

THE ROLE OF DEBT RECOVERY AGENTS AND SOLICITORS IN ASSET REALIZATION

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Abstract

Every lender will have to deal with an insolvency or dissolution of one of its borrowers. Therefore when a business that has debts becomes insolvent, it's the responsibility of the insolvency practitioner to identify and assess the company's assets and release funds through these assets to pay the business' creditors because recovering funds with which to pay creditors is of huge importance to those who are owed money. This paper attempts to provide an exposition on the role of Debt Recovery Agents and Solicitors in asset realization. It adopts the doctrinal research methodology.

1.0 Introduction

Debt recovery is a significant aspect of financial services in Nigeria. The Nigerian financial industry can be regarded as the backbone of the Nigerian economy, and finance providers play a crucial role in providing funding for economic development. In any case, with loaning comes the chance of default, and as a result, the quest to recuperate obligations emerges. Obligation recuperation laws in Nigeria are significant for fund suppliers as they give a lawful system for recouping extraordinary obligations. The issue of Debt

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recovery is immensely important in today's commercial setting in Nigeria. This is because, during situations of Insolvency or other debt circumstances, creditors consistently seek better and more effective means of recovering their debts. For the issue of insolvency, there exist a handful of steps which can be put in place to resolve this kind of problem, which would either make the company solvent again without resorting to an outright liquidation. In this paper, the author seeks to unravel the concept of Debt and its consequential recovery in Nigeria, while majorly examining the part various recovery agents and solicitors play in helping creditors realize their assets with the company or debtor.¹

2.0 Conceptual Clarifications

To succinctly address the issue of debt recovery *vis-à-vis* the role of debt recovery agents and solicitors in the quest for asset realization, it is important to define certain terms which are key to this research. These include Debt, Debt Recovery, Debt Recovery Agents, Debt Recovery Solicitors and Asset Realization.

2.1 Debt

Debt is an obligation or liability to pay a sum of money or other considerations owed to another party. It can arise from a loan, credit purchase, or unpaid bills. In *Re: Yabuku*,² the

¹ AA Adedigba, 'Debt Recovery Laws in Nigeria and How it affects Financial providers' (2022) *LivingSpring Solicitors* <<https://livingspring solicitors.com>> accessed 21 February 2024

² [1997] 5 NWLR (Pt. 506) 549 at 559.

court defined debt as: ‘a sum of money due by agreement or otherwise which can be enforced by law’.

A more elaborate definition of the term was issued by the Court in *Guaranty Trust Bank Plc v Innoson Nig. Ltd.*,³ where it held that Debt is ‘an obligation to pay a sum of money or other consideration arising from a transaction, whether such obligation is present or future, absolute or contingent, or whether such obligation is owed jointly or severally.’ From the foregoing, it can be deduced that the concept of debt can only exist in a Creditor and Debtor relationship. Debt could arise out of a loan, mortgage, or any other means by which a natural or artificial person incurs liability which must be serviced or redeemed.⁴

Debts are in various types such as active debts which are payable in the lifetime of the debtor, convertible debt, bad debt, fraudulent debt etc. However the type that creates anxiety to most creditors and debt collectors are bad debts. These are debts which are either never collected, or the interest and the principal sum has its payment past due and remains uncollected or settled. Failure to comply by the due date may occur for many reasons such as: illness, death, bad customer/debtors relationship etc. It is important to state at this point that loans should be backed by a form of collateral.⁵

³ [2018] 2 NWLR (Pt. 1601) 1.

⁴ Adedigba (n 1).

⁵ V Chioma, ‘The Intricacies of Debt Recovery in Nigeria’ (25th February, 2020) <<https://www.michaelmaschambers.com/insight-page.php?i=7&a=the-intricacies-of-debt-recovery-in-nigeria>> accessed 20 February, 2024.

2.2 Debt Recovery

Debt recovery is the process of collecting outstanding debts that are owed to a creditor. It involves taking legal action or using other means to recover the money owed. It can also be defined as the process of recovering debts owed by a debtor to a creditor, either through amicable settlement or legal means. It involves a range of activities, such as contacting the debtor, negotiating a repayment plan, and taking legal action if necessary. In *Continental Merchant Bank Plc v Azikiwe*,⁶ the court defined debt recovery as: ‘the process of enforcing a legal obligation to pay a debt owed by one party to another’. Consequently, Debt recovery involves the process of making individuals or companies pay the sum that they owe to others when they have not paid back the debt at the agreed time. Debt recovery is crucial because it has a direct impact on your credit score.

2.3 Debt Recovery Agents

These are persons or agencies responsible for assisting or helping creditors recover their money or asset from debtors. Recovery agencies or the agents are people who pursue the debt owed by customers and businesses for banks or financial institutions. Most of these recovery agents act like officials to collect the dues from the customers for a fee or a percentage of the total money owed. These are generally third-party agencies as they are not part of the original contract. Though there are a handful of issues with debt recovery through

⁶ [2007] 10 NWLR (Pt. 1042) 168.

agents and their agencies, this has turned out to be one major way of recovering debt in Nigeria.⁷

Having examined the various classes of debt recovery agents under Companies and Allied Matters Act (CAMA) 2020,⁸ it is important to reiterate that there are various types of debt collection agencies who also assist private entities and individuals recover their debts from debtors in Nigeria. These classes include:

1. **First-Party Agencies:** These are usually subsidiaries or departments of a company that owns the debt; or the creditor. They are called first party because they are a part of the original contract.
2. **Third-Party Agencies:** A third-party agency is usually not a party to the original contract. The creditor assigns accounts directly to such an agency on a contingency-fee basis. The collection or third party agency makes money only if money is collected from the debtor (often known as a ‘No Collection - No Fee’ basis).
3. **Debt Buyers:** The debt buyer purchases accounts and debts from creditors for a percentage of the value of the debt and may subsequently pursue the debtor for the full balance due, including any interest that accrues under the terms of the original loan or credit agreement. This is most times the case when Asset

⁷ Single Debt, ‘What does a recovery agent do?’ (2023) <<https://singledebt.in/blog>> accessed 21 February 2024.

⁸ No. 3

Management Corporation of Nigeria (AMCON) is involved in a debt recovery situation. The agency purchases debts from banks or financial houses at a particular percentage which may have reduced the value of the debts, but bears some risks involved in the recovery of the debt.⁹

2.4 Debt Recovery Solicitors

Debt recovery solicitors are practitioners who are responsible for assisting, aiding and collecting debt for creditors who are mostly banks or financial institutions. To be a qualified debt recovery solicitor or practitioner, one must be in compliance with the requisite statutory provisions governing debt recovery for natural and artificial persons in Nigeria. It is important to note that Debt Recovery Solicitors could also qualify as Insolvency Practitioners in Nigeria. An insolvency Practitioner is a qualified professional entrusted with overseeing the intricate process of managing financial hardship and the insolvency of companies in accordance to CAMA 2020. An Insolvency Practitioner has the role of safeguarding the interest of the various stakeholders, ensuring fairness and preserving the integrity of debt proceedings. The qualifications of an Insolvency Practitioner are contained in Section 705 of CAMA 2020. It is also important to note that bodies which have been authorized by the Commission can validly act as Debt Recovery Solicitors or Insolvency Practitioners in Nigeria.¹⁰

⁹ Chioma (n 5).

¹⁰ CAMA 2020, s704 - 705.

2.5 Asset Realization

When a business that has debts becomes insolvent, it is the responsibility of the insolvency practitioner to identify and assess the company's assets, known as asset realization, and release funds through these assets to pay the business' creditors. Sometimes assets are not straightforward to locate or identify, but recovering funds with which to pay creditors is of huge importance to those who are owed money. However, the concept of asset realization involves the examination of the property or asset of a company or debtor in view of redeeming its debts or liabilities to a creditor. Asset realization can also be a complex process, with many different factors to take into consideration.¹¹

It is important to note that CAMA 2020 comments on the realization of assets for corporate bodies in Nigeria. Section 232 of CAMA provides or empowers a debenture holder to take steps in realizing their asset through the securities of the debtor in instances of breach. It further provides for the right of Debenture holders with a secured floating charge to realize his or her security, etc.

If a lender identifies an asset of value, the first question it will ask is how best to realize that asset. The second will be how much that method will cost.

¹¹ Forbes Solicitors, 'Asset Realisation' <<https://www.forbessolicitors.co.uk/business/insolvency/asset-realisation.htm>> accessed 20 February, 2024.

3.0 Legal Framework governing the Recovery of Debt in Nigeria

Debt recovery is an evolutionary kind of financing process in every jurisdiction hence; there is never an end to improving the framework. As a result of this, one jurisdiction borrows from the advances in other jurisdictions in order to make the financial system vibrant. There is no globally unique system and more than the laws, the institutions that operate a debt system are more important than all the statutes. The following are the various laws that comment of the concept, mode, procedure and effect of Debt recovery in Nigeria:

1. Companies and Allied Matters Act (CAMA), 2020.
2. Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, CAP F2 LFN, 2004.
3. Banks and Other Financial Institutions Act (BOFIA) CAP B3. LFN, 2004.
4. Asset Management Corporation of Nigeria Act (as amended), 2019.
5. The Secured Transactions in Movable Assets Act, 2017.
6. Bankruptcy Act, CAP B2, LFN, 2004
7. Central Bank of Nigeria Act, 2007 CAP A66, NO. 7 LFN
8. Nigerian Deposit Insurance Corporation Act (NDIC) CAP N102 LFN, 2006
9. Federal High Court (Civil Procedure) Rules, 2019.
10. High Courts Civil Procedure Rules of various States.
11. The Secured Transactions in Movable Assets Act, 2017.

We will elaborate on a few:

3.1 Nigerian Deposit Insurance Corporation Act (NDIC) CAP N102 LFN, 2006

The Nigerian Deposit Insurance Corporation Act 2006¹² came into being by virtue of the Federal Government official Gazette published in 29th December 2006. By section 1 of the establishment section and section 2 creates the responsibilities viz.

- a) Insuring all deposit liabilities of licensed banks and such other deposit taking financial institution (hereafter referred to as “insured institution) operating in Nigeria within the meaning of section 16 and 20 of this Act, so as to engender confidence in the Nigerian banking system.
- b) Giving assistance to insured institutions in the interest of depositors in case of imminent or actual financial difficulties particularly where suspension of payment is threatened to avoid damage to public confidence in the banking system.
- c) Guaranteeing payment to depositors in case of imminent or actual suspension of payment by insured institutions up to the maximum amount as provided for in section 20 of the Act.
- d) Assisting the monetary authority in the formulation and implementation of banking policy so as to ensure sound banking practice and fair competition among insured institutions in the country and

¹² Federal Government Official Gazette Published on the 29th December, 2006.

- e) Pursuing any other measure necessary to achieve the functions of the corporation provided such measures and actions are not repugnant to the objects of the corporation.

Section 3(1) States, notwithstanding any provision contained in any other law, no person other than the Corporation shall insure deposit liabilities or guarantee payment to depositors of insured institutions operating in Nigeria.

Section 3(2) any person who contravenes the provisions of this section commits an offence and is liable in conviction to:

- a. In case of an individual, a fine of N100,000.00 or imprisonment for a term not exceeding 5 years or to both such fine and imprisonment.
- b. In case of corporate body, a fine of N500,000.00 for each day the contravention continues.

NDIC Act of 2006 was repealed by the NDIC Act 2023¹³. The new Act has the under listed public policy objectives

- a) Protecting depositors by providing an orderly means of conversation in the event of failure of their insured institution or the inability of such insured institutions to make payments to depositors.

¹³ NDIC Act 2023, dated 26th November, 2023

Provided that in the latter case such payment shall only be made with the concurrence of the Central Bank of Nigeria

- b) Contributing to financial system stability through effective surveillance mechanism in its role as a key participant in the financial system safety-net not arrangement; and
- c) Enhancing public confidence and financial system stability by:
 - (i) Providing orderly exit mechanism for failed insured institutions, and
 - (ii) With the concurrence of the Central Bank of Nigeria, providing a framework for the resolutions of failing insured institutions.

The Corporation shall in addition have power to:

Insure deposit liabilities and guarantee payment to depositors of insured institutions within the scope of section 28 of this Act up to the maximum amount provided in or under section 25 of this Act in the event of revocation of the operating license of an insured institution or in the case of actual suspension of payments by an insured institution.

In summary, the Act of 2023 was established for the purpose of insuring all deposit liabilities of licensed bank and other financial institutions operating in Nigeria, providing assistance in the interest of depositors in case of imminent or actual financial difficulties and other financial institutions. The Corporation supervises the banks so as to protect

depositors; foster monetary stability, promote an effective and efficient payment system and promote competition and innovation in the banking system. This Act meant to make this corporation more effective, ensure its independence and autonomy and bring it in line with the current realities and debt practices.

In its capacity, as official liquidator, the NDIC has secured a judgment against JOLIMAIR NIG. LTD and three other debtors who owed the defunct GULF BANK PLC the sum of N1.4bn. in a recovery suit, NDIC v JOLIMAIR NIG. LTD & 3 ORS¹⁴, the NDIC prayed the court for the recovery jointly and severally from the respondents of a total debt of N1, 494,987,317.44.

The amount was due and payable by JOLIMAIR NIG. LTD to GULF BANK (in liquidation) as at 16/1/2006, where the defendant bank's operating license was revoked by the Central Bank. This amount was granted the bank in liquidation and guaranteed by three other respondents in the suit. Joseph Samir Karker, Abba Shour and Patrick Sule Uduka. The application was brought pursuant to the Failed Banks Act. NDIC paid N1.7bn claim to insured depositors of failed institution from recovered debts.

¹⁴ FHC[L|CS|1328|17, See also NDIC v. FMB (1997) 2 NWLR (pt 490 735, *REEKE v. LEITH & EAST COAST SHIPPING CO. LTD (LIQUIDATOR)* (1911) SC. 808

There have been comments that the Nigeria Deposit Insurance Corporation, NDIC Act 2023 is an international fraud. One of the first to draw the attention of the Federal Government to the fraud was the former State Commissioner for Home Affairs¹⁵, though recently appointed the Board Chairman of the Agency, he vehemently protested to president Tinubu that there is no gainsaying the fact that the new Act falls short of the standards stipulated by the International Association of Deposit Insurers (IADI), for NDIC Insurance and establishment of corporate governance principles.

Another problem was that the president's power to appoint members of the Board of the Corporation was eroded. CBN has the power to nominate four out of the seven Directors and only one Director was independent. This is unlike the previous Act where seven out of the 12 were independent. The process leading to the amendment of the 2006 Act started after the peer review assessment of the International Association of Deposit Insurance (IADI) in 2011 visited Nigeria to assess the deposit insurance mechanisms in the country and to evaluate the level of compliance with international best practice. It was therefore recommended that the agency needed more operational freedom.

Unfortunately rather than work to achieve the IADI recommendations, the NDIC Act version sent to the National Assembly as drafted by the past CBN leadership in

¹⁵ Abdulhakeem Abdullateef was formerly, Commission for home Affairs, Lagos State.

collaboration with the MD\CEO of NDIC who was until December 2020, the CBN Director of Banking Supervision with the power to license, supervise, and grant forbearance to bank, withdraw their license, sanction them and order their liquidation to itself.

Criticisms have however, attended the 2023 Act on the ground that it gave more powers to the Governor of Central Bank in the control and management of the NDIC. The printing of the new Naira notes saga and the current Legal issues involving the former Governor of the Central Bank and the EFCC are among the consequence of the jaundiced 2023 Act. It is alleged that the above power of the NDIC contributed in goating Nigeria to the present economic quagmire. The 2023 Act needs to be repealed urgently.

3.2 Companies and Allied Matters Act (CAMA), 2020

CAMA empowers a secured creditor to appoint a Receiver or a Receiver/Manager over specific assets of a company or the entire undertaking of a company. The right of appointment of a Receiver can be exercised by a secured Creditor without recourse to court where the debenture securing the debt or other agreement between the company Creditor and the Debtor Company provides for any such right.¹⁶The appointment of a Receiver provides an effective and expeditious means of debt recovery, and it is commonly deployed by secured Creditors. It is however, only available to secured Creditors against corporate entities.

¹⁶ Companies and Allied Matters Act (CAMA) No. 3 of 2020, s554.

3.3 Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, Cap F2 LFN, 2004

The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act was enacted to provide for the recovery of debts owed to failed banks and for the trial of offences relating to financial malpractices in banks and other financial institutions. This law also excludes the application of limitation laws to debts owed to failed banks.

3.4 Banks and Other Financial Institutions Act (BOFIA) CAP B3. LFN, 2004

This tribunal has the jurisdiction over the recovery of eligible loans and the enforcement of securities/any form of asset that is attached to the loan.¹⁷ Proceedings of the tribunal do not prevent the right of the bank from approaching a court to recover the debt. The Act empowers the tribunal to grant an injunction to the bank, grant an order of mandamus directing the debtor to perform an act, by an ex-parte order grant custody of security of the debtor etc.¹⁸ Although this is an expedient method of recovering bank loans, the jurisdiction of the tribunal is significantly limited. Further, the fact that the validity of the order granted by the tribunal can be challenged in court adds a layer of delay to the debt recovery process.

¹⁷ Banks and Other Financial Institutions Act (BOFIA) Cap B3. LFN, 2004, s115.

¹⁸ Ibid s122.

3.5 Asset Management Corporation of Nigeria Act (As Amended), 2019

AMCON was established under the AMCON Act to acquire, manage, and realize eligible debts that have been owed to banks and other financial institutions. The extension of AMCON powers to all the property or assets of a Debtor, including assets that do not form part of the security means that AMCON can easily ground the entire business of a Debtor in exercise of its powers. It would appear that while seeking to address the problem of bad debts in the banking sector, the AMCON Act also indirectly punishes the use of debt as a means of financing business operations.¹⁹

3.6 The Secured Transactions in Movable Assets Act, 2017

The Secured Transactions in Moveable Assets Act, 2017 (STMAA) was enacted to facilitate access to credit secured with movable assets, perfect the security interest and aid the realization of the security. The STMAA additionally establishes the National Collateral Registry (NCR) for perfection of the security interest. The NCR aids with determining the security right of the borrower and is expected to interface with other registries that record any transaction in movable assets. This is an innovation that aids a centralized registry of all movable assets that can be used as security.

¹⁹ Aelex, 'Legal Framework for Debt Recovery in Nigeria' (2023) <<https://www.aelex.com/workshop>> accessed 21 February 2024.

However, this law is not devoid of limitations and challenges. First, the law is applicable only to transactions in moveable transactions. While such transactions constitute a significant proportion of debt finance in the country, the value of these transactions are usually lower than the value of transactions that are secured by immovable assets. This means that most high value credit transactions are outside the scope of the STMAA. In addition, the right of creditor to repossess a collateral without recourse to the judicial process could prove problematic.²⁰

Please note that there are limitations of action in debt recovery matters, generally, the statutory limit for actions pertaining to recovery of debt that arose from a contract is six (6) years excluding the year the contract was entered and executed.²¹ This provision states that an action for recovery of debt becomes statute barred if not commenced within (6) six years from the date a refund becomes due and the Creditor has made a formal demand thereof. However, under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, the Limitation laws do not apply. It states that: "The provisions of the Limitation Law of a State or Limitation Act of the Federal Capital Territory, Abuja shall not apply to matters brought before the court under this Part of the Act".

²⁰ Ibid.

²¹ Limitation of Action Law, s(s) 18, 20 and 21(1) (a).

Also, section 35(5) of the AMCON (Amendment No. 2) Act, 2019, excludes the application of a Limitation law or act or similar statutes to a recovery of debt action commenced under the AMCON Act. The provision states that:

Any statute of limitation of a state or Federal Capital Territory or any statute or rule or practice directions of any court limiting the time within which an action may be commenced does not apply or operate to bar or invalidate any claim brought by the Corporation in respect of an eligible bank asset or brought to recover a debt or enforce any security or obligation of a guarantor or surety in connection with an eligible asset.

4.0 The Role of Debt Recovery Agents and Solicitors in Nigeria

Without a doubt, debt recovery agents and solicitors play pivotal roles in enhancing the finance sector in Nigeria. Considering that the prevalent default in redeeming or satisfying debts would lead to a consequential degradation of the country's economy, difficulty or hardship in the existing borrowing regime, as well as undue collapse or winding up of existing financial institutions and banks. It has become pivotal to unravel the impact or role these agents such as receivers, administrators or nominees who qualify as Insolvency practitioners in Nigeria, play in ensuring asset realization on the part of creditors. The CAMA 2020 provides that a person acts as an Insolvency Practitioner in Nigeria in

relation to a company if he acts in any of the following capacities:

1. The liquidator, provisional liquidator or official receiver; or
2. Administrator or administrative receiver; or
3. Receiver and manager, or as nominee or supervisor of a company's voluntary arrangement.²²

Consequently, the following are the various obligations and responsibilities of an insolvency practitioner in the recovery of debt as well as the restructuring of the corporate practice in Nigeria:

4.1 Role of a Liquidator, Provisional Liquidator or Receiver

A liquidator is one of a variety of roles an insolvency practitioner assumes depending on the case they have been appointed to deal with. Acting as a liquidator in both solvent and insolvent company liquidations, the insolvency practitioner's role here is to realize company assets and ensure these are distributed appropriately to creditors. In insolvent liquidations such as Creditors' Voluntary Liquidations (CVLs), creditors typically comprise of suppliers, banks, and other lenders; in an MVL, which is the liquidation of a solvent company, it is directors and shareholders who are often in line to receive the proceeds. Accordingly, CAMA 2020 provides that the Court may appoint a liquidator or liquidators for the purpose of

²² Companies and Allied Matters Act (CAMA) No. 3 of 2020, s704.

conducting the proceedings in winding-up a company and performing such duties in reference to it as the court may impose and where there is a vacancy, the official receiver shall by virtue of his office, act as liquidator until such time as the vacancy is filled.²³ Under the Law, a Liquidator is empowered to perform such roles that are beneficial to the company which is either winding up or in the course to do so (approaching insolvency). The powers of a liquidator are succinctly provided for in Section 588 of CAMA 2020.

4.2 Role of an Administrator or Administrative Receiver

An insolvency practitioner will be appointed the administrator of a company in both administration and pre-pack administration cases. They will work to realize a better outcome for creditors whether this is through arranging a sale of the company or facilitating an ordered shutdown of the business. It is important to note that Section 496 of CAMA 2020 provides for the roles of an Administrator in managing or realizing the assets of a company in Nigeria. It stipulates that an administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company. Additionally, an Administrator of a company shall exercise the additional powers specified in Eleventh Schedule to this Act.²⁴ It is important to note that an administrator has the powers to summon a meeting of creditors or members for the purpose of administering the asset of a company under debt. The

²³ Ibid s584(1).

²⁴ Ibid s497.

administrator's task is to assess the company's financial position, develop a feasible restructuring plan, and negotiate with creditors and other stakeholders to achieve the best possible outcome for the company.

4.3 Role of a Receiver and Manager

A receiver or manager also qualifies as a general liquidator under CAMA 2020. In situations where a company defaults on its secured debts, the insolvency practitioner can be appointed as a receiver and manager. It is important to highlight the fact that a receiver and manager can be appointed in two ways: by the court and out of court. This is clearly provided for in section 552 and 553 of CAMA 2020. On the roles of a receiver and manager, a person appointed as a receiver of any property of a company shall, subject to the rights of prior encumbrances, take possession of and protect the property, receive rents and profits and discharge all outgoings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless he is an appointed manager, he does not have power to carry on any business or undertaking.²⁵ It is important to reiterate that a person appointed manager of the whole or any part of the undertaking of a company shall manage the same with a view to the realization of the security of those on whose behalf he is appointed.²⁶ Finally, the primary role of a receiver and manager is to realize the assets secured by the creditors to repay the debts owed to them.

²⁵ Ibid s556 (1)

²⁶ Ibid s556(2)

4.4 Role of a Nominee and Supervisor of a Company's Voluntary Arrangement

An insolvency practitioner can also act as a nominee or supervisor in the voluntary arrangements between the company and its creditors. These arrangements are designed to facilitate the company's recovery by agreeing on the repayment plan that the creditors find acceptable. In Company Voluntary Arrangements (CVAs), an insolvency practitioner will take on the dual roles of nominee and supervisor. They will first act as a 'nominee' and will be responsible for putting together a viable proposal for the CVA. A Statement of Affairs (SOA) will be produced and creditors will be informed how much they could expect to receive should the CVA be implemented. Once the CVA has been passed by creditors, the insolvency practitioner will become 'supervisor' of the agreement and will oversee matters throughout the duration of the CVA. The ongoing performance of the business will be monitored to ensure the company remains on track to complete the CVA and emerge with a good chance of enjoying a successful future.

5.0 Procedure for Debt Recovery in Nigeria

The stages of business debt recovery typically involve a series of steps and services designed to recover debts in a legal and efficient manner. These stages are:

1. **Initial Assessment and Demand Letter** – The process begins with an initial assessment of the debt situation. This involves understanding the nature of the debt, the amount owed, and the debtor's details.

Following this, a formal letter of demand is sent to the debtor, outlining the debt, and requesting payment. This letter often serves as a final warning before legal action is taken and may include a deadline for payment.

Note that this letter is a condition precedent to instituting an action for debt recovery. The importance of this letter has been expressed in the Court of Appeal case of *Coscharis Beverage Ltd. v ITF & Anor*²⁷ where Joseph Shagbor Ikeyegh JCA stated that when a debt is due to be repaid, the effluxion of time does not alone automatically set the machinery in motion. A creditor must first make a demand for such debt in writing and a letter of demand and ensuring that the debtor receives same. Any action until this is done will be fatal against the plaintiff. Failure to react to the letter amounts to admission of the liability charged.

It is important to stress that the use of law enforcement agents is condemned, the use of self-help, the Army, police etc. See *Okefu & Anor v AIG Zone II Onikan & Ors*²⁸, held Police has no business in civil matters.

2. **Commencing Legal Proceedings** – If the debtor fails to respond or pay the debt as per the demand letter, legal proceedings can be initiated. This involves filing a claim for the debt recovery,

²⁷ (2021) LPELR 568 49 CA

²⁸ (2019) LPELR- CA/L/332/2018.

enforcement of payment and damages for breach in the appropriate court. The choice of court depends on the amount of the debt, as different courts have different monetary jurisdictions.

3. **Filing and Serving a Claim and Statement of Claim** – After commencing legal proceedings, a claim and statement of claim are filed and then served to the debtor. These documents outline the details of the debt, the basis of the claim, and the relief sought.
4. **Obtaining Judgment** – If the debtor does not respond to the claim or if the court finds in favour of the creditor, a judgment is obtained. This judgment is a formal decision by the court that the debtor owes the debt to the creditor. This is either summary judgment or default judgment.
5. **Enforcement of Judgment** – Once a judgment is obtained, various enforcement actions can be taken to recover the debt. This may include through the Courts by issuing an enforcement warrant to seize and sell the debtor's assets; or insolvency with bankruptcy against an individual debtor; or issuing a statutory demand and then initiating liquidation insolvency proceedings if the debtor is a corporation.
6. **Bankruptcy or Liquidation Proceedings** – If the debtor is unable to pay the debt, bankruptcy (for individuals) or liquidation (for companies)

insolvency proceedings may be initiated. This involves the sale of the insolvent debtor's assets to pay off the debt.

7. **Post-Recovery Actions** – After the debt is recovered, there may be additional steps to finalize the matter, such as notifying credit reporting agencies or concluding any legal proceedings.²⁹

6.0 Challenges to Debt Recovery Agents and Solicitors under CAMA 2020

Having examined the various roles played by Debt recovery solicitors and agents in achieving debt realization for their clients, it is important to reiterate that there exist similar challenges which consistently affront the smooth exercise of these roles. Consequently, below are some of these challenges:

1. Dearth or Inadequate Statutory Framework.
2. The paucity of Corporate Rescue Mechanisms.
3. Corruption and Judicial Changes.

6.1 Dearth or Inadequate Statutory Framework

The primary Statute governing corporate rescue and insolvency law and practice in Nigeria is the Companies and Allied Matters Act 2020. In the CAMA, copious provisions were made for corporate insolvency. However, the procedure on corporate insolvency as provided in the CAMA seems

²⁹ Wayne Davis, Why Use a Debt Recovery Law Firm? (*December 2, 2023*)< <https://stonegatelegal.com.au/why-use-a-debt-recovery-law-firm/>> accessed 21 February 2024.

outdated and not in conformity with global trends. Hence, there have been urgent suggestions for the review of the CAMA so as to bring it in conformity with global trends.³⁰ Furthermore, the inadequacy of statutory framework as relating to corporate insolvency in Nigeria had been attributed to the fact that there is no law specifically dedicated to the resolving of corporate insolvency.

Accordingly, CAMA 2020 lacks comprehensive and the up to date provisions that align with global trends in corporate restructuring. This largely hinders insolvency practitioners from effectively executing corporate rescue plans. A good example is the Companies Creditors Arrangement Act (CCAA) of Canada; this law is similar to Chapter 11 of the United States Bankruptcy Code and provides a number of options for companies to restructure their debts than what is provided by CAMA 2020.

6.2 The Paucity of Corporate Rescue Mechanisms

It is the contemporary best practice to develop and allow for the rehabilitation of insolvent corporate entities rather than winding it up. Hence, the objective of modern insolvency legislations focuses on restructuring of insolvent companies to allow for recovery and continuity in place of dissolutions. Notwithstanding the imperative for viable corporate rescue mechanisms, the only available remedy to encourage business

³⁰ O Abayomi-Olukunle, 'Reforms, Revolutions and the Ministry of Trade & Investment: Amendment of the Companies and Allied Matters Act', (The Lawyer, ThisDay Weekly Pull-out, 2016) 12.

recovery under the extant law in Nigeria are the procedure for arrangement and compromise, receivership, mergers and acquisitions, are few and inadequate. These limitations restrict insolvency practitioners from having a diverse toolkit to address various financial distress scenarios. The absence of moratorium provisions weakens their abilities to protect distressed companies from legal actions, making it more challenging to implement restructuring plans without the threat of litigation.³¹

6.3 Corruption and Judicial Attitude

The concept of corruption is not subject to comprehensive, precise or concise definition. However, the word "corruption" has been used to describe conduct that reflects abuse of public office for private gain. It should be noted that public office is abused for private gain when an official accepts, solicits or extorts a bribe. Private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. It is therefore pertinent to state that public office can be abused for personal benefit without bribery, through patronage and nepotism, the theft of state assets or the diversion of state resources.³² It may appear from the above descriptions of corruption that corrupt practices are prevalent only in the public sector, but this is not correct.

³¹ H Chidi, 'Issues and Challenges in Corporate Rescue and Insolvency Practice in Nigeria' (2001) *Rivers State University of Science and Technology* <<https://www.researchgate.net/publication/332291758>> accessed 21 February 2024.

³² K Yusuf, 'Financial Crime' in O Olanipekun, *Banking: Theory, Regulation, Law & Practice* (Lagos: AU Courant 2016).

Corrupt practices can occur in the private sector. Hence, corruption has been described as the 'abuse of entrusted power for private gain. In the same vein, corruption has been described as including 'bribery, fraud and other related offences. Furthermore, the definition of official corruption was not limited to only the public sector, but mentions official duties or in relation to any matter connected with the functions, affairs or business of a government department or corporate body or other organization or institution in which the person is an official. Consequently, corruption within the legal system and potential external influence can prevent insolvency practitioners' efforts to achieve equitable and transparent outcomes in corporate restructuring. The judiciary's susceptibility to corruption may lead to biased decisions, lengthy legal proceedings, and the manipulation of insolvency processes.³³

7.0 Recommendations and Conclusion

From the foregoing, it is trite that debt and debt recovery remains a very serious issue in Nigeria which needs to be addressed timeously. While debt recovery professionals are empowered by the CAMA 2020, it is important to reiterate that the Act is still responsible for some challenges they face during the performances of their various roles. It has been demonstrated overwhelmingly in this paper that there are certain issues and challenges in the path to viable, orderly and

³³ N S Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' [2006] 13 (1) *Journal of Finance Crime* 96

effective corporate rescue and insolvency law and practice in Nigeria. In order to overcome these issues and challenges, it would be exigent to extensively reform the cause of corporate insolvency and rescue in Nigeria. Thus, it is recommended among others that:

1. The Nigerian National Assembly is obligated to enact a special legislation for issues and concerns of Insolvency and debt recovery in Nigeria, additionally; this new specific legislation must provide a number of options for companies to restructure their debts than what is provided by CAMA 2020.
2. Repeal the 2023 Act to curb corruption and improve its international best practice.
3. To create moratorium provisions that inheres during corporate insolvency and rescue proceedings, as well as provides minimum standards or educational qualifications and regulates persons who act or practice as corporate insolvency. This is because the absence of moratorium provisions weakens their abilities to protect distressed companies from legal actions, etc.
4. There is also a need to facilitate anti-corruption measures in order to guarantee the integrity of proceedings for insolvency practitioners. Additionally, the judiciary needs to steer clear from elements of bias or any other related element that can hinder justice.

In conclusion, it is important to state that a debt recovery agent or solicitor must be careful not to employ any of the

following means or methods for debt recovery: harassment, abuse or oppression of the debtor, use of threat or violence, use of obscene languages, employ the use of thugs, mystical, occultic or any diabolical methods; and most of all, the use of the police or other security agents to arrest a debtor. The Police are not empowered by any statutes to recover debts as they are not debt collectors. In *Oceanic Securities Int. Ltd v Balogun & Ors*,³⁴ the court expressly mentioned that:

It has been stated many times that the police have no business in the enforcement of debt settlements or recovering of civil debts for banks or anybody.’

Note that, the inability to pay a debt is not a crime but the issuance of dud cheques to offset indebtedness is a criminal offence. In situations like this, it becomes fraudulent and security agencies such as the Police or the Economic and Financial Crimes Commission (EFCC) can be contacted, and they may or may not decide to become involved. But it is never really an assurance that the debt will be recovered from the debtor.³⁵ More so, litigation should be considered as the last option and should be resorted to only when the debtor is recalcitrant and willfully neglects to liquidate his indebtedness.

³⁴ [2012] LPELR-9218.

³⁵ Chioma (n 5).