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TEMPLARS ThoughtLab

Making a Choice as to the Mode of Winding Up

Introduction

1. There are different modes of winding up under Nigerian insolvency law. Where a company intends to wind up, it can do so through any of the modes. Making a choice as to what mode of winding up to deploy is not as simple as it may seem. Each mode has significant legal implications and comparative advantages. A company that intends to embark on a winding up therefore must carefully consider these legal implications to choose the mode that best suits its circumstances.
2. There are three broad modes of winding up under the Companies and Allied Matters Act, 2020, ("**the CAMA**") which is the law that governs winding up of companies in Nigeria. These are: voluntary winding up, winding up by the court or compulsory winding up and winding up under the supervision of the court. This article will start by explaining what each of these modes entails and then proceed to discuss their legal effects. However, winding up by the court and winding up under the supervision of the court will be considered together under legal effects as their legal effects are the same. An order for a winding up subject to the court's supervision operates for all purposes as an order for winding up by the court.¹

Modes of winding up explained:

Meaning of voluntary winding up:

3. Voluntary winding up takes place when a company passes a special resolution to wind up on its own volition and by itself through its appointed liquidator. Voluntary winding up may also occur where the period, if any, fixed for the duration of the company by the company's articles expires, or the event, if any, occurs, which is provided in the articles that on its occurrence the company shall be dissolved, and the company has, in general meeting, passed a resolution requiring the company to be wound up voluntarily.²

¹ Section 653(2) of the CAMA

² Section 620 of the CAMA

4. This mode of winding up commences at the time of passing the resolution.³ Voluntary winding up can take one of two ways. The first is when the members of a company pass a resolution for the winding up of that company and this is known as a members' voluntary winding up. Voluntary winding up can also occur where the creditors of a company which is unable to pay its debts, pass a resolution that the company should be wound up. This is known as a creditors' voluntary winding up.
5. A special feature of voluntary winding up is the directors' statutory declaration of solvency. In this regard, where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors, may at a meeting of the directors make a declaration that the company is solvent. The declaration will state that the directors have made a full inquiry into the affairs of the company and are of the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of the winding up. For the declaration to be effective, it must be made within the five weeks immediately preceding the date of the passing of the resolution for winding up of the company. In addition, it must be delivered to the Corporate Affairs Commission, together with a statement of the company's assets and liabilities as at the latest practicable date before making the declaration for registration. This should be done not later than 15 days after passing the resolution.⁴
6. A voluntary winding up where a declaration of solvency has been made and delivered in the prescribed manner is referred to as "a members' voluntary winding up" and a voluntary winding up where a declaration has not been made and delivered is referred to as "a creditors' voluntary winding up".⁵ The latter mode of voluntary winding up rarely happens.
7. While a company may choose to go for members' voluntary winding up, it cannot choose creditor's voluntary winding up. Creditors' voluntary winding up can only be embarked on and driven by creditors.⁶ For this reason, creditors' voluntary winding up is not discussed in detail in this article. The term "voluntary winding up" as used in this article will therefore be used solely as it relates to members' voluntarily winding up.
8. The court generally does not play a role in a voluntary winding up, save where it is converted to winding up subject to the supervision of the court, or where the liquidator, a creditor or contributory makes an application to the court for direction in relation to any matter in the winding up process.⁷

Winding up by the court:

9. Winding up by the court, otherwise known as compulsory winding up, commences⁸ where an authorized person presents a petition to the court to wind up a company. The petition can be made (either jointly or separately) by the company or a director of the company, a creditor, the official receiver, a trustee in bankruptcy to, or a personal representative of, a creditor or contributory, the Corporate Affairs Commission under section 366 of the CAMA or a receiver, if authorised by the instrument under which he was appointed.⁹

10. A company may be wound up by the court where:
 - (a) the company has by special resolution resolved that the company be wound up by the court;
 - (b) default is made in delivering the statutory report to the Corporate Affairs Commission or in holding the statutory meeting;
 - (c) the number of members is reduced below two in the case of companies with more than one shareholder;
 - (d) the company is unable to pay its debts;
 - (e) the condition precedent to the operation of the company has ceased to exist; or
 - (f) the court is of opinion that it is just and equitable that the company should be wound up.¹⁰

Winding up subject to the supervision of the court:

11. Winding up subject to the supervision of the court, as the name implies, is a winding up process which is subject to the court's supervision and not the freewill of the members or creditors of a company.
12. The procedure for winding up under the supervision of the court is as follows:
 - i. the company passes a special resolution for voluntary winding up;
 - ii. subsequently, a petition is brought to court for the continuance of the winding up subject to the supervision of the court;
 - iii. where the court is of the opinion that the winding up should continue, the petition is deemed to be a petition for winding up by the court;
 - iv. upon the grant of the winding up order, the court grants an order on such terms and conditions as the court thinks just. These terms and conditions will form the basis for the administration of the winding up proceedings.
13. Where any of the conditions stated above applies and the court makes an order directing that a voluntary winding up should continue under the supervision of the court, the order will have the same effect as an order for winding up by the court. One of such effects is that all pending actions against the company will be automatically stayed and may only be continued with the permission of the liquidation court and the assets of the company cannot be subject to any attachment or execution.¹¹

³ Section 578(1) of the CAMA

⁴ Section 625(1)(2) of the CAMA

⁵ Section 625(4) of the CAMA

⁶ See sections 635 - 641, 556 (4) (5) and 664 (1) of the CAMA

⁷ Section 646 of the CAMA

⁸ Section 578(2) of the CAMA

⁹ Section 573(1) of the CAMA

¹⁰ Section 571 of the CAMA

¹¹ Section 580 of the CAMA

Legal effects of voluntary winding up and winding up by the court or subject to the supervision of the court:

(i) Control of the liquidator and the liquidation process:

14. By the nature of a voluntary winding up proceeding, the liquidator has expansive powers to make any decision he deems fit provided that he acts within the provisions of the law. The CAMA generally gives wide powers to the liquidator which will enable him to perform his duties and carry out the liquidation of the company as may be necessary.¹² Among other things, the liquidator can appoint anyone to assist him in the liquidation process, compromise or make any necessary arrangements with any class of creditors,¹³ manage the business of the company as he deems fit, adjust the rights of contributories as he deems fit, bring or defend any action in the name of the company.
15. In comparison, in a winding up by the court or under the court's supervision, on making the winding up order or an order for the liquidation to continue subject to supervision, the court may impose restrictions on the powers of the liquidator and any other terms it deems fit for the conduct of the winding up. The authority of the liquidator to act is therefore circumscribed. In a winding up by the court, the court indirectly drives the entire process despite the presence of an appointed liquidator.¹⁴ Typically, in a winding up by the court, the liquidator is required to report the progress of the liquidation to the court.
16. With respect to winding up subject to supervision, the court has the inherent power to:
 - i. appoint an additional liquidator to act together with the liquidator appointed by the company;
 - ii. remove the liquidator appointed by the company or the liquidator appointed by the court itself and appoint another;
 - iii. allow creditors, contributories, or others to apply to the court for orders or directions, and generally on such terms and conditions, as the court deems fit.¹⁵
17. The appointment of additional liquidators or replacement of the existing liquidator may alter the liquidation process and may involve more liquidation costs than as originally envisaged by the company. Also, the administration of the company is likely to be affected by the constant regulation of the liquidator's activities by the court and the uncertainty as to which of the actions and decisions of the liquidator are likely to be ratified or set aside by the court. More so, creditors are more likely to challenge the decisions of the liquidator more often during winding up by the court. This often leads to protracted applications to court which, in turn, elongate the liquidation process.

¹² Section 627 of the CAMA

¹³ This is subject, however, to the sanction of the company by a special resolution or the committee of inspection in a creditor's voluntary winding up. See section 644(1) of the CAMA.

¹⁴ Please see section 651 of the Companies and Allied Matters Act 2020

¹⁵ Please see section 649 of the Companies and Allied Matters Act 2020.

18. In comparison, although the court may, on the application of a creditor, a member of the company or the liquidator make specific orders for direction in a voluntary liquidation,¹⁶ the court generally does not interfere with the decisions and actions of the liquidator in a voluntary winding up.
19. In addition, the Corporate Affairs Commission has a duty to take cognisance of the conduct of liquidators of companies which are being wound up by the court and to take appropriate steps where a liquidator does not faithfully perform his duties. The Commission may, at any time, require the liquidator to answer any inquiry in relation to the winding up in which he is engaged and if the Commission deems fit, it may apply to the court to examine the liquidator or any other person on oath concerning the winding up.¹⁷
20. This level of supervision does not apply to a liquidator in a voluntary winding-up. Oftentimes, the liquidator conducts the winding up from start to finish without any involvement by, or recourse to, the court. Therefore, where what it is intended is a discrete and private winding up process, a company should opt for a voluntary winding up.

(ii) **Protection of assets of the company after commencement of winding up:**

21. Sections 576 and 577 of the CAMA provide:

In a winding-up by the Court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up shall, unless the Court otherwise orders, be void.

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 is void.

22. Section 576 of the CAMA reproduced above places a bar on the disposition of the assets of a company being wound up by the court or the sale of its shares or alteration of its membership subject, however, to a contrary directive by the court. Section 577 prohibits, and renders void, attachment or execution against any assets of a company being wound up by the court or under supervision by the court. This prohibition is absolute and cannot be cured by leave of the court as in the case of disposition of assets. These provisions have the effect of shielding and protecting the assets of a company being wound up by the court from interference by external forces.
23. In comparison, there are no equivalent provisions in respect of voluntary winding up. The much protection afforded the assets of a company undergoing voluntary winding up is as provided in section 624 of the CAMA. This section prohibits and voids the transfer of shares and the alteration in the status of the members of a company being wound up voluntarily where such transfer or alteration is done without the sanction of the liquidator. Clearly, this provision only relates to transfer of shares and alteration of membership of the company and says nothing about the disposition of assets of the company being wound

¹⁶ Section 646 of the CAMA

¹⁷ Section 595(1)(2) of the CAMA

up voluntarily or the attachment or execution against its assets. It necessarily follows that the assets of a company undergoing voluntary winding up can be disposed of and may be subject to attachment, sequestration or execution of a judgment notwithstanding the pendency of the winding up.

24. Relatedly, in a members' voluntary winding-up, from the date of appointment of a receiver or manager, the powers of a liquidator to deal with the property or undertaking over which he is appointed ceases unless the receiver or manager is discharged, or the security is realised. In the case of a creditors' voluntary winding up or where the property concerned is in the hands of an officer of the court (such as a liquidator appointed by the court in a winding up by the court), on the appointment of a receiver or manager, the liquidator or officer shall not be bound to relinquish control of such property to the receiver or manager except under the order of the court.¹⁸ Put differently, a receiver or manager may still be appointed over the assets of a company undergoing members' voluntary winding up. And the powers of a receiver manager trump the powers of the liquidator in relation to the assets of the company over which the receiver is appointed.
25. In comparison, the assets held by a liquidator appointed by the court under a compulsory winding up cannot be relinquished to a receiver or manager appointed over the same assets save where the court otherwise orders or where such as an asset is subject to a validly created and perfected charge, and in which case the asset would be outside the insolvency estate and outside the grip of the liquidator.¹⁹
26. It is clear, therefore, that while the law protects and shields the assets of a company being wound up by the court from external interference, the assets of a company undergoing voluntary winding up may still be subject to execution, attachment or receivership during the course of winding up. It is important to bear this in mind when deciding on what mode of winding up to embark on.

(iii) Court proceedings involving a company under winding up:

27. Section 580 of the CAMA provides that where the court makes a winding up order or a provisional liquidator is appointed in a winding up by the court, no action or proceeding shall be proceeded with or commenced against the company except by leave of the liquidation court given on such terms as the court may impose. The effect of this is that all ongoing court proceedings against a company undergoing winding up by the court are automatically stayed by operation of law upon the making of a winding up order or the appointment of a provisional liquidator.²⁰ This may, in fact, signal the end of many cases against the company as some litigants may not be willing to go through the rigour of applying for and obtaining the leave of the liquidation court. And where such an application is made and leave is refused by the liquidation court, that may also be the end of the case except where the applicant chooses to appeal the refusal.
28. In comparison, there are no equivalent provisions in relation to voluntary winding up. The legal effect of this is that all ongoing cases against the company being wound up voluntarily may be proceeded with notwithstanding the pendency of

¹⁸ Section 556(4)(5) of the CAMA

¹⁹ Section 577 of the CAMA

²⁰ Section 580 of the CAMA

the winding up. Depending on the circumstances of each case, the liquidator may have to prosecute or defend the cases until conclusion before the company may be finally dissolved.

(i) Final dissolution:

29. In a winding by the court or under supervision, the final dissolution of the company is by the order of the court,²¹ the implication of which is that the court may refuse to make the order until certain conditions it may deem fit are fulfilled. In a voluntary winding up, however, no order of court is required to finally dissolve the company. What is required is merely for the liquidator to file the liquidation account and returns of the last general meeting of the company with the Corporate Affairs Commission which the Commission will register in its books. The company is deemed dissolved three months following the date of the registration.²²

(ii) Timing:

30. From experience, a voluntary winding up usually takes between six and twelve months to conclude, depending on the size of the company and the volume of claims to be settled by the liquidator. This would also depend on the number and nature of pending suits against the company as discussed in the preceding paragraph.
31. In comparison, a winding up by the court or subject to the court's supervision will usually take longer and may take up to sixteen months or even years to conclude due to the constant reports to be made by the liquidator to the court, and the regulation of the liquidator's activities by the Corporate Affairs Commission. Owing to the busy schedule of a typical liquidation court, it usually takes time before any application for direction or report is considered by the court and the needed direction or sanction given.

(iii) Likelihood of intervention by creditors with pending cases:

32. In a voluntary winding up, creditors with pending cases are less likely to approach the court for an order to stop or stay the winding up process than they would in a winding up by the court, especially where the company is solvent and there is a declaration by the directors to that effect. This is because creditors may proceed with any claims they have in any court against the company while the winding up process is ongoing, and the liquidator will be required to defend such claims in those courts on behalf of the company. Oftentimes, the liquidator is able to resolve the cases amicably with the creditors with some form of arrangement or compromise in a private manner. In a court supervised winding up, however, any case against the company is stayed by operation of law and can only be continued with the leave of the liquidation court.
33. Experience has shown that the moment creditors get wind of the fact that an order has been made by the liquidation court which has the effect of staying pending cases, they usually become apprehensive regarding the uncertainty surrounding their cases. As a result, they are likely to take every conceivable step to stall the winding up process. This could be by way of flooding the court with

²¹ Section 617(1) of the CAMA

²² Section 631 of the CAMA

numerous applications, not just to seek permission to continue with the cases they have against the company in other courts, but also to stay the winding up proceedings, usually on the basis that it was commenced in bad faith against their interest and to overreach their pending cases. Where the court refuses their application, they may appeal against the refusal and will almost always apply for an order to stay the winding up proceedings pending the determination of their appeal.

34. With many such applications from different creditors in place, the winding up proceedings may be stalled and may take a long time, and even several years, to conclude.

Conclusion

35. From the highlights above, it is clear that there is no mode of winding up that is foolproof or devoid of challenges. Each has its own legal effects and comparative advantages. For example, while a voluntary winding up affords a company a wide latitude of privacy and control of the liquidation process, there are really no provisions of the law that shield the company and its assets from external interference by way of lawsuits, receivership, judicial attachment or execution during the course of winding up. And while a company undergoing winding up by the court may be shielded from lawsuits, receivership, or the levying of execution on its assets, it is equally prone to challenge by creditors especially those with pending cases in court against the company which are automatically stayed by the winding up order.

It is therefore important for a company that intends to embark on a winding up to carefully consider the legal effects of each of the modes of winding up as discussed above to apprise itself of what it may be up against during the course of winding up before arriving at a decision.