts at the Collateral Registry (established by the Secured Transactions in Movable Assets Act 2017) and use same as collateral for accessing loans.

Objectives of The Act

The objectives the Act are:

- (a) enhance financial inclusion in Nigeria;
- (b) stimulate responsible lending to micro, small and medium enterprises;
- (c) facilitate access to credit secured with movable assets;
- (d) facilitate perfection of Security Interests in movable assets;
- (e) facilitate realization of Security Interests in movable assets; and
- (f) establish a Collateral Registry and provide for its operations.²

Application of The Act

The Act applies to

1. All security interests in movable assets created by an agreement that secures payment or the performance of an obligation.
2. A person who is a creditor, borrower or guarantor under the Act and
3. All financing and operating leases entered into after the commencement of the Act.

²Secured Transactions in Movable Assets Act 2017, Section 2

The Act does not apply to

1. Any right of set off
2. The creation or transfer of an interest in land other than account receivables and
3. Any interest created by a transfer, assignment or mortgage in movable property governed by a law for which a registry has been established with regards to ships and aircrafts.³

Security Interests

What is a security interest?

A security interest is a property right in collateral that is created by agreement and secures payment or other performance of an obligation. However, it does not include a personal right against a guarantor or other person liable for the performance of the secured obligation.

How created?

Under Secured Transaction in Movable Assets Act 2017, a Security interest is created by a Security Agreement between the Grantor and the Creditor.⁴

Security interests in any asset acquired by a Grantor after the coming into force of the Security Agreement shall take effect without further consent or any other act of the Grantor at the moment the grantor acquires such asset where:

- a. the asset falls under the Collateral description in the Security Agreement; and
- b. the security agreement provides that the Security Interest extends to the Grantor's present and future assets.⁵

³*Ibid.* Section 2

⁴Secured Transactions in Movable Assets Act 2017, Section 3(1)

⁵*Ibid* Section 3(2)

Security Agreement

What is a Security Agreement?

A Security Agreement is an agreement entered into between the grantor and creditor that creates a security interest under the Act.⁶

Contents of a Security Agreement

As provided under Section 5, a Security Agreement shall contain the following:

1. reflect the intention of the grantor and creditor to create a security interest;
2. identify the grantor and creditor;
3. describe the secured obligation including the maximum amount for which the security interest is enforceable;
4. describe the collateral adequately;
5. indicate the tenor of the obligation secured; and,
6. confirm the agreement by parties to submit to arbitration as first recourse in a situation that any civil dispute arises

National Collateral Registry

The Secured Transaction in Movable Assets Act provides for a National Collateral Registry which shall

(a) receive, register and store information about Security Interests in

movable assets and;

(b) provide access to persons who may seek information on security interests from the Collateral Registry.⁷

The Collateral Registry established by the Act is akin to the Land Registry as it relates to registration of Legal mortgages in immovable properties. However, it is to be noted that the

⁶*Ibid* Section 63

⁷Secured Transactions in Movable Assets Act 2017, Section 11

Collateral Registry applies only to Movable properties just as the Land Registry applies only to immovable properties.

It is instructive to state herein that in the same way people are allowed to carry out searches at the Land Registry and the Corporate Affairs Commission for the purpose of determining whether particular properties are encumbered, a search may also be carried out at the collateral registry upon provision of the unique biometric identifier of the Grantor and the serial number of the collateral.

Financing Statement Meaning

A Financing Statement is a form usually containing information of the transaction such as the details of the creditor, grantor and a description of the property for the purpose of effecting registration at the Collateral Registry.

Contents of the Financing Statement

A Financing Statement shall contain the following:

1. Grantor type description: individual, micro, small or large business;
2. in the case of a company, co-operative or registered business name, the unique identification number which shall be the Corporate Affairs Commission registration number or other registration number issued by the appropriate authority for registering these types of debtors;
3. in the case of an individual, the unique identification number derived from approved biometric based identification, gender, name, address including telephone and date of birth

4. the name and address of the creditor or its representative; a sufficient description of the collateral; the maximum amount for which the secured obligation may be enforced; the period of time for which the registration is to be effective, and such other information as the Registrar may consider necessary.⁸

Usually, a collateral is sufficiently described in the financing statement if it is described by the item, kind, type or category; or a statement that a security interest is taken in all of the Grantor's present and after-acquired property or any other description that reasonably identifies the collateral.⁹

Amendment of a Registered Financing Statement

A registered financing statement may be amended by the creditor upon the registration of an amendment financing statement. An amendment to a registered financing statement that adds a collateral or a new grantor is effective as to the added collateral or the added grantor only from the date and time when the amendment financing statement is registered.¹⁰

Duration of Registered Financing Statement

A registered Financing Statement shall be valid until the expiration of the term specified in the Financing Statement or its cancellation, whichever comes first.¹¹

⁸Secured Transactions in Movable Assets Act 2017, Section 14

⁹*Ibid* Section 15(2)

¹⁰*Ibid* Section 19

¹¹ *Ibid* Section 18(1)

Duration of a registered financing statement may be renewed or extended by an amendment of the financing statement before its expiration.¹²

Cancellation of Registered Financing Statement

A registered financing statement may be cancelled upon the filing of a cancellation statement by the creditor.¹³

A creditor is mandated by the Act to file a cancellation statement within 15 working days of receiving a request for cancellation from the Grantor or the Borrower. However, the creditor is only obliged to do so where all obligations under the security agreement have been performed and there is no commitment to make future advances.¹⁴

Priority of Security Interests

The Act provides that priority between perfected security interests in the same collateral shall be determined by the order of registration.¹⁵

A secured creditor may transfer a secured obligation notwithstanding any agreement with the Grantor or the Borrower limiting the right to transfer the secured obligation and without having to obtain consent of the Grantor or the Borrower.¹⁶

¹² Secured Transactions in Movable Assets Act 2017, Section 18(2)

¹³ *Ibid* Section 21(1)

¹⁴ *Ibid* Section 21(2)

¹⁵ *Ibid* Section 23

¹⁶ *Ibid* Section 25(1)

A security interest that is transferred shall have the same priority as it had at the time of the transfer.¹⁷

A creditor may enter into an agreement to subordinate its priority in favour of any other claimant and such Subordination is effective without registering an amendment financing statement in the Registry.¹⁸

An agreement to subordinate shall not adversely affect the rights of a person that is not a party to the agreement.¹⁹

By Section 34(1) of the Act, notwithstanding the provisions of the Sherriff and Civil Process Act, a perfected security interest has priority over the rights of an unsecured creditor that has obtained a judgment or an order of attachment, unless the judgment creditor, before the security interest is perfected: .

- (a) registers a financing statement;
- (b) seizes the collateral; or
- (c) serves a notice of its claim on the third party holding property for the debtor.

Rights and Duties of a Grantor, Borrower and Creditor

The Grantor or Borrower and Creditor have certain duties under the Act which shall be exercised and discharged in good faith and in accordance with reasonable commercial standards.

A person in possession of an encumbered asset shall preserve the asset from damage, impairment and loss, excluding fair wear and tear having regard to the nature of the asset.²⁰

¹⁷*Ibid* Section 25(2)

¹⁸ *Ibid* Section 26(1)&(2)

¹⁹ *Ibid* Section 26(3)

²⁰ Secured Transactions in Movable Assets Act 2017, Section 35(3)

One of the duties of a creditor is that he shall, not later than 15 working days after the day on which the confirmation statement of the registration was received, provide the Grantor and the Borrower a copy of the Confirmation Statement.²¹

Where a person fails to discharge a duty or obligation imposed by the Act, the person to whom the duty or obligation is owed shall have a right to recover damages for any loss or damage.²²

Rights of a Creditor in The Event of Default by the Borrower

In the case of a default, the creditor may exercise his right under the Act and the security agreement or may resort to any appropriate judicial remedy. Under Section 40 of the Act, in order to enforce his right in the event of a default by the borrower, the creditor shall give to the borrower and the Grantor a notice of the default and intention to repossess the collateral, and after 10 days of sending the notice of default, he may take possession of the collateral.

There are basically two ways by which the secured creditor may take possession of the collateral, viz:

1. Pursuant to a judicial process
2. Without judicial process, if the Grantor consented to relinquishing possession without a court order in the security agreement.²³

In the case of repossession without judicial process, a creditor may request for assistance from the Nigeria Police having authority within the location of the collateral and the Police shall

²¹ *Ibid* Section 37(1)

²² *Ibid* Section 36

²³ *Ibid* Section 40(4)

provide assistance for the peaceable repossession of the collateral, upon presentation by the creditor of a copy of the relevant security agreement and duly certified confirmation statement.

A secured creditor under the Act has a power of sale guaranteed under Section 44 of the Act which power he may exercise upon taking possession of the collateral. However, it is important to note that in exercising the power of sale, a creditor shall obtain a reasonable price available at the time of the sale or disposal.

A creditor who intends to sell collateral is required to send a notice not less than 10 working days before the sale to the borrower, the grantor and any other person who has registered a financing statement in respect of the collateral before the creditor repossessed the collateral.²⁴

However, by Section 45(2) of the Act, the Creditor may proceed with the sale of the collateral without informing the aforementioned persons where:

- a. the Collateral may perish within 10 working days of the repossession;
- b. the Creditor believes on reasonable grounds that the Collateral will decline substantially in value if it is not disposed of immediately;
- c. the cost of care and storage of the Collateral is disproportionately large in relation to its value; or
- d. the Collateral consists of inventory or farm products.

A creditor shall, within 15 working days after the sale of a collateral, give to the persons entitled to receive a notice of sale, a statement of account in writing, stating the:

- a. amount realized from the sale;

²⁴ Secured Transactions in Movable Assets Act 2017, Section 45(1)

- b. amount of the costs of the sale; and
- c. balance due to the Grantor or to the Creditor, as the case may be²⁵

Distribution of Proceeds of Sale

Upon sale of the collateral, the proceeds shall be distributed by the creditor in the following order:

1. Settlement of all reasonable cost and expenses of the sale
2. Settlement of the borrower's indebtedness to him
3. Settlement of the borrower's indebtedness to other creditors who have a subordinate security interest perfected by registration, in the order of their priority
4. Payment of the balance to the Grantor.²⁶

A creditor may pay the surplus into the Court if there is a dispute as to whom amongst the other creditors is entitled to receive payment pending a resolution of the matter.²⁷ It should be noted that a borrower remains liable for any outstanding financial liabilities.²⁸

Right to Redeem the Collateral

At any time before a creditor sells the collateral, the Borrower, Grantor, or other creditor may redeem the collateral by:

- a. fulfilment of all the obligations secured by the Collateral; and
- b. payment of any other reasonable expenses incurred by the Creditor.²⁹

By Section 49(2) A grantor's right to redeem the collateral shall have priority over any other person's right of redemption.

²⁵*Ibid* Section 47

²⁶Secured Transactions in Movable Assets Act 2017, Section 48(1) & (2)

²⁷*Ibid* Section 48(3)

²⁸*Ibid* Section 48(4)

²⁹ *Ibid* Section 49(1)

It is noteworthy that the provision of the Stamp Duties Act shall not apply to any secured transaction under the Act.³⁰

Interface Between the National Collateral Registry and Other Registries Dealing With Movable Assets in Nigeria.

Section 2(1)(c) of the STMA Act provides that every public registry established by any Act of the National Assembly to co-ordinate or warehouse or oversee transactions in movable assets in Nigeria shall be operated in a manner that creates automated interface between such a registry and the National Collateral Registry, with purpose to ensuring and guaranteeing that the registry is made accessible through, by and from the National Collateral Registry.

Pursuant to and in strict compliance with the above provision of the STMA Act the Corporate Affairs Commission made new requirements for registering charges with the Commission on moveable assets. This took effect on 3rd April, 2018.

In the process of registering their charges pursuant to Section 197 of the Companies and Allied Matters Act (CAMA) Companies are now required to accompany the **FORM CAC 8** with the following additional information, viz:

- a. Serial number or Chassis number of the collateral (Motor Vehicle, Plane, Boats, Plants and machinery etc.)
- b. BVN of the Business Owners/Board of Directors.
- c. Moveable assets Used.
- d. High level description of the moveable assets used.

³⁰*Ibid* Section 54

Challenges

Whilst the enactment of the Act is a laudable step as it seeks to encourage MSMEs by promoting responsible lending to MSMEs, there are foreseeable challenges which may bedevil the smooth operation of the Act. Further, the operation of the Act may create difficulties for persons who may subsequently acquire interests in a property in respect of which a security interest has been created in favour of another under the Act.

Firstly, it is not in doubt that in Nigeria, people often purchase used movable assets ranging from used cars, expensive phones, to television sets, laptops and desktops directly from the owners without having to go through the rigmarole of conducting a search to determine if there are competing interests in respect of the said properties. All they have to do is confirm that title resides in the owner of the movable asset. Unlike in the case of immovable properties where the purchaser knows that he has an obligation to carry out a thorough due diligence which includes physical inspection of the property and a search at the Land registry to ensure that there are no encumbrances or competing interests before purchasing the Land. The operation of this Act creates a new dimension as to the interests that may be created over a movable asset. Although the Act makes it an offence to do so, nevertheless, a fraudulent grantor may after obtaining a loan using a movable asset as collateral proceed to sell the same property to an unsuspecting buyer. This challenge is real as vast majority of the public are not informed that movable assets can now be used as collateral for loans and registered at the Collateral Registry.

Further, Judgment Creditors, may run into a brick wall whilst enforcing judgments against Judgment debtors who may have

used most of their valuable movable assets as collaterals for loans pursuant to the Act. The two major ways of enforcing judgments are by garnishee proceedings and writ of *fieri facias(fifa)*³¹. Usually where a Judgment Creditor fails to reap the fruits of the judgment by garnishee proceedings, he may revert to executing the judgment by a writ of *fifa* to attach the movable or immovable properties of the Judgment debtor. Thus where such Judgment debtor does not have an immovable property or enough funds in any bank account to offset the judgment debt, but only has movable assets which have been used as collateral for loans, the Judgment Creditor may be unable to reap the fruit of the judgment as the Act clearly provides in Section 34(1) that notwithstanding the provisions of the Sherriff and Civil Process Act, a perfected security interest has priority over the rights of an unsecured creditor that has obtained a judgment or an order of attachment.

Finally, although the Act establishes a Mediation and Dispute Resolution Panel for the purpose of resolving any civil dispute that may arise between the Creditor and grantor, the panel was only made the first recourse (but not the final). Further, the Courts are vested with jurisdiction to entertain disputes between the parties relating to transaction governed by the Act.³² Thus, considering the litigious nature of secured transactions, actions will invariably be instituted in courts by the parties to either enforce certain rights under the security agreement or challenge and/or set aside whatever decision that may be delivered by the Panel established by the Act. Usually whilst such actions are pending the Creditor will be unable to take possession of the collateral, until the determination of the suit which might take

³¹See the Sheriff and Civil Process Act Cap. S6 LFN 2004

³²See Section 56 of the Secured Transactions in Movable Assets Act 2017

quite a long time. Unfortunately, movable Assets depreciate with time unlike immovable assets that appreciate over time. Therefore, it is very likely that before the suit is determined the movable asset may have depreciated far below the amount lent or may have become totally worthless, with the effect that the creditor under the Act becomes an unsecured creditor who will have to resort to other means to get his money back.

Conclusion and Recommendation

In conclusion, the enactment of the Secured Transaction in Movable Assets Act and the Credit Reporting Act in seeking to empower and encourage small and medium scale enterprises is a commendable step. However in order to have a seamless application of the Secured Transaction in movable Assets Act, it is important to sensitize members of the public on the need to always carry out searches at the collateral registry to ensure there are no encumbrances on a movable property before purchasing such property, since the application of this law will equally have far-reaching consequences on property rights in view of multiple interests that may be created over a movable property, just the same way we see in cases of immovable properties.

Notably, the provision of Section 2(1)(c) of the Act is indeed commendable as it seeks to avert the problems and conflicts that might arise from the application of the various laws and registries on movable assets in Nigeria. Ordinarily, a creditor would have had to undergo the tedious rigmarole of carrying out searches at the Corporate Affairs Commission and the National Collateral Registry to ensure that there are no encumbrances before accepting a movable asset as collateral. A potential creditor might be discouraged by this tedious procedure. The Act has therefore made process a seamless one by creating a legal

platform for interface between all public registries dealing in registration of charges in movable assets to ensure that all information relating charges in movable assets available in the record of all public registries can now be accessed from one source, i.e. the National Collateral Registry.

Further, there is the need for a fast track procedure for actions instituted in court involving mortgages of movable properties under the Act in view of the fact that being movable properties, their value depreciates substantially with time unlike the case of immovable properties. Although, the problems that this may cause is watered down by the fact that under the Act the mortgage may extend to both present and subsequently acquired properties of the grantor. Nonetheless, this point is noteworthy, since subsequently acquired properties may not be as valuable as the original property and in some cases there may be no properties acquired subsequently.