www.symbiosisonlinepublishing.com
ISSN Online: 2577-7815

Review Article International Journal of Family Business and Management Open Access

Current Perspectives in the Recovery of Bank Loans in Nigeria

Kathleen Okafor*

[1]*LL.B, BL, LL.M, Ph.D, Dean, Faculty of Law, Baze University, Abuja.*

Received: June 3, 2019; Accepted: June 26, 2019 ; Published: July 12, 2019

***Corresponding author:** *Kathleen Okafor, LL.B, BL, LL.M, Ph.D, Dean, Faculty of Law, Baze University, Abuja, Email: ke_okafor@yahoo.com*

Abstract

Prior to the independence of Nigeria in 1960, commercial lending in Nigeria was basically non-existent as the economy was mostly subsistent agriculture. However, the growth of trade between the United Kingdom and the West African sub-region inevitably led to the establishment of the African Banking Corporation in 1891 by Elder Dempster Company, a shipping conglomerate in Lagos, Nigeria. Progressively, many corporations in manufacturing, telecommunications, banking, oil and gas, retail and other businesses merged and started utilising facilities of banks for expansionary purposes or for other operational purposes. However, due to frequent policy somersaults, poor management, predatory lending practices, general economic meltdown and macro-economic headwinds, companies started defaulting on the facilities and the creditors have had to realise their securities. Some of the statutory provisions and cases on the process and laws on recovery of debts have been subjected to conflicting interpretations partly because of the multitude of institutions and laws on the subject. Nevertheless, there is the underlining objective of maintaining the principle of separate legal entity of companies and also ensuring that creditor's assets are recovered. This paper essentially considers the laws and cases and the emerging framework of realisation of secured and unsecured credits. In this paper, there is focus on bank lending and the institutional regulations which have developed as a result of growing Non-Performing Loans (NPLs) and bank failures

Introduction

The Structural Adjustment Programme in Nigeria in 1986 resulted in increased investor participation in the banking industry which increased the number of banks over a 10 year period. By 1995, the number of distressed banks had increased to 60, out of which 31 were terminally insolvent [1]. This scenario generated many non-performing loans (NPLs) which represented as much as 44 per cent of total loans disbursed. Distressed banks accounted for 60.82% of the total NPLs in the Nigerian banking industry which clearly indicated a link between NPLs and bank failures [2].

The various factors which contributed to the banking crisis included unprofessional lending practices, mismanagement of the banks, and general operational corruption in national activities, management's inordinate appetite for profit maximisation, capital inadequacy and also general inefficient economic management. To salvage the situation, the Nigerian Deposit Insurance Corporation was set up in 1988 mainly as a guarantor of bank deposits and also to prevent the demise of banking institutions. The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree was promulgated in November 1994 with Failed Banks Tribunal set up to recover debts owed to banks and to punish the perpetrators of inefficient lending practices in banks through the introduction of special proceedings to expedite trial of cases falling under the Decree.

By 1999, over 45 criminal cases and 672 debt recovery cases were concluded under the provisions of the Decree before the replacement of the Decree with the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act [3].

Nevertheless, bank loans to the economy as at the end of 2015 hovered aroundN13.1 trillion with the ratio of non-performing loans to total credit arising to 11.7 per cent as at the end of June 2017 from 5.3 per cent. The balance sheets of most deposit money banks (DMBs) became seriously jeopardized [4], due to humongous debt overhang of NPL spartly due to depreciation of the naira and depression leading debtors to default on servicing foreign currency-denominated loans. These lending practices put depositor's funds at risk thereby disrupting the lending cycle needed for economic development.

Statutory Framework

Presently, there are many enactments which regulate recovery of bank loans in Nigeria. These include the Companies and Allied Matters Act (CAMA), The CBN Act, the Investment and Securities Act (ISA Act)with the Securities and Exchange Commission Rules 2013, the Banks and Other Financial Institutions Act BOFIA in relation to licensed banks and other financial institutions, the Nigerian Deposit Insurance Corporation (NDIC) Act, the Assets Management Corporation of Nigeria (AMCON) Act which resolves banks' non-performing loans/assets, the Failed Banks (Recovery of Debts and Financial Malpractices in Banks Acts (FBA) 2004, and the recent Secure Movable Assets Acts 2017).

Firstly, the Companies and Allied Matters Act (CAMA) [5] broadly outlines the procedures for all corporate insolvency to protect the assets of companies in liquidation and also ensure proper and orderly disposition of debts/liabilities [6]. In the case of banks, the dominant objective of the laws is to protect depositor's interests and retain public confidence in the financial system.

Section 414 of CAMA broadly provides the process of winding up of all insolvent companies which also applies to failed banks to protect the depositors and creditors of Failed Banks in liquidation. Section 414 of CAMA provides that "where a company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void".

Section 417 of CAMA provides that, "If a winding up order is made or a provisional liquidator is appointed, no action or proceedings shall be proceeded with or commenced against the company except by leave the court on such terms as the court may impose". Accordingly, s. 417 safeguards the interest of creditors as a whole as a matter of public policy which means that action may be commenced against a failed bank once the NDIC has been appointed as provisional liquidator. The creditor can only bring a claim before the liquidator with leave of court to execute any judgement and existing proceedings against the failed bank must be stopped.

Under section 500 (1) OF CAMA [7], "where a creditor levies execution against any goods or land of a company or attaches any debt due to the company, and the company is subsequently wound up, the creditor shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up.

Section 500 (1) (c) CAMA however states that; "... the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit".

Section 500 (2) CAMA defines what amounts to completion of an execution or attachment as follow: "*For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and on attachment of a debts shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver*".

The summary of these provisions is that the court can in its discretion set aside any liquidation and permit the creditor to retain the benefit of the execution or attachment of its judgement against the failed bank. Thus, in the case of ***Federal Mortgage Bank of Nigeria v NDIC (Liquidator of United Commercial Bank Limited) in Liquidation***, the Federal Mortgage Bank of Nigeria (FMBN) as the creditor, obtained judgement against the United Commercial Bank Limited (UCML). FMBN levied execution and attached UCBL's movable assets on the 5th of September 1994, and the Deputy Sheriff attached the assets with UCBL's premises. Four days later, UCBL's banking licence was revoked, and the NDIC was appointed a liquidator and assumed control over the assets of the bank including the attached assets. FMBN subsequently applied to the High Court for an order compelling the liquidator to produce the attached assets of the bank and to direct the deputy sheriff to sell same. The Supreme Court decided that where execution and attachment of a bank's asset have been carried out, but the appointment of the liquidator occurs prior to the sale of the assets, any such execution or attachment would be deemed to be inchoate, and thus falls within the ambit of **Section 414 of CAMA**, which renders the action void.

Furthermore, under **section 501 (1)** of CAMA where the assets of the company have been taken by a deputy sheriff in execution of a judgement or an order of court, and prior to the completion of execution a notice is subsequently served on the sheriff that a provisional liquidator has been appointed, the sheriff is mandated to deliver the assets to the liquidator.

These general insolvency laws seek to protect the interest of creditors as a whole, by preventing a single creditor who through an execution of a judgement obtained from a court of competent jurisdiction from receiving full payment of his claim at the cost of the claims of other creditors. The common law case of **Walker v Syfret** [8] supports the statutory provision of CAMA in that, a sequestration order which includes an attachment order or judgement crystallises the insolvent's position; the hand of the law is laid upon the estate and at once, the rights of the general body of creditors have to be taken into consideration. Thereafter, no transaction can be entered into with regard to the estate matters by a single creditor to the prejudice of the general body. Applying these provisions to failed banks, in contrast with regular companies, the creditor's primary focus and the NDIC as liquidator for banks, is to mainly secure and satisfy the deposit liabilities of the failed bank in liquidation.

The importance of this section is that once a winding up order is made, or where a provisional liquidator has been appointed to liquidate the assets of the company, no action against the failed bank can be commenced, neither can any on-going proceedings be continued except with the leave of the Federal High Court [9] subject to such terms as the court may impose [10]. The Banks and Other Financial Institutions Act [11] (BOFIA) also provides that, no suit shall be instituted against a bank whose control has been assumed by the NDIC and if any such proceedings are instituted in any court or tribunal against the failed bank, it shall abate, cease or be discontinued without further assurance other than by this Act [12].

A. The Failed Banks Act

Section 2 of the Failed Banks Tribunal (Consequential Repeal, etc.) Act No. 62 of 1999 abolished the Failed Banks tribunals. The Failed Banks Decree was later repealed by the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (FBA).

I. Jurisdictional Issues:

Section 1 of the Act vests the Federal High Court with exclusive jurisdiction in any action for the recovery of any debt owed to a failed bank and the jurisdiction conferred by the Act cannot be ousted by the agreement of the parties or by the provision of any other law. Under section. 1 of the Failed Bank Acts, the jurisdiction of the courts is as follows:

The Federal High Court in this Act referred to as "the Court" shall have power to *"recover, in accordance with the provisions of this Act, the debts owed to a failed bank, in the ordinary course of business and which remain outstanding as at the date the bank is closed or declared a failed bank by the Central Bank of Nigeria;"*

Thus, the Federal High Court is empowered "to recover, in accordance with the provisions of this Act, the debts owed to a failed bank, arising in the ordinary course of business and which remains outstanding as at the date the bank is closed or declared a failed bank by the Central Bank of Nigeria."

Section 1 (3)(a)(c) and Rule 17 of the Failed Banks Act provide for proceedings to be conducted in a manner to avoid undue delay. Accordingly, hearing may continue on a day to day basis. It is noteworthy that this provision has not reduced cases and adjournments.

II. The main Objectives of the Failed Banks Act include

- To assist in resolving distress of failing banks through speedy recovery of their non-performing loans arising in the course of business and which remains outstanding as at the date the bank is closed or declared a failed bank.
- To sanitize the banking sector through criminal prosecution and conviction of errant directors found guilty of banking malpractices.
- Speedy trial of offences relating to financial malpractices in banks and other financial institutions as specified in the Act or such other offences relating to the business or operation of a bank under any enactment.

III. Provision for Lifting the Corporate Veil

Under Section 1 (3) (b) (ii) of the Act, the court may lift the veil of a company which is owing a failed bank to trace the representatives and assets of the failed financial institution. The veil of incorporation will be lifted to hold the directors, shareholders, and corporate officers of failed banks connected with the granting of the loan, liable for an unsecured debt, or the security is impossible to locate, or the identity of the debtor is difficult to locate, or the debtor is non-existent, fake or fictitious or in any way unidentifiable. Under Section 12(2) thereof, the court can proceed to recover from such officers of the failed bank jointly and severally, the outstanding loan and interest.

IV. Proof of the Debt

The Failed Bank Act grants power to the Court to control the property of a debtor where the court is satisfied that a prima-facie case has been made out against a person to prohibit disposition of property movable or immovable, stop outward payments, operations or transactions (including any bill of exchange) for the time specified and grant interim measure of protection pending the determination of the proceedings. Nigerian rules on insolvency do not seem to contemplate specific provisions on the certainty of the date of document. Indeed, there is no need to prove date certain as applies in Italian law. The Nigerian rules appear to be less stringent in that proof that a payment or transaction occurred before insolvency may be given with any means, including by alleging factual elements and circumstances which may demonstrate anteriorly to insolvency regardless of date certification by public authorities. This position is somewhat similar to the open clause encompassed in the second part of section 2704 of the Italian Civil Code allowing case law to establish other equivalent instances' where the date can legally be considered certain.

In the United Kingdom, and Italy, filing proof of claim in administration or liquidation proceedings, entails filling in a form and filing documents in support of the claim. The liquidator may request for further proof and documents thereof. A creditor has a right to challenge the denial or admission of the claim. However, there appears to be no basic need to prove date certain anteriority to insolvency in Nigeria. Under English law, it is not necessary that a contract should be dated to be valid. Nor is it necessary for an officer of the insolvent company to be physically present once there is acceptance, consideration and the intention to create legal relations between the parties, and delivery of the deed. If an issue arises on the date of the document, reference can be made to other elements connected to the formation thereof in order to establish timing.

Similar conclusions may be drawn on the U.S. approach to the problem. No date certain requirement is contemplated in Title 1 of the U.S. Bankruptcy Code, neither in Chapter 7 (liquidation), nor in Chapters 11 and 13 (reorganisation). As far as pre-petition claim for proof of debt in bankruptcy is concerned, there is a presumption of validity of the claim and supporting evidence thereof, and in principle debtors will hardly question the date or validity of the documents filed with the claim.

The French legal system, which for a number of historical reasons appears to bear the most similarities to the Italian and Nigerian ones does not seem to contemplate a date certain concept. The existence, date and validity of claims/debts under French insolvency law are matters of proof. There are no specific rules concerning the date certain within the framework of insolvency proceedings. Creditors must file a declaration of claims/debts (*declaration de creance*) with the creditors' representatives within a specific time period (2 months for French creditors). The claims/debts are verified and paid in accordance with the rules applicable to the insolvency proceeding. The notarisation or the registration of an agreement attributes certainty as to the date of the covenant giving "*date certaine*" to the document and overturning the burden of proof for challenging the date of the claim/debt. Even if this element may strengthen the claimant's position, it is not essential, in that claims/debts which do not have "date certain" can also be accepted if they are clearly evidenced.

Under section 1 (4) of the Failed Banks Act, the court may admit and act on any evidence which it considers relevant in any civil and criminal proceedings notwithstanding that the evidence was inadmissible under any other law or enactment. This provision is controversial but the court is given the power to consider the weight of evidence to be accorded to such evidence. Also, primary and secondary evidence may be used to establish the loan and that the payment is due.

To aid the courts in dispensation of debt recovery, Section 6 of the Failed Banks Act provides as follows:

(a) The examination reports and recommendations of the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation or their joint examination reports and recommendations; or

(b) Any report of the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation

(c) The report of a person appointed by the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation, on the financial condition of a Failed Bank shall be sufficient proof that a loan or advance is owed to a failed bank and is due for recovery under those Acts.

This provision is salutary as assembling primary evidence of the debt had been onerous because of operational negligence, deliberate destruction of evidence, and administrative lapses by financial institutions. Usually, errant officers had left the bank and the Courts continued to require statements of account as required under the Evidence Act to prove indebtedness and explanations of the lodgements and entries [13]. Furthermore, the Supreme Court had decided that "in order for a claim of debt outstanding in a customer's account with its Banker to succeed, the Bank must prove how the debit balance claimed from the Customer was arrived at….[14]" Section 6 thereof therefore effectively amends the Evidence Act, on the need for direct evidence as electronically generated statement of accounts can now be tendered I courts under the in evidence.

To entrench quicker recovery by the courts under the Failed Banks Act. Section 22 thereof states that the Act prevails over any other enactment or law in any case of inconsistency.

To secure the assets from jeopardy, the court may issue, an interim attachment of the debtor property under Section 3 of the Act and the court may also prohibit any disposition of the debtor's property, moveable or immoveable or to stop all outward payments, operations or transactions on the debtors account, based on prima facie case. The properties may also be vested in the court to preserve such assets pending the determination of the proceedings.

V. Application Process for Recovery of Debt

Procedurally, when a creditor issues a demand for settlement of a debt and the company fails to comply with the demand, the creditor has the right, without more, to petition for the winding up of the company [15]. For companies outside banks, the winding up process is deemed to have commenced once there is a resolution of member's voluntary winding up. A winding-up petition under **CAMA** is filed at the Federal High Court within the jurisdiction where the debtor company operates [16].

Under Section 7 of the Failed Banks Act "An application for the recovery of a debt owed a failed bank shall be brought before the court by the receiver or liquidator of the failed bank and where there is no receiver or liquidator, by a person appointed by the Central Bank of Nigeria or the Nigerian Deposit Insurance Corporation".

The application must contain the following information:

(a) The name and address of the borrower,

(b) If the borrower is a body corporate, a partnership or a sole trader,

(i) The address of its principal place of business,

(ii) The names and addresses of its shareholders, directors, proprietors or partners, as the case may be;

(c) The amount of loan and advance outstanding;

(d) Details of securities pledged, if any; and

(e) Such other information as may be useful to the Court.

There is provision in the Act for a simple originating process in FORM A of the Appendix to the Schedule. The Schedule is titled 'Procedure for the Recovery of Debts at the Federal High Court'. These are clear rules of procedure for proceedings under the Failed Banks Act. However, the Act and the Schedule do not specify the filing of an affidavit or pleadings in support of the application as required in general civil proceedings under the Federal High Court (Civil Procedure) Rules. Paragraph 3(5) of the Schedule thereof to the Act stipulates that the evidence need not be stated in the application.

Under section 8(1) of the Act and Paragraph 10(1) of the Schedule, the debtor is required to file a reply in response to the application. The form of the debtor's reply is not stated i.e. whether by way of an affidavit or by way of pleadings.

Furthermore, to ensure that actions are not extinguished due to laces or delay by parties, **Statute of limitation** of any state or that of the FCT is excluded from applying to matters brought before the court relating to debt recovery [17].

VI. Summary Proceedings

For speedy recovery of loans, the Act and the Schedule provide for summary proceedings. The timelines for filing are shorter in that the debtor is to enter appearance not later than 15 days from the day of his service with the debt recovery application [18]. His reply to the application is expected to be filed within six (6) days after entering appearance [19]. Paragraph 22 of the Schedule to the Act also empowers the court to abridge the time upon an application. Day-to-day hearing of debt recovery applications is also stipulated [20] for speedy trial.

Where a debtor in his reply to the debt recovery application admits his indebtedness, the court will enter judgement for the admitted sum [21]. Under Section 8(2), therefore, the court may allow the debtor no more than 30 days within which to pay the admitted sum, but may proceed to the hearing of the debt recovery application where the debtor fails to pay the admitted sum within the time stipulated or where he disputes the debt. However, if the debtor pays the loan and interest within the period specified [22] under Sub-Section 8)2), the court shall issue the debtor a Certificate of Clearance and shall release to the debtor all documents and properties pledged as security for the loan. Under section 9(1)(a) thereof "where the debtor – having admitted the debt pursuant to section 8 – fails to pay the admitted sum within the time stipulated by the court, "*the Court shall proceed to hear the case and enter judgement and make such Orders as it deems appropriate for the purposes of this Part of the Act*."

Where the debtor disputes any loan or interest or fails to pay within the period prescribed under Section 8, the court shall proceed to hear the case and enter judgement or make any order it deems appropriate [23]. Also, the court may make an order for the payment of the loan and interests and if the debtor fails to pay within the specified period, the Court shall levy execution [24].

VII. The Evidence Required

Section 1(3) of the Failed Banks Act mandates the court to conduct its proceedings in such manner as to avoid undue delay and all proceedings under the Act are to be held in open court. The Act dispenses with strict adherence to rules of evidence in the adjudication of matters which are brought there under.

The objective of this provision is to allow the court to focus on the merits of the claims rather than on procedure. A key provision of the Act is the power of the court to admit and act on any evidence which it considers relevant to the proceedings before it, notwithstanding that such evidence is inadmissible under any other law or enactment. Section 1(4) of the Act provides that:

'The Court shall have the power to admit and act on any evidence which it considers relevant in any civil or criminal proceedings notwithstanding that the evidence is inadmissible under any other law or enactment'.

Similarly, Section 22 of the Act provides that:

'Where a provision of this Act is inconsistent with that of the Evidence Act or any other enactment or law, the provisions of this Act shall prevail and that other provisions shall, to the extent of its inconsistently, not be applicable.'

The implication of the above provisions is that the provisions of the Evidence Act are not binding on the Court in a debt recovery action under the Failed Banks Act. In the case of NDIC V. Gateway Paper Products Ltd & Anor [25], the court held that the provisions of the Act not only require the court to admit the evidence but also to act on it. Evidence may be rejected or regarded because of non-compliance with the Evidence Act or any other law as to evidence.

To simplify the evidential requirement in trial of cases under the Act. Section 6 of the Act allows examination reports by the Central Bank of Nigeria (CBN), the NDIC or any person appointed by either of the institutions as sufficient proof of the existence of a debt, meaning that the onus is on the customer to prove repayment of the loan or overdraft.

VIII. Concurrency of Criminal and Civil proceedings

Section 7(3) of the Act allows a debt recovery application to be filed, notwithstanding the pendency of a criminal proceeding. This statutory rule recognises that *Rule in Smith v. Selwyn* is anachronistic and no longer applicable in Nigeria [26]. The rule provides that where a civil wrong is also a crime, a civil action cannot be brought before the court until the criminal matter is concluded or a cogent reason for default of criminal action is provided.

In the case of Alao v. Nigerian Industrial Development Bank [27]. The court of Appeal held that continued application of the Rule in *Smith v. Selwyn* will work injustice, in view of the nature and pace of criminal trials in Nigeria. Proof of a criminal matter is quite different from proof of a civil matter (in this case, for recovery of debt) and there was really no justifiable reason why the two should be related.

For speedy recovery of debts, Section 3 of the Act empowers the court, at any stage of the proceedings, where it finds that a prima facie case has been made out against a person, to make an Order attaching the person's properties and bank accounts pending the determination of the proceedings.

Interlocutory Orders may be made aimed at preserving assets from which a judgement debt may be settled in the event that judgement is entered against a debtor. Nevertheless, such orders exert pressure on a debtor and compel early settlement of the debt or quick settlement plan.

Although, a director or a shareholder of a company is generally not liable for the indebtedness of the body corporate unless he gave a guarantee or stood surety for the debt.

IX. Sale by Auction or Private Contract

For prompt and effective realisation of the subject assets, sale by auction or private contract is allowed under the Act. Once a property is sold under Section 11(1), the Court has the power to execute an instrument of transfer which is conclusive proof of title by the purchaser. The consent of the Governor as required by the Land Use Act is not required.

However, compliance with the following requirements must be made:

I. Monies recovered from the sale under section 11(1) are to be paid to the Liquidator or Receiver within two weeks from the date of sale.

II. If the money recovered from the sale is insufficient to cover the judgement debt, further execution can be levied against the other assets of the individual or body corporate or against the personal assets of the directors, partners or individuals (in the case of an association).

B. The NDIC Act

Another relevant provision on bank recoveries is **Section 39 (1) of the Nigerian Deposit Insurance Corporation Act 2006 (NDIC Act)** [28] which empowers the NDIC, in consultation with the CBN, to form a bridge bank to assume the deposit and liabilities of any failed bank. The bridge bank, so incorporated, will be given a banking licence by the Central Bank of Nigeria to act and carry out activities like a regular bank [29]. Thus, the NDIC may utilise a bridge bank for liquidation purposes, or for restructuring. Where a systematically important bank (SIB) or a bank that is "Too Big to Fail" becomes insolvent and the CBN as a regulatory agency revokes its licence, the NDIC (usually through the special purpose vehicle of a bridge bank) may also completely liquidate the assets of the bank and dissolve it, or may assume control of the Bank and collaborate with AMCON to "save" the bank [30]. The failure of any big financial institution may trigger national disruption of the larger financial system and economic disorientation.

The special resolution of banks is based on section 40 of the NDIC Act. The NDIC recently became the provisional liquidator of Skye Bank now called Polaris Bank [31]. The bridge bank – Polaris Bank – was in turn sold to the Asset Management Corporation of Nigeria (AMCON) by the NDIC. The aim of the rescue process was to save depositors' funds and to ensure that the bank continued as a going concern, being a "**systemically important bank"**.

Any bank, whose licence has been revoked or withdrawn by the CBN, becomes a failed bank. By definition, a failed bank is an insured institution whose capital to risk, weighed asset ratio or regulatory capital falls below the minimum prescribed by the CBN [32]. On another hand, a bridge bank is defined as a financial institution that is authorised to hold the assets and liabilities of another bank, specifically an insolvent or failed bank [33]. A bridge bank is usually charged with the responsibility of continuing the operations of the insolvent/failed bank until the bank becomes solvent, acquired by another entity, or liquidated and totally dissolved.

C. AMCON Act

In the recovery of bank loans, the role of AMCON is crucial. The functions of AMCON include [34] the acquisition and disposition of eligible bank assets and equities in accordance with the provisions of the Act with the approval of the Central Bank of Nigeria [35]. After the acquisition, AMCON may recapitalise the Bridge bank by purchasing the bank through acquisition of a significant equity in the bank amounting to control which should reverse the bank's negative equity position. As an alternative, AMCON could source new investors in the bank.

Under **Section 5, 25 and 30 of the AMCON Act** [36], AMCON can also purchase the assets of a bank referred to as an eligible financial institution [37] in collaboration with the Central Bank of Nigeria.

The assets referred to as eligible assets are assets of an eligible financial institution specified by the Governor of the Central Bank of Nigeria as being eligible for acquisition by the Corporation [38]. Assets include the "Financial Assets" of the Bank. The Asset Management Corporation Act (Amendment Act) [39] has included anew term called "eligible equity" which it defined as "*shares, stock or other interest in the equity or share capital of an eligible financial institution*" [40], has been included as assets of the bank.

Section 61 of the AMCON Act, defines an eligible institution as a bank duly licensed by the Central Bank of Nigeria to carry on the business of banking in Nigeria under the BOFIA and shall include a bank or other financial institution, whose banking licence has been revoked by the Central Bank of Nigeria, pursuant to the Banks and Other Financial Institutions Act.

As in s. 417 CAMA, once winding up has commenced, any activity or action which purports to deprive the failed bank of its property, whether through sequestration, attachment or even execution of a judgement against the assets of the "Bank in liquidation" has no legal effect. Accordingly, where a creditor of a failed bank obtains a judgement, (but is yet to execute the said judgement against the bank) prior to the revocation of the bank's license, the judgement cannot subsequently be executed against the failed bank. Obviously, **section 414** of CAMA does not cover judgements concerning the estate of the company undergoing winding-up as where a mere declaratory judgement is given on behalf of a third party against the company. The only recourse open to the creditor is to present a claim to the liquidator, which will be treated according to priority ranking in liquidation of the affairs of the bank.

The effect of **Section 414 CAMA** is to immediately trigger the grant of a winding up order by the Federal High Court which initiates the winding-up process as opposed to being triggered by the appointment of a provisional liquidator. The question which arises is whether the judgement creditor upon notice of the appointment of a liquidator or the revocation of a bank license, can subsequently execute the judgement before winding up order is obtained by the provisional liquidator.

It is notable that both NDIC and BOFIA Acts confer the responsibility of obtaining a winding up order from the Federal High Court on the NDIC once the NDIC becomes the provisional liquidator of a failed bank [41].

D. BOFIA Act

Section 40 of BOFIA provides as follows; "where the license of a bank has been revoked pursuant to section 39 of this Act, the Corporation shall apply to the Federal High Court for a winding up order of the affairs of the Bank [42].

Post-Judgement applications/Motions made against a Failed Bank: Any application made by the creditor after the license has been revoked and a provisional liquidator (NDIC) appointed will be considered as ancillary or consequential reliefs, and will not be subject to section 417 of CAMA.

Consequently, post judgement applications are not considered as "freshly instituted or constituted proceedings" as envisaged by Section 417 [43]. This means that section 417 is only applicable to actions which are just about to be "freshly instituted or proceedings which are already pending in court" against a company for which a provisional liquidator has been appointed. Accordingly, section 417 would not apply in respect of matters which had already been concluded before the appointment of the provisional liquidator. In effect, Section 417 of CAMA does not extinguish the right of the failed bank to institute action against any other person [44].

Sections 414 and 417 of CAMA are part of the basic frame works in creating and implementing an insolvency regime for failed banks with the objectives of protecting the entire depositors and creditors of failed banks in liquidation and ensuring the protection of creditors' rights and interest.

In addition to the oversight responsibilities of the CBN and the NDIC for financial stability, the Act provides that the Central Bank of Nigeria (CBN) may turn over the control and management of a failing bank to NDIC on terms and conditions [45] as the CBN may stipulate. Also, the Act provides that no suit shall be instituted against a bank whose control has been assumed by the Corporation. If any such proceeding is instituted in any court or tribunal against the bank, it shall abate, cease or be discontinued without further assurance other than this Act [46].

One crucial provision of BOFIA is the setting aside of the general principle that a secured creditor has priority over an unsecured creditor. Thus, Section 54 of the BOFIA provides that "*where a bank is unable to meet its obligations, or suspends payment, the assets of the bank in the federation shall be available* ***to meet all the deposit liabilities of the bank and such deposit liabilities shall have priority over all other liabilities of the bank.*** Thus, priority ranking under the BOFIA is to the effect that depositors must have priority over other secured/unsecured creditors. This led to the case of ***First Bank of Nigeria Plc. v. Nigeria Deposit Insurance Corporation*** [47]. The facts of the case are these: Prior to the revocation of Lead Merchant Bank's (LMB) licence, LMB was indebted to First Bank of Nigeria Plc.'s (FBN) under a clearing and settlement banking transaction. To this end, FBN secured its interest with an unregistered legal mortgage over LMB's property. However, upon liquidation of LMB by the Nigerian Deposit insurance Corporation (NDIC), FBN made repeated demands from NDIC for the payment of LMB's outstanding indebtedness to it.

In response to the demand, NDIC contended that whilst it recognised FBN's interest in the property of LMB, it must comply with priority ranking under the BOFIA in settling same, which is to the effect that depositors of LMB must have priority over all other secured/unsecured creditors. FBN's interest in the LMB's property was secured by an unregistered mortgage, which makes FBN essentially an unsecured creditor.

The learned trial judge dismissed the contention by FBN by relying on Section 54 of the BOFIA. The trial court reasoned that the right of the mortgagee to institute an action had not crystallised since all the depositors had not been paid.

i. The Justification for Priority of Bank Deposits in Nigeria

Based on the **Depositors Preference Rule i.e.** the claims of depositors enjoy a privileged status in the event of insolvency of a bank over secured and unsecured creditors.

The objective of the protection of depositor's fund is to maintain the assets of banks for the benefit of depositors, to minimise the negative consequences of bank runs. This rule is further reinforced by the fact that depositors are not only viewed as creditors of the bank but are also persons entitled to a claim for premiums charged on **insurable deposits** with the bank.

Section 2 of the NDIC Act [48], provides that: "***All deposits of a licensed bank or any other financial institution shall be insured with the Corporation***."This in effect entails that procedurally, the bank must be in compliance with its obligations to contribute to insurance of its deposits under Section 54 of the BOFIA as a pre-condition before the NDIC can realize the bank's interest [49]. "*If the Bank is unable to meet its obligation, or suspend payments, the assets of the bank in the Federation shall be available to meet the obligations of the bank and such deposit liabilities shall have priority over all other liabilities of the bank? The question is: What are the assets of the bank that are available to meet the obligations of the bank*? Ordinarily, the assets of the bank comprise owned or possessed assets and are limited to, *cash and balance at the Central Bank of Nigeria, treasury bills and other eligible bills, loans and advances to banks/customers, debt securities, equity shares (and other variable yield instruments), participating interest, tangible and intangible fixed assets, etc.* Hence, where a security interest is created that takes away the asset from the ownership of the bank, that asset cannot be said to belong to the bank for purposes of distributing it amongst its creditors.

E. Secured Transaction in Movable Assets Act, 2017

Legislation on recovery of debt is the Secured Transaction in Movable Assets Act, 2017which permits the taking of security over movable assets. In practice, the question arises whether a bank which has granted security over its movable assets is subject to Section 54 of the BOFIA due to the general principle that a charge is only an encumbrance, and the movable asset continues to remain with the bank.

The resolution of the issue then is by determining the proper definition of assets from the accountants view. The assets of the bank are equal to its liability plus its capital. Whereas the lawyer sees the assets of the bank as equal to net assets meaning that, the assets of the bank comprise ownership plus possession. So, where a security interest is created that takes away the asset from the ownership of the bank, then that asset cannot be said to belong to the bank for purposes of distribution amongst its creditors.

Legally, a charge does not necessarily transfer ownership to the charge but is an equitable encumbrance on the asset. Unlike a mortgage, a charge does not give an immediate right to be paid from the charged property. A charge must appoint a receiver or approach the court for an order to sell. This differentiation presents a situation where a mortgage created in certain parts of the country, operating the property and Conveyance Act of 1881 and Property and Conveyance Act like the old Western Region, Lagos etc. excludes the mortgaged asset from the assets of the bank and no longer available for distribution by the creditors.

On another hand, where a mortgage is created in the conveyance states, such mortgage would be available for distribution to the creditors. Section 41 of BOFIA, provides that "t*he Corporation liquidation expenses enjoy priority over all other liabilities* ***including over legal mortgage or crystallized debentures***".

Duties, Functions and Liabilities of directors/ managers

Until wound up, the directors of banks and ailing companies continue to owe fiduciary and non-fiduciary duties to their companies such as duty of care and skill, to keep proper books of records, not to enter into transactions which may jeopardize the creditors funds, to observe the utmost good faith towards their companies in all transactions, and also not to indulge in fraudulent trading or under value transactions [50].

Particularly, the duties under section 279(7) (CAMA) state that, the directors/managers must not abdicate from their responsibilities or allow their personal interests to conflict with their duties [51]. They must not make secret profit or other benefits and must not misuse corporate information and property in their possession as the company still exists. Jointly, the Failed Banks Act, and CAMA, allow the courts to hold directors, shareholders, partners, managers, officers and other employees of failed banks who are connected to debts and loans to be jointly and severally liable where the security is impossible to locate or debtor is unlocated or non-existent, fake or fictitious. Both laws are complementary in the pursuit of creditor's protection, and state that a company becomes insolvent if it is indebted to its creditors in a sum exceeding N2, 000 and is unable to pay same after statutory notice demanding payment or to secure or compound the debt satisfaction [52].

CAMA's definition of an insolvent person is also unrealistic: any person in Nigeria who, in respect of any judgement, decree or court order against him, is unable to satisfy execution or other process issued thereon in favour of a creditor, and the execution or other process remains unsatisfied for not less than six weeks [53]. This definition implies that a court order may be made even in cases of clear balance sheet insolvency where the company's liabilities exceed the assets of the company. In practice, once a company's liabilities exceed the company's asset such a company is insolvent. For banks, the CBN's report on the financial health of a bank is sufficient proof of insolvency [54]. For failed banks, disposal of the Bank's property, movable or immovable, and all outward payment on debtors account must be halted. Consequently, once the company is insolvent, the directors' must consider the interest of creditors for priority over those of shareholders and the directors must seek to minimise losses and maximise value for creditors.

Under CAMA, erring directors may be criminally liable for pre-insolvency acts such as inducing any person to give credit to the company by false pretences or fraud; making or causing any gift/transfer of a charge on the company's property or causing execution to be levied with the intent to defraud creditors; concealing or removing the company's property within two months before the date of a judgement/order for payment of money obtained against the company [55]. Directors will also be criminally liable if they trade recklessly or with intent to defraud creditors [56]. Directors, who misapply company funds, are liable to account for the company's money or property and may be compelled to repay with interest [57].

The legal position of unsecured creditors i.e. landlords, employees, trustees, other interested persons: The Pari-Passu Principle

Under CAMA, the court is empowered to appoint a Receiver/ Manager where a security is at risk based on an application [58]. The application may be made by the receiver members/ shareholders, creditors, or representatives, trustees in bankruptcy, a contributory, or an interested person [59]. An application may be made to the court for the judicial sale of the company's assets in order to recover the debts, or for the appointment of a receiver in order to recover the debts of the company, for the principal debt and interest.

After judgement, repayment may be enforced on the moveable and immovable assets of the debtor through attachment of the movable or immovable property, garnishee proceedings, or judgment summons.

Further, there are provisions for preferential payment of all local rates and charges, due and payable, assessed taxes, pension fund contributions, wages and salaries, employee holiday remuneration etc [60]. However, this priority ranking is in conflict with BOFIA which gives priority of liquidation expenses over all other liabilities including over legal mortgages or crystallised debentures [61]. Priority ranking under CAMA is therefore subject to the Failed Banks and the NDIC Act, for banks only. Priority ranking under CAMA will continue to apply outside failed banks.

Voidable and Impeachable transactions

Companies, who are distressed financially or who are unable to pay their debts as they fall due, are statutorily barred from embarking on new transactions unless their negative financial situation is positively reversed [62]. Such transactions by distressed organisations are usually termed fraudulent trading, misfeasance, undervalue transactions or wrongful trading. Fraudulent trading arises to defraud creditors, while misfeasance consists in the misuse of company's property; misapplication of company's funds consists in utilising company's resources for non-company purposes, or making illegal/unauthorized payments. Undervalue transactions consist in share transfers and transactions at undervalue, wrongful trading which involve obtaining credit on behalf of the company without any clear cut realistic prospect of repayment. Under Common Law and various statutes in Nigeria, there are remedies available like injunctions to prevent debtors from misusing assets or absconding, recovery of commission/interests, attachment of movable or immovable properties and appointment of Receiver/Manager [63].

Also, the veil of incorporation may be lifted to hold the directors and other errant officers personally liable for crime and civil breaches. Other remedies available include rescission of the transactions, damages, and criminal indictment and conviction [64].

However, to sustain the distressed company's operations, a receiver is empowered to borrow money on the security of the property in his possession, upon approval of the court. The creditor of such loan is protected to the extent of the claim having priority over debenture holders who initiated the appointment of the receiver.

Group Insolvency: Lifting the Corporate Veil of Incorporation

The issue of insolvency further becomes complex where the group or subsidiaries become insolvent due to various factors ranging from mismanagement, unprofitability, non-diversification, government regulatory requirements etc. Since it is a fundamental principle of law that an incorporated company is separate from its members, control by a company in a subsidiary does not translate to ownership and the separate entity of the subsidiary remains sacrosanct [65]. Thus, the law maintains the veil of incorporation and the subsidiary company has its own separate legal personality, and the parent company is not ordinarily liable for the loans or acts of its subsidiary [66]. Accordingly, the subsidiary's assets and liabilities remain separate from those of its parent and affiliates, for the purposes of execution or for liability for debts of the other [67] In this regard, section 567 of (CAMA) maintains separate definitions of "company" and "holding company". Under Part XV of CAMA, winding up proceedings apply only to companies not holding companies. Commencement of winding up proceedings for a company in a group, does not translate to automatic winding-up of other entities in the group. However, due to interlocking and interdependence of entities in a group, insolvency of an entity in a group, usually affects the solvency of the holding company. Where more entities in a group are insolvent, the proper procedure is to commence separate insolvency proceedings. Nevertheless, insolvency proceedings for insolvent affiliates in the group may trigger cross-default contract clauses of solvent affiliates. The liquidator would thereby need to enforce obligations against the solvent affiliates separately which may necessitate additional insolvency actions. The affiliates may be exposed to liabilities associated with insolvency proceedings, such as fraudulent trading under sections 495 and 506(1) of CAMA. Normally, the creditors would have recourse to the solvent affiliates to pierce the corporate veil and hold the solvent affiliates as shadow directors for breach of contract, negligence, deceit etc.

Recently, in **Re Southard & Co Ltd** [68], Temple man LJ had succinctly depicted this scenario by stating that even where a subsidiary declined into insolvency, the parent and other subsidiaries may "prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."

An important Nigerian case on this cross default scenario is Ecobank Plc. /Honeywell Group Dispute is relevant [69]. Honeywell Group was stated to be insolvent. Honeywell's subsidiaries (Anchorage Leisure Ltd, Honeywell Flour Mills Plc. and Siloam Global Ltd) had obtained bank facilities from the defunct Oceanic Bank Plc. which Ecobank had acquired in 2011. Honeywell (on behalf of its subsidiaries), negotiated the settlement of the debt resulting in N3.5bn payment to Ecobank. Honeywell contended that N3.5bn had been agreed as full and final settlement of the debt while Ecobank claimed it was part-payment of the original N5bn debt. Following the dispute, Ecobank, at different times, filed separate winding-up petitions against the subsidiaries and affiliates. The Court decided that due to the original debts being separately owed by the three different companies in Honeywell Group, a single winding up proceeding against Honeywell was incompetent.

Recommendations

a. The huge rate of bank insolvencies and collapses raises a need for urgent reorientation of managerial efficiency and transparency in Nigerian companies' governance. A most salient factor is that as a first step, effective corporate governance must be installed in all companies. Whistle blowing schemes should also be encouraged more in corporate management to pre-empt unnecessary loans which cause corporate collapses. It is salutary that the recent Corporate Governance Code of Nigeria Act of 2018 addresses this point.

b. Considerable progress has been made on reducing the rigours of loan proceedings e.g. on burden of proof, applications and summary processes and other procedural and evidential requirements. However, the numerous laws on this subject need to be harmonised into one composite legislation for ease of application.

c. There is need for better inter-agency cooperation to reduce, to the barest minimum, the number of cases and loans outstanding. These agencies are mainly regulatory and can have a one-stop establishment encompassing NDIC, CBN, AMCON, and SEC.

d. A special regime should also be provided for MSMEs and women entrepreneurs under the law for access to funds without security as the present law is tailored to suit big time users and suppliers of capital. Naked and unsecured debentures should be regulated under a separate legal regime.

Conclusions

The current framework on Recovery of loans is time and resource consuming, which militates against the availability and circulation of funds needed for other companies.

a. Alternative Dispute Resolution Mechanisms in debt recovery processes should therefore be integrated in all loan agreements and debentures to minimise litigation which is inimical to business development.

b. The culture of Nigeria in terms of political instability, corruption and poverty necessitates stricter and faster enforcement of the laws in this arena to reduce humongous losses to the business community and the economy in general.

c. For the courts to work more effectively in loans adjudication, automation of court proceedings and provision of ICT gadgets for judges are needed to support the framework.

d. Nigerian laws are silent over group insolvency proceedings. Consequently, companies in a group may voluntarily decide to appoint one insolvency officeholder to save costs and avoid multiplicity of processes. However, under the law, each entity in a group must be treated as a distinct entity for the purposes of insolvency proceedings. This will however continue to increase cost of insolvency proceedings. Thus, where insolvency proceedings are instituted against companies in a group, the actions must be separate and unconsolidated actions.

e. There is a plethora of legislations and institutions on recovery of bank loans in Nigeria, some conflicting and repetitive. Although the underlying objectives remain the sustenance of funds for the national economy through protection of contractual rights of capital suppliers, judicial intervention should be more dynamic and constructive as our legislative draftsmen still need skills updating in the unique sphere of recovery of bank loans applying purposive principle of interpretation of laws.

References

1. CBN Annual Report 1995
2. CBN Annual Report 2010
3. FBA Act
4. NDIC Annual Report 2017
5. Companies and Allied Matters Act CAP. C20. L.F.N. 2004 (CAMA)
6. S. 401 – 531 CAMA
7. Section 24 of the Asset Management Corporation of Nigeria Act, 2010 (AMCON Act).
8. (1911) AD 141, Par. 166
9. Section 417 CAMA
10. NDIC VS Alhaji Mohammed &Ors(2018) LPERL-44744 9 CA.
11. S. 41 BOFIA
12. S. 41, Banks and Other Financial Institutions Act. CAP B3. LFN, 2004
13. NDIC (Liquidator of all States Trust Bank) vs Plateau State Govt. &Ors, 1998, FHC/J/CS/75/204.
14. Bilante International Ltd vs NDIC, 2011 15 NWLR (pt. 1270) 407 @428-429, paragraph E-b
15. S. 408 CAMA
16. S. 251 of the Constitution of Federal Republic of Nigeria
17. The Schedule is headed ‘Procedure for the Recovery of Debts at the Federal High Court’. This operates as the Rules of Procedure for Proceedings conducted under the Failed Banks Act.
18. S. 44 NDIC Act 2006
19. Paragraph 5(2)
20. Paragraph 10(1) FBA
21. Paragraph 17 of the Schedule
22. Section 8(1) Failed Banks Act
23. Section 8(3), FBA
24. SECTION 9(1), FBA
25. SECTION 9(2) FBA
26. (2018) LPELR-43795 (CA)
27. (1914) 3 KB 98
28. (1999) lpelr-6673(CA)
29. The NDIC Act, CAP N102 L.F.N. 2006
30. Federal Mortgage Bank of Nigeria v NDIC (Liquidator of United Commercial Bank Limited) in Liquidation, (1999) 2NWLR (Pt. 591) 3333.
31. S. 5 Asset Management Corporation Act, 2010 (AMCON Act).
32. Section 40 (1) of the Nigerian Deposit Insurance Corporation Act (NDIC Act) CAP. N102 L.F.N. 2004
33. S. 37 NDIC Act
34. S. 39 NDIC Act
35. S. 5, AMCON Act.
36. See Federal Mortgage Bank of Nigeria v NDIC (1999) 2NWLR (Pt.591) 333.
37. Federal Mortgage Bank of Nigeria v NDIC (1999) 2NWLR (Pt.591) 333.
38. Nigerian Deposit Insurance Act CAP. N102 L.F.N. 2004
39. section 24 of the Act
40. AMCON (Amendment Act), 2015
41. Section 61 AMCON (Amendment Act)
42. Section 40 (2) of the Nigeria Deposit Insurance Act CAP. N102 L.F.N. 2004 and Section 40 of the Banks and Other Financial Institute Act 2007
43. NDIC vsAlhajiNasidi Mohammed &Ors.(2018) LPELR-44744 (CA).
44. Federal Mortgage Bank of Nigeria v NDIC (Liquidator of United Commercial Bank Limited) in Liquidation (1999) 2 NWLR Pt.591, 1999 21 Law SC. 66, 1997.
45. Onwuchekwavs NDIC (2002) 5NWLR (PT. 760) 371 AT 393, Agro Allied Development Ent.Ltd v MV Northern Reefer &Ors.(2009) 12 NWLR (Pt. 1155) 255 S.C.
46. Section 36 BOFIA Act
47. Section 41 (1) & (2) BOFIA Act
48. Federal High Court, 2017, Hon. Justice Ibrahim Buba (Punch Newspaper, 20th March, 2017).
49. Cap 301 LFN 2004
50. First Bank of Nigeria Plc. v Nigerian Deposit Insurance Corporation (Federal High Court) Punch Newspaper, 28/7/17.
51. S. 279(1) CAMA
52. S. 280 CAMA
53. Section 40 CAMA
54. Section. 650 CAMA
55. NDIC Act
56. West Mercia Safetywear v Dodd , HLC Environmental projects v Carvalho. In Brady v Brady.(1987) 3 BCC 535 at 552
57. Section 504 CAMA
58. Section. 506.
59. Section. 505 CAMA
60. Section. 409 CAMA
61. Section. 409 CAMA
62. Section. 494 CAMA
63. Section 54 BOFIA & Section 20&21 NDIC Act
64. CAMA, BOFIA and NDIC Act
65. Section. 506 CAMA
66. Section. 279 (9) CAMA and section 49&50 BOFIA
67. Salomon v Salomon (1897) 1 AC 22.
68. FDB Financial Services Ltd. v. Adesola (2000)8 NWLR (Pt 668) 171 at 83H-184A.
69. Adams v Cape Industries Plc. (1990) BCLC 479 at 513.Bank of Tokyo v Karoon (1987) AC 45 at 64F.
70. (1979) IWLR 1198
71. Honeywell Flour Mills Plc (FHC/L/CP/1571/2015) and (FHC/L/CP/1689/2015), Soloam Global Services Ltd (FHC/L/CP/1572/2015), Anchorage Leisures Ltd (FHC/L/CP/1570/2015) and Honeywell (FHC/L/CP/1571/2015).