
Implications of the Asset Management Corporation of Nigeria Act 2010 on some Extant Laws

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Introduction

The Asset Management Corporation of Nigeria Act 2010 ("AMCON" or the "Act") came into effect in July 2010. It established and regulates the activities of the Asset Management Corporation of Nigeria (the "Corporation"). The Act made inclusions in Nigerian substantive law which until now had experienced minimal reforms. These inclusions have significant implications in company and bankruptcy laws, especially with respect to directors' exposure to liability and the process for filing bankruptcy petitions. The Act also made extensive introductions to Nigerian Securities Law.

Significantly, the inclusions apply only to assets to be classified as non-performing pursuant to the Act. They do not extend to assets outside the purview of the Act. The corollary of this is that only companies who had dealings with banks with respect to assets delineated as eligible assets would be affected by the Act.

This newsletter follows an earlier edition¹ which provided an overview of the Act. Whilst this edition examines the implications of certain provisions of the Act on existing rules specifically, company and bankruptcy rules, the provisions relating to securities law as well as implications of the Act on procedural law are examined in a subsequent edition.

Reforms in Company Law

The Nigerian Company Law excludes directors from personal liability for acts performed on behalf of their companies. The law in this regard presupposes that a director is an agent

¹See Aina Blankson, LP July 2010 Newsletter



of a company and as such should not be liable for acts performed on behalf of the company except where the director assumed personal liability.² This provision is in consonance with the doctrine of corporate personality which presupposes that a company assumes a separate and distinct personality from its members from the moment of incorporation.³ The company thus wears a corporate cloak which cannot be pierced unless under circumstances authorized by law. Nigerian courts have pierced the corporate veil in a number of instances,⁴ especially in cases of fraud or where the interest of justice demands that the veil be lifted to hold controlling shareholders, directors or other officers of the company (as the directing minds of the company) liable for acts of the company.

Some exceptions to the doctrine of corporate personality were also included in CAMA. Section 506(1) of CAMA stipulates that if, in the course of winding up of a company, it appears that any business of a company has been carried on in reckless manner or with intent to defraud the creditors of the company or creditors of any other person for any fraudulent purpose, the court may, on the application of the official receiver, liquidator or any creditor or contributory of the company declare that any persons who were knowingly parties to the carrying on of business as aforesaid be personally liable for the debts or other liability of the company. Of particular

relevance to this paper however, is section 290 of CAMA. The section deals with cases where a company: (a) receives money by way of loan for specific purpose; or (b) receives money or other property by way of advance payment for the execution of a contract or project. If the company in any of these cases, and with intent to defraud, fails to apply the money or property for the purpose for which it was received, every director or other officer of the company in default is personally liable to the party from whom the money or property was received.⁵

In consonance with section 290 of CAMA, section 49 of AMCON holds directors of borrowing companies personally liable for any non-performing loans obtained from eligible financial institutions. However, a careful review of the two provisions reveals that section 49 of AMCON goes beyond section 290 of CAMA in many respects to extend the scope of liability.

Section 61 of AMCON defines a **“debtor” or “debtor company” as any borrower, beneficiary of an eligible bank asset and includes a guarantor of a debtor, guarantor or director of a company.** By this definition, directors of borrowing companies are directly brought within the purview of the Act as debtors. The Act goes on to grant the Corporation power to apply for possession of any movable or immovable property of such a debtor or debtor company.⁶ The application is required to be made ex-parte and entitles the Corporation to retain possession of any seized assets for fourteen days before commencing a debt recovery action against the debtor or debtor company. In making this application, the Corporation is only required to show that it has reasonable cause to believe that the debtor or debtor company is the bona fide

² Nigerian Companies and Allied Matter Act (CAMA) Cap C20, Laws of the Federation of Nigeria, 2004; Section 279. See also *Yesufu v Kupper International N.V* (1996) 5 N.W.L.R (Pt. 446) 17 at 28 – 29

³ This was the position taken by the House of Lords in the celebrated case of *Salomon v Salomon Co. Ltd* [1897] AC 22 See also *Habib Nig. Bank Ltd v Ochete* (2001) F.W.L.R (Pt. 54) 384

⁴ See *Nathaniel Adeniji v State* (1992) 4 N.W.L.R (Pt. 248) 1

⁵ Section 290(c) CAMA

⁶ Section 49(1) AMCON



owner of the movable or immovable property.⁷ The Act further gives the Corporation power to attach funds belonging to a debtor or debtor company where it has reason to believe that the debtor or debtor company has funds in an eligible financial institution.⁸ Thus, granting the Corporation power to attach any real or intangible property belonging to a debtor or debtor company (including personal property of directors) prior to commencement of a debt recovery suit.

A couple of points are worthy of note here. First, the phrase “where the Corporation has reasonable cause to believe that a debtor or debtor company is the owner of **any**⁹ movable or immovable property” means that the Corporation can apply to attach any property of the debtor or debtor company (including personal property of directors of affected companies) whether or not such assets were used as collateral for the loan. While the section provides an in-road to lifting the veil to hold directors liable for non-performing loans obtained by their companies, it goes beyond the requirement of section 290 of CAMA which requires that the company must have obtained the loan with intent to defraud and must have failed to apply the loan for the purpose for which it was received. Thus, section 49 of AMCON effectively removed the requirement for proof of any wrongdoing on the part of directors, as all that the Corporation is required to show is evidence that the property it seeks belongs to relevant company directors.

Secondly, it would appear going by the definition of a “debtor” or “debtor company” in section 61 of the Act as **“any borrower, beneficiary of an eligible bank asset,”** that the draftsman perceived directors to be

beneficiaries of non-performing loans, entitling the Corporation to proceed against them. Where, however; the intention is to classify them as borrowers as well as beneficiaries, it is submitted that the definition could form the basis of series of litigations given that the directors may not have obtained the loans in their personal capacity. Since the application is to be made ex-parte, directors may be forced to forfeit their assets, even if temporarily, in satisfaction of debts owed by their companies even before becoming aware of the suit.

Significantly, even though the Act relates to non-performing loans of Nigerian banks, these loans were issued to variety of companies in Nigeria. The effect of the provisions of section 49 of the Act may therefore be widespread. Even so, not all companies would be affected by the Act. Section 49 of the Act and section 290 of CAMA may therefore pose significant difficulties and confusions in practice. It is pertinent to note that the Act made no reference to the provisions of CAMA on the issue. Giving an indication that the two provisions would apply side by side or that section 49 is merely to serve as an exception to the company law provision. It remains to be seen how the courts would reconcile the two sections in practice.

Reforms in Bankruptcy Law

AMCON made substantial changes in the law regulating bankruptcy petitions in Nigeria. The law regulating bankruptcy in Nigeria is the Bankruptcy Act.¹⁰ It stipulates the circumstances under which a debtor would be held to have committed an act of bankruptcy. This includes where a creditor obtained a final judgment or order against the debtor for an unpaid sum and a bankruptcy notice served on

⁷ Ibid

⁸ Section 50(1) AMCON

⁹ Emphasis ours

¹⁰ Cap B2, Laws of the Federation of Nigeria 2004



the debtor with no pending application for stay of execution and the debtor does not within fourteen days of service of the notice on him comply with the notice or satisfy the Court that he has a set-off, counter claim or cross demand; or execution is levied against a debtor and the goods sold or held by the Court Bailiff for twenty-one days; or the debtor files a declaration of his inability to pay his debt in Court or presents a bankruptcy petition against himself.¹¹ Only when a debtor commits any of these acts of bankruptcy can a receiving order be made against him on the petition of either the creditor or the debtor himself. Even then, a creditor shall not be entitled to present a bankruptcy petition against the debtor unless the debts owed is not less than N2000; the debt is a liquidated sum payable immediately or at some certain future time; the act of bankruptcy has occurred within three months before the petition; and the debtor is ordinarily resident in Nigeria.

On the occurrence of these events or on the petition of the debtor himself of his inability to pay his debt, the Court may make a receiving order to protect the estate of the debtor and the debtor shall thereafter be declared bankrupt.

In consonance with the Bankruptcy Act, the Asset Management Corporation Act grants the Corporation (in its capacity as a creditor) power to apply to Court for a receiving order against a debtor. In contrast however, all that is required for the Corporation to maintain such an application is failure of a debtor to liquidate an amount ordered by a Court in a debt recovery action within thirty days of the order.¹² Three points are of particular significance here. First, to obtain a receiving order against the debtor, the Corporation is

not required to file a bankruptcy petition.¹³ It can obtain the order by a simple application before the Court, possibly the same Court from which the recovery order was obtained. Curiously though, the section is titled "special powers in bankruptcy proceedings," implying that the action is one to be maintained in a bankruptcy suit. Secondly, there is no requirement for the debtor to commit any of the acts of bankruptcy required by the Bankruptcy Act.¹⁴ Thirdly, the Act disallows the requirement for any of the conditions precedent set out in the Bankruptcy Act¹⁵ to be met before the Court can issue a receiving order.¹⁶ Thus, simplifying the process by which a debtor could be declared bankrupt in Nigeria.

Interestingly though, once a receiving order is made and the debtor declared bankrupt notwithstanding that the provisions of the Bankruptcy Act were not complied with,¹⁷ the Act requires the Court to appoint an Official Receiver or authorize the Corporation to assume office of a Trustee over the property of the debtor.¹⁸ Thereafter, the Trustee appointed by the Corporation is required to act in accordance with the provisions of the Bankruptcy Act.¹⁹ The Act further stipulates that any person adjudged bankrupt under the Act shall be deemed bankrupt under the Bankruptcy Act.²⁰ Giving an indication that the purpose of the Act is to simplify the process and avoid the complexities currently existing in the Bankruptcy Act for a debtor to be adjudged bankrupt.

¹¹ Section 1 Bankruptcy Act

¹² Section 51(1) AMCON

¹³ Section 51(2) AMCON

¹⁴ Ibid. See above for acts of bankruptcy

¹⁵ See above

¹⁶ Section 51(2) AMCON

¹⁷ Section 51(3) AMCON

¹⁸ Section 51(4) AMCON

¹⁹ Section 51(5) AMCON

²⁰ Section 51(7) AMCON



The provisions of the Act relating to bankruptcy however pertain only to debtors of the Corporation. They do not extend to debtors who are not involved with the Corporation. This then means that where other creditors wish to proceed against debtors, they would need to comply with the Bankruptcy Act as presently constituted. This speaks against uniformity of process in the Nigerian legal system. There may therefore be need for the National Assembly to embark on a comprehensive reform of the Nigerian Bankruptcy Act.

Conclusion

Going by the forgoing, there is clearly need for the National Assembly to embark on comprehensive reforms in areas where the Act attempted reforms to ensure uniformity of application. Granted that the inclusions in the Act were borne out of the need to maintain stability within the financial sector and recover the huge assets comprised in the debts which are currently non-performing or may become so during the life of the Corporation, only a uniform approach in the entire legal system would ensure lasting stability. Such would also avoid uncertainties that may arise with individual resolution of the particular activities that are affected by the Act and ultimately save legal costs which may otherwise be spent in resolving the uncertainties.

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