



Understanding Winding-Up in Nigeria: Frequently Asked Questions (FAQs)

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Introduction

Companies are formed for many reasons, with the intent that they flourish, be profitable and by staying as a going concern, able to generate returns on investment for the shareholders, continue to be an employer of labour, taxpayer to government, responsible corporate citizen contributing to worthy causes, and service provider meeting the needs of its customers. However at some point, due to varying circumstances, it might become necessary to terminate the life of a company, dissolving its business via winding-up. Winding-up could become necessary when a business is no longer making profit; when competition is wearing down a business; the owner is no longer interested in operating the business; or arising from the business' inability to pay its debts, etc.

Winding-up in Nigeria is primarily governed by the *Companies and Allied Matters Act Cap. C20, Laws of the Federation of Nigeria (LFN) 2004 (CAMA)*, *Winding-Up Rules 2001 (WR)* and subsidiary legislation. Sectoral requirements may also apply, for example pursuant to provisions of *Banks and Other Financial Institutions Act Cap. B3, LFN 2004 (BOFIA)* and the *Insurance Act, Cap. L14, LFN 2004 (IA)*. This article tries to answer some FAQs on winding-up in Nigeria.

WE WOULD LIKE TO WIND-UP OUR COMPANY, WHERE DO WE START FROM?

The mode of consummating winding-up is dependent on the party initiating it - the company's creditors or the company itself (i.e. its shareholders/directors). **Section 401 CAMA** provides for the various ways a company can be wound up: By Order of Court; Voluntary Winding-up; and Winding-up by Supervision of Court.

By Order of Court

Winding-up by Order of Court¹ generally occurs pursuant to a petition for winding-up presented for any of the following reasons: inability to pay its debts; failure to hold statutory meetings or deliver statutory reports to the Corporate Affairs Commission (CAC); number of members falling below the statutory minimum of two (2); or the Court believes it is just and equitable that the company be wound up – **section 408 CAMA**. According to **sections 403, 408 and 410 CAMA**,



¹The Court with jurisdiction in this matter is the Federal High Court (FHC). This is by provisions of **section 693 CAMA** which defines Court as the FHC; and the powers granted by **section 251(1)(e), Constitution of the Federal Republic of Nigeria 1999 as amended** upon the FHC, to handle all matters arising from the operations of the **CAMA**.



creditors, official receivers, contributories, trustees in bankruptcy, personal representatives, or the CAC (on approval of the Attorney General of the Federation), are eligible to petition the Court for winding-up of relevant companies.

This mode of winding-up is deemed to commence at the time the winding up petition is presented to the Court and not when the winding-up order is made, except in respect of a company which has previously passed a resolution for voluntary winding-up - **section 415 CAMA**. Also, if the assets of a company is in jeopardy, the Court on application may appoint a provisional liquidator, before the making of a winding-up order - **section 422 CAMA**.

In the case of an insurance company, **section 32 IA** provides that liquidation of Insurers can only be done on the petition of either fifty (50) policyholders or of the National Insurance Commission (NAICOM), the industry regulator; and **section 33 IA** prohibits the voluntary winding-up of insurance businesses, except for the purpose of effecting an amalgamation, transfer or acquisition. Whilst in the case of a bank, **section 12(b) BOFIA** provides that Central Bank of Nigeria (CBN) may, with the approval of the Board of Directors and by notice published in the Gazette, revoke any licence granted under the Act, if a bank goes into liquidation or is wound up or otherwise dissolved.²

Voluntary Winding-Up

Voluntary winding-up is a self-imposed liquidation process approved by the shareholders to terminate the life of a company. It can be effected either as a Members Voluntary Winding-up or Creditors Voluntary Winding-up:

I. Members Voluntary Winding-up

Members of a solvent company by a special resolution may decide to end the business and realise the assets of the business, in order to distribute the proceeds amongst members. **Section 462 CAMA** provides that, the directors may *within five (5) weeks of passing the resolution for winding-up* submit to the CAC for registration, a statutory declaration of solvency, stating that the business is solvent and can repay its creditors within twelve (12) months.

ii. Creditors Voluntary Winding-up

The directors of an insolvent company voluntarily decide to liquidate its assets in order to pay its debts. It usually arises when the liabilities of a company exceed its assets and it is unable to pay its creditors, thus it cannot carry on its business.³ Here the company's creditors nominate a person to be a liquidator on behalf of the company.

Winding-up by Supervision of the Court

This is when a company passes a resolution to voluntarily wind-up itself and petitions the Court to supervise the winding-up; or a petition for the continuance of a voluntary

winding-up subject to the supervision of the Court on terms the Court may seem just.

WHAT IS THE ROLE OF THE LIQUIDATOR IN A WINDING-UP PROCESS?

A liquidator is appointed either by the shareholders, or by creditors of a company through an application to the Court. He is appointed to run the affairs of a company being wound-up, by ensuring all company's debts are settled (if any) and surplus proceeds distributed accordingly. In **CBCL (Nig) Ltd v. Okoli**,⁴ the Court held that “the legal effect of appointing a liquidator in accordance with CAMA is that the liquidator assumes the right to act as an agent of the company for the purposes of dealing with the assets and liabilities in receivership. The liquidator can also bring or defend, an action on behalf of the company yet the company does not lose its legal personality or title to its goods.”

In addition, **section 425 CAMA** provides that “a liquidator is responsible to bring or defend any legal proceeding in the name and on behalf of a company; appoint a legal practitioner or any relevant professional to assist in the performance of its duties; run the business in so far as its benefits the winding-up; and meet up with creditors and potential/ future claims owners again the company for compromise or arrangements that may render the company liable amongst many others.”

WHAT IS THE LEGAL STATUS OF A COMPANY BEING WOUND UP?

A company being wound up maintains its legal personality, and only loses its legal personality when fully wound up – **CBCL (Nig) Ltd v. Okoli**.⁵ Thus, initiating a winding-up process or appointing a liquidator does not in itself result in the death of the company.

In **Progress Bank (Nig) Plc v. O.K. Contact Point Ltd**,⁶ the Respondent wrongfully presumed that a company under liquidation is dead. There was also nothing before the Court of Appeal (CA) to show that the Applicant had been dissolved. The CA held that by **section 417 CAMA**, actions or proceedings against a wound-up company, where a liquidator has been appointed, is maintainable with the leave of court. Thus a company in liquidation can sue and maintain

² **Section 7(1) BOFIA** prohibits the restructure, reorganisation, merger or disposal of interests in banks without the prior consent of the Governor of the CBN

³ The directors must prepare a statement of affairs to be reviewed at the creditors meeting.

⁴ [2009] 5 NWLR (Pt. 1135) 446 at 461, Paras F-G

⁵ *Supra*

⁶ [2008] 1 NWLR (Pt. 1069) 514 at 529 Paras D-G

an action in court but no action can be brought against it, except with leave of court.

A party intending to commence an action against a company for which a Provisional Liquidator has been appointed or a winding-up order made, must seek and obtain prior leave of court.

WHAT IS THE TIME FRAME FOR THE COMPLETION OF A LIQUIDATION PROCESS?

There is no single answer to this question, it usually depends on how long it takes a liquidator to realise assets and agree members and creditors' claims. Circumstances of the subject company could affect the timelines; for example if the liquidation process itself is being challenged - *Mann v. Goldstein*.⁷ However it is usually completed between twelve (12) to twenty-four (24) months.

WHAT ARE THE COST IMPLICATIONS IN A LIQUIDATION PROCESS?

The cost implication of a liquidation process depend on the liquidation procedure, the complexity, size and the company's circumstance. For instance, an insolvent company, would require the cost of liquidation low in order to meet up with the creditors or members' entitlements. When a company goes into liquidation, the cost of the proceedings are paid out of sums received from the sale of assets. Therefore, creditors, who hope to recover some of their debts out of the assets, show direct interest in the level of costs. Nonetheless, a Court Ordered Winding Up can be considered most expensive, because in addition to a liquidator's remuneration and disbursements, counsel fees and court costs also have to be paid and the process is longer.

Also, in the performance of a liquidator's duty he might require the help of other professionals - *section 425(c) CAMA*, thus increasing costs. Examples of such professionals include a legal counsel in defending or instituting legal actions on behalf a company; Auctioneer, to auction the assets of the company on behalf of the liquidators; Valuers, to value the assets of the company for sale etc.

Section 422(6) CAMA provides that where a person other than the official receiver is appointed a liquidator, the remuneration of a liquidator will be by way of percentage or otherwise as directed by the court.⁸ *Rule 142 WR*, elaborates further by providing that unless the Court otherwise orders, the committee of inspection or creditors shall fix the remuneration of a liquidator and it shall be on a commission or percentage basis.⁹ Thus, the likely cost of liquidation process is not certain, as it is dependent on certain factors to become ascertainable.

WHAT EFFECTS DO LIQUIDATION PROCEDURES HAVE ON EXISTING CONTRACTS?

Upon the appointment of a liquidator, existing contracts will not automatically terminate, unless otherwise expressly provided. Thus termination of contract provisions, retention of title, set-off, deemed assignment/transfer, deemed trust and other pre-agreed clauses will remain valid irrespective of liquidation. However, a liquidator may apply to Court to disclaim onerous or unprofitable contracts of the company. Nonetheless, upon the completion of the winding-up process, all its contracts are terminated, mostly without prejudice to the liabilities incurred before termination.

WHAT IS THE EXTENT OF DIRECTORS' POWERS IN A LIQUIDATION PROCESS?

In accordance with *section 464 CAMA*, when a liquidator is appointed, all powers of the directors will cease, except the continuance is sanctioned at the general meeting or by the liquidator.¹⁰ In *Adamu Gbedu v. Joseph Itie & Ors*¹¹ the CA held that "...the effect of appointing a liquidator under section 422(9) of the Act upon winding-up of a company is the divestiture of the powers of its board of directors and the investiture of such powers on the liquidator. When this happens, the board is said to be *functus officio*..."

WHAT IS THE DIFFERENCE BETWEEN LIQUIDATION AND RECEIVERSHIP?

Receivership is the appointment of a receiver by a secured creditor, usually a bank, to manage a company in the interest of the secured creditor. Whereas, Liquidation is a process where the affairs of a company are wound up and a liquidator appointed to manage and sell off the assets of the company in order to pay off the creditors and, if anything is left, the shareholders, and then dissolve the company.

WHAT ARE THE CHALLENGES FACED IN THE LIQUIDATION OF A COMPANY?

One of the most pressing challenges faced in the liquidation process is laying off, of



⁷ [1968] 1 WLR 1091

⁸ If more than one person is appointed a liquidator, their remuneration shall be distributed among them, in such proportions as the court directs.

⁹ One part of the money shall be payable in the amount realised after necessary deductions and the other part on the amount distributed in dividend.

¹⁰ Section 464(2) CAMA

¹¹ [2010] 10 NWLR (Pt. 1202) at 260, Paras C-F

employees. Some companies find it difficult to fully discharge payments of severance packages that becomes due upon termination. Another likely challenge is selling the assets of a company: potential buyers will want to pay less than the market value of the property, once they are aware of the circumstances of the company and that it must sell its assets. In addition, creditors are potentially exposed to losses because of the challenges of having to sell the company's assets at the earliest possible time.

IF WE CHOOSE NOT TO WIND-UP WHAT OTHER OPTIONS DO WE HAVE?

A company facing financial difficulty, does not necessarily need to resort to winding-up, as other alternatives to winding-up include: Mergers & Takeover; Striking off for being defunct; and Restructuring a company. However the option to be pursued could be function of the circumstances of the company, interest of third parties, market conditions, economic outlook etc.

Mergers & Takeover

A merger simply means the amalgamation or the combination of two or more companies, to create a new organization or absorption of the weaker company. It involves the consolidation of the undertakings or any part of the undertakings of companies – **section 119 Investments and Securities Act, Cap. 124 LFN, 2004**. Merger can be classified under Large, Medium and Intermediate.¹² Under merger, there is contemplation of transfer of properties and liabilities amongst the companies; however the rights and liabilities are not transferable except as specifically provided for. On its part, takeover is the acquisition of sufficient share in another company to gain acquiring control over the other company.

Nonetheless, Merger or Takeover as a viable option to winding-up may only be possible, if a strong and financially viable company, is willing to merge with, or acquire the company.

Restructuring a Company

This is the reorganization of ownership, operational etc. of a company in order to make it more profitable, or better organized for its present need. The reorganisation of a company usually affects a company's business practices, decision makers,

business model etc. The various modes of reorganisation include Arrangement & Compromise, Management Buy-In, Management Buy-Out, Arrangement on Sale, Recapitalisation etc.

Corporate restructuring can only be possible if the creditors, members or investment companies still believe in the company and are willing to reorganise the business operations of the company, to make the company function better.

Striking Off for Being Dormant

This is a process of striking off a company's name from the Companies Register for being defunct. This usually occurs where the Commission believes that a company is no longer in operation; or where a company is being wound up but the Commission believes that the liquidator is not acting or a company has been fully wound-up but the returns have not been made to the Commission. In either case, the Commission is expected to send notices in accordance with **section 525 CAMA**¹³ before striking off a company. However, any party aggrieved¹⁴ by the striking off can apply by petition to the court within twenty (20) years of the striking off for a restoration of the company to the Register¹⁵-**section 525(6) CAMA**.

This option may seem more attractive as people can simply allow their companies go dormant in the hope that the Commission will strike off the company after a period of time. In addition it is cheap, saves time on liquidation process, gives room for restoration etc. However this resort can only be possible for companies that are not in debt. As matter of strategy, and to avoid reputational risk, multinationals intending to have the names of their subsidiary (NigerianCo) struck off the register, will typically change the name of NigerianCo to a neutral name ahead of allowing it to fall into dormancy. This is because the Commission is required to publish the names of such companies (thereby giving shareholders/directors the opportunity to regularize if they so wish) before striking them off- **525(3) CAMA**.



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¹² By the **Securities and Exchange Commission (SEC) Rules and Regulations 2013, Rule 427** provides the threshold for a Small Merger as below N1 billion; Medium Merger between N1 billion and N5 billion; and Large Merger above N5 million, of either combined assets or turnover of the merging companies.

¹³ CAC shall send two (2) notices inquiring whether the company is carrying on business or in operation; then a publication in the Gazette notifying the company of a strike off; and in absence of a response after the forgoing, the company's name will be struck off the register.

¹⁴ The court must be satisfied that the applicant as a right to bring the petition.

¹⁵ The court can either order a restoration or refusal and not a penalty as a condition for restoration.