

AN ANALYSIS OF THE EXTENSIVE POWERS OF THE ASSET MANAGEMENT CORPORATION (AMCON) UNDER THE AMCON ACT*

ABSTRACT

In an attempt to provide for more efficiency in the recovery of debts owed under Non-Performing Loans and with a ruthless approach to achieving the Federal Government's goal of recovering all the outstanding debts that are seen as a cause for the slowdown in the Nigerian Economy, the National assembly seems to be constantly amending the Asset Management Corporation of Nigeria (AMCON) Act 2010 in order to extend the powers of the Asset Management Corporation of Nigeria (AMCON). The powers that have been given to AMCON have never been limited by each amendment, they have only been expanded, this paper seeks to examine all the extensive powers donated to AMCON by the National Assembly to aid the Corporation in its bid to recover these outstanding debts.

Keywords: AMCON, Debt Recovery.

INTRODUCTION

The Asset Management Corporation of Nigeria (AMCON or “*the Corporation*”) is empowered by the AMCON Act to hold, manage, realise and dispose of Eligible Bank Assets (EBA), including the collection of interest, principal and capital due and the taking over of collateral securing such assets, in accordance with the provisions of the AMCON Act.¹ These EBA are Non-Performing Loans (NPLs) which the Corporation was created to resolve as a means of stabilizing and re-vitalizing the Nigerian economy.

First enacted in 2010, the AMCON Act has been amended three times, once in 2015, again in 2019 and most recently in 2021. Each time the Act has expanded the powers of the Corporation in resolving these NPLs and recovering outstanding debts. This paper intends to give an analysis on the expanded powers of the Corporation in its efforts at debt recovery under the AMCON Act as amended in 2021 (“*The Act*”) as well as commentary on the issues arising from the extensive powers given to AMCON under the Act. The powers of the Corporation shall be broadly examined in the paragraphs that follow.

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¹ See Section 5(c) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

Surveillance

The Act empowers the Corporation to seek an ex parte order of the Federal High Court, to place any bank account of a debtor under surveillance. The Corporation is further permitted by the Act to obtain access to any computer system component, electronic or mechanical device of any debtor with a view to establishing the location of funds belonging to the debtor with banking secrecy and the protection of customer confidentiality not being a ground for the denial of the power of the Corporation to utilize its powers under this provision.² The Act also states that the Corporation shall furnish all Federal Government agencies and Ministries with a list of recalcitrant debtors and impose an obligation not to contract with or pay the debtors on the list.³ This provision is further developed by Section 50b(1) – (3) of the Act which empowers the Corporation to publish in the national dailies or newspapers, the names of debtors that have failed to meet their payment obligations, and shall forward the said publications to all procuring entities⁴ who shall thereafter be restrained from awarding any contract to, conduct any business with or make any payment under an existing business relationship, without clearance or consent of the Corporation.

Section 50A(1) of the Act also empowers the Corporation to demand by written notice, for any Eligible Financial Institution (EFI) to furnish the Corporation with details of, and balances in, all accounts maintained by the debtor with the said EFI as well as details of all investments by way of deposits or in financial instruments made by such a debtor with or through the EFI or the Bank identification number or its equivalent of the debtor. Failure to comply would result in a fine of ₦10,000,000 and ₦50,000 per day for each day the failure to comply continues,⁵ as well as a prison term of 3 years for a director of such an EFI.⁶ The Corporation, without prejudice to the foregoing is also empowered to apply to the court, by motion ex parte to compel such an EFI to disclose the required information which the court shall grant, unless it sees good reason to the contrary.⁷

Under Common Law, a bank has an implied duty to keep its customer's information secret or confidential.⁸ Also, as argued by Abdulah, "*the customer's right of privacy must certainly be*

² See Section 6(1)(ua) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

³ See Section 6(6) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

⁴ Although all procuring entities are deemed to have knowledge of the list of debtors upon publication by virtue of Section 50B(2) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

⁵ See Section 50A(2) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

⁶ See Section 50A(3) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

⁷ See Section 50A(4) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

⁸ See *Tournier v National Provincial and Union Bank of England [1924] 1 KB 461*

respected and a most important aspect of a person's rights is the right to keep his/her information private. There is the further possibility that disclosure of any confidential information after the termination of the banker-customer relationship may cause loss or damage to the person (Hapgood M., 2007, p.158). Finally, a customer's confidential information could be of a commercially sensitive nature, and disclosure might adversely affect his/her subsequent business or commercial activities. Given the above factors, it seems that the bank's duty of confidentiality should be maintained indefinitely, even after the customer's death, as long as the law does not indicate a specific time for the termination of the duty.”⁹

The issue that arises herein is that, due to the Corporation’s powers under the Act, the Banks will be forced to essentially breach the duty of confidentiality imposed by common law in compliance with the provisions of the Act.¹⁰ Further, it seems like it is actually the aim of the Act for the adjudged debtor’s businesses to be significantly impacted or in fact, hindered, as a result of their outstanding debt. This then draws the question, in a situation where a debtor is a contractor for the government, and its main source of income is from government contracts, how then can a debtor repay a loan if his businesses have been essentially shut down because of the said debt.

LIMITATIONS TO ACTIONS INVOLVING AMCON

Prior to the 2019 Amendment, the Act provided that, with respect to any debt owed to the Corporation by reason of its acquisition of an EBA, time shall begin to run, and the cause of action deemed to arise, from the date of the purchase of the EBA. However, the Act now provides:

“any statute of limitation of a state or federal capital territory or any like statute or rule or practice directions of any court limiting the time within which an action may be commenced does not apply or operate as a bar or invalidate any claim brought to recover or enforce any security or obligation of a guarantor or surety in connection with an eligible bank asset”¹¹

Thus, removing any time limitation whatsoever regarding any claim by AMCON for the recovery of a debt acquired by the purchase of an EBA.

⁹ S. Abdulah , "The Bank's Duty of Confidentiality, Disclosure Versus Credit Reference Agencies; Further Steps For Consumer Protection: 'Approval Model'" [2013] 19(4) JCLI
<https://webjcli.org/index.php/webjcli/article/view/296/405#_edn14> accessed 28 February 2022.

¹⁰ It should be noted that compliance with a statute is an exception to the breach of the duty of confidentiality as stated in *Tournier v National Provincial and Union Bank of England (Supra)*

¹¹ See Section 35(5) the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

What is of note here is whether the amendment would only apply to debt acquired or claims instituted after the said amendment came into force on 29 July 2019 or whether it would also apply to debts acquired or actions instituted prior to that date. In essence, the question here is whether the amendment would operate retrospectively or not? The Supreme Court has explained, in the case of *Chigbu v. Tonimas (Nig) Ltd*¹² that limitation laws are procedural not substantive and thus have the power of operating retroactively. The court held that:

“The distinction between substantive law and procedure can be quite difficult at times. However, procedural or adjectival law relates to practice and procedure; that is, rules according to which substantive law is administered. It prescribes the method for enforcement of rights as well as the enforcement of obligations or duties. On the other hand, substantive law is concerned with the creation, definition, limitation of obligation. The limitation Edict, 1994 of Imo State is a procedural law. Being a procedural law, it operates retrospectively. By virtue of sections 44 and 45 of the Edict, the intention of the lawmaker was to make the Edict operate retrospectively.”¹³

It should therefore be clear that the said Section 35(5) of the Act would apply to all actions in connection with an EBA whether before or after the amendment came into force.

Also, the Act as amended in 2019, increased the time allowed after service of a Pre-Action Notice, before a Claimant may file an action against the Corporation. The time was increased from 30 days to 90 days after service of the pre action Notice.¹⁴

This also throws up another issue. Section 2(a) of the Public Officer’s Protection Act provides that:

“the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury within three months next after the ceasing thereof: Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison;”(emphasis supplied)

This grants a limitation period of 3 months from the date the cause of action arose for actions against a public officer. In the case of *C.B.N. v. Umar*,¹⁵ the Court of Appeal explained that:

“Under section 18(1) of the Interpretation Act, the expression “public officer” is defined to mean a member of the public service of the Federation

¹² (2006) 9 NWLR (Pt. 984) 189

¹³ Ibid at P. 208-209, paras. H-D.

¹⁴ See Section 43(2) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

¹⁵ (2019) 10 NWLR (Pt. 1679) 75 (CA)

within the meaning of the Constitution of the Federal Republic of Nigeria, 1999 and the public service of a State. The term or expression “public service of the Federation” is defined in section 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to mean the service of the Federation in any capacity in respect of the Government of the Federation, and includes service as staff of any Corporation established by an Act of the National Assembly.”¹⁶

The court in that case, following the above analysis held that the Appellant, which was created by an Act of the National Assembly to act for the Federal Government, was a public officer. Applying the principle in that case to the Corporation, this would mean that the Corporation, being a body established by an act of the National Assembly to act for the Federal Government, is a public officer.

The effect of the foregoing is that with AMCON being a public officer and also requiring a 90 day pre action notice before an action is commenced against it, even if such a pre action notice is served on AMCON the day the cause of action arose and the civil action in respect of the said cause of action is filed on the 91st day after the service of the pre-action notice, the action would still be statute barred as it would have been filed a day after the 3 month period stipulated by the Public officer’s protection Act.

This amendment has therefore had the ultimate effect of robbing an injured party of any right of action. Such a provision ought to be challenged and struck down as being unconstitutional or at the very least against public policy.

BANKRUPTCY AND WINDING UP

Section 51 of the Act previously provided:

“Where the Court gives decision against a debtor in a debt recovery action under this Act requiring the debtor to pay any sum to the Corporation and such sum is not liquidated or paid over to the Corporation within 30 days from the date of the order for payment thereof, the Corporation may apply to the Court to issue a receiving order against the debtor.”¹⁷

The 2019 amendment removed the need for a decision against the debtor as a prerequisite for the application of a receiving order and stated that:

“(1) Where a debtor fails to comply within 90 days, with a written demand notice issued by the Corporation requiring the debtor to pay a liquidated sum to the Corporation which the Corporation certifies on the face of the

¹⁶ Ibid at P. 87, paras. A-B

¹⁷ See Section 51(1) of the AMCON act as amended in 2015

demand as being owed by the debtor to the Corporation in connection with an eligible bank asset acquired by the Corporation, the court shall, on the application of the Corporation by originating motion, make a receiving order against the debtor except where at the hearing of the application, the debtor proves to the satisfaction of the court that he does not owe any liquidated sum at all to the Corporation or that he has a Counter-Claim, set-off, or cross demand which equals or exceeds the liquidated sum owed to the Corporation.

(2) a receiving order made under subsection (1) is deemed to have been, and have full effect and force as a receiving order, made under the Bankruptcy Act.”¹⁸

Similarly, while Section 52 of the Act previously provided that:

“Where the Court gives a decision against a body corporate in a debt recovery action under this Act, requiring the debtor company to pay any sum to the Corporation and such sum is not liquidated or paid over to the Corporation within 90 days from the date of the order for payment, the Corporation may apply to the court to issue a winding-up order against the debtor company.”

The 2019 amendment removes the need for a decision against the debtor as a prerequisite for the application of a winding up order and states that:

“where a debtor that is a body corporate fails to comply in full, within 30 days, with a written demand notice issued by the Corporation requiring the body corporate debtor to pay a liquidated sum to the Corporation which the Corporation certifies as being owed by the body corporate, to the Corporation in connection with an Eligible Bank Asset acquired by the Corporation, the court shall, on the Application of the Corporation, by way of an originating motion, make a winding up order against the body corporate debtor except where, at the hearing of the application, the body corporate debtor proves to the satisfaction of the court that it does not owe any liquidated sum at all to the Corporation or that it has a counter-claim set-off or cross-demand which equals or exceeds the liquidated sum owed to the Corporation.”

Furthermore, the Act also provides that:

“For the purposes of Section 51, 52 and 53 of this Act, the “debtor” or “debtor company” shall as may be applicable include –

- a) The borrower,*
- b) All guarantors or sureties of the borrower,*
- c) All directors and shareholders of the borrower,*

¹⁸ Sections 51(2)-(7) 2015 Act are replicated in Sections 51 (3)-(8) of the 2019 Act

- d) *All directors and shareholders of any corporate entity guarantor or surety of the borrower. And*
- e) *All companies and entities, 50% or more of whose share capital is owned or controlled jointly or otherwise by one or more of the persons listed in paragraph (a)-(d)”*¹⁹

To employ an illustration to explicate the extensive powers of the above provisions, “A” could default on a loan guaranteed by “B”, a company. “C”, is shareholder of only a single share in “B” but has over 50% of the shareholding in “X”, a company completely unrelated to “A” or “B”. The Corporation has the power to demand from “X” the full loan amount failing which, the Corporation is empowered to either apply for a receiving order or a winding up order against “X”.

DEBTOR’S PROPERTY

Previously, the Act provided that the Corporation could take over a debtor’s property only where the property was used a security for the NPL and where the property was not secured by the loan.

Section 34(1)a of the Act as it was under the 2019 amendment, provided as follows:

“(1) Subject to the provisions of the Land Use Act and section 36 of this Act, upon the acquisition of an eligible bank asset by the Corporation, without any other assurance other than the provision of this section, the Corporation shall immediately: (a) subject to paragraphs (c) (i) and (d), become vested with and acquire legal title to the eligible bank asset and all assets or property tangible or intangible by which such eligible bank asset is secured and be vested with power, to the exclusion of all other creditors, to take possession of, manage, foreclose or sell, transfer, assign or otherwise dispose of the acquired eligible bank asset and any tangible or intangible asset or property by which such eligible bank asset is secured in full or partial satisfaction of the debt owed to the Corporation by reason of the acquisition of the eligible bank asset notwithstanding that the security interest in such asset or property is equitable only.”

This meant that AMCON acquired immediate legal title in any property secured by the eligible bank asset and could sell and manage same in accordance with Section 34 above. The acquisition of the eligible bank asset also operates to extinguish any equity of redemption of the charge in relation to such assets or property.

The Act, as amended in 2021 now provides that legal title over all the debtor’s property, regardless of whether same was used to secure the loan, automatically become vested in

¹⁹ See Section 50B(4) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

AMCON²⁰. This would empower AMCON to exercise all the rights of a person with legal title over a property which include the power to sell and or manage the said property.

The Act expands the power of the Corporation to take custody of a debtor's property under Section 49 and the power to freeze the assets of a debtor under Section 50. The Act allows for an ex parte application for an order granting possession of the debtor's property under section 49 or for the freezing of a debtor's accounts under Section 50. Further the act specifically states that the Corporation may apply for such orders before or after filing a suit and that such orders, even though obtained ex parte would last until final determination of the suit.²¹

Previously, the AMCON Special Debt Recovery Practice Direction 2013 allowed for ex parte orders to last for the determination of the suit but was not explicit on that fact. It simply stated that interim means interlocutory.²² This has however been challenged as being unconstitutional as it has been an established principle of law, rooted in the constitutional requirement of fair hearing that a court cannot make an order to last for the determination of the suit without putting the other side on notice. For example, in the of *Aliyu & Ors v. Intercontinental Bank Plc & Anor*²³ the Court of Appeal clearly stated that:

“A court of law has no power, even under its inherent jurisdiction, to make an order of interim injunction to last the duration of a matter. This is a fundamental vice and a clear un-judicial and injudicious exercise of discretion under a wrong principle of law. This Court must intervene in such circumstances and discharge or set aside such orders, notwithstanding the lapse of the time within which the Appellants could apply to set aside the order as of right under the Rules of Court”

However, in the case of *America Specification Autos Ltd & Anor v. AMCON*²⁴ the Court of Appeal, when dealing with a challenge to the constitutionality of ex parte orders made to last the determination of a suit in an AMCON proceeding held that:

“proceedings bordering on the provisions of Asset Management Corporation of Nigeria (AMCON) Act, is sui generis and the rules applicable thereto, in relation to the life span of an ex parte order is distinct from the ones obtainable in ordinary civil proceedings. To this extent, this does not affect the validity of an ex parte order made to last beyond a limited time; it

²⁰ See Section 34(1)(a) and (b) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

²¹ See Section 49(3) and 50(2) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

²² See Section 1.1(7) of the AMCON Special Debt Recovery Practice Direction 2013

²³ (2013) LPELR-20716(CA)

²⁴ (2017) LPELR-44016(CA)

is not rendered unconstitutional merely because it is made pending till the determination of the res."²⁵

Seemingly ending the debate as to the constitutionality of Sections 49 and 50 until such time as the Supreme Court may make a pronouncement on the issue. It should be stated that although the definition of Court has been expanded by the Act to include the High Court of a State, High Court of the Federal Capital Territory, or any other superior court exercising original jurisdiction, it is only the Federal High Court that is empowered to make orders pursuant to orders 49 and 50 of the Act.²⁶

It is also important to note that, whilst the old Sections 49 and 50 prior to amendment in 2019, provided that an action must be commenced within 14 days of obtaining an ex parte order in this regard, or the said order shall lapse, there is no such provision under the Act.

INTERIM RELIEFS

The Act has prohibited the grant of any injunctions against the Corporation or its officers. Section 34(6) of the Act provides that:

“no injunction preservative or restorative order, interim, interlocutory, perpetual or like order shall be granted against the Corporation or its directors or officers in any action, suit or proceeding in relation to an eligible bank asset or any asset or property by which such eligible bank asset is secured and in particular under subsection (1)(a) and Section 39 of this Act, and the remedy of any claimant against the Corporation in any such action suit or proceeding is limited to monetary compensation”

However, quite recently, a Lagos State High Court in an unreported ruling in *Suit No. LD/8418LMW/19 – Mr Adedayo Mumini Shittu & Anor v. Knight Rook Ltd & Ors*, delivered on 24 October 2019, held that this provision was unconstitutional. The Court, per Jose, J held that the provision seeks to curtail the inherent powers granted to the court by the constitution to grant injunctions in deserving cases. The court in that case, via the said ruling, granted an interlocutory injunction restraining the Defendants (AMCON and its appointed receiver being the 2nd and 3rd Defendants respectively) from restricting the Claimants' access to their property until the determination of the suit.

Enforcement of judgment

²⁵ Ibid at P.13 Paras D-E.

²⁶ See Section 61 of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

Where a judgment or order is obtained against the Corporation, no enforcement or execution proceeding whatsoever can be commenced against the Corporation without the prior written consent of the Attorney General of the Federation.²⁷ Further the Act specifically provides that any funds in any bank whatsoever, is deemed to be under the “custody and control” of the Corporation.²⁸ This would mean that the attachment of any funds belonging to the Corporation, in any bank would require the consent of the Attorney General of the Federation, not only by virtue of Section 19(3) of the Act but also Section 84(1) of the Sheriffs and Civil Processes Act. Also, the Act expressly prohibits the grant of any interim, interlocutory or preservative order of attachment against the Corporations funds in any proceeding.²⁹

On the other hand, the Act provides that any application for stay of execution, injunction pending appeal, stay of proceedings or even an application for leave to appeal by any party other than the Corporation or a receiver appointed by the Corporation, shall be conditional and the party applying shall deposit either the entire sum claimed in the case of an interlocutory appeal or the entire judgment sum if judgment has been delivered, into an interest yielding account in the name of the registry of the relevant court.³⁰

It is also noteworthy to add that the Act also made a Certificate of Judgment a registrable instrument in all land registries of the Federation.³¹

CONCLUSION

In conclusion, the AMCON Act has granted extensive powers to the Corporation, however these powers seem to be overly draconian and in the opinion of the author are somewhat inconsistent with a democratic society.

²⁷ See Section 19(3) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

²⁸ See Section 19(4) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

²⁹ See Section 19(5) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

³⁰ See Section 53(7) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

³¹ See Section 45(2) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).