SF SEFTON FROSS

Monday, 30 July 2018

NATIONALISATION OF FAILED BANKS IN NIGERIA

Introduction

In what can be described as a sudden turn of events, the Nigerian Deposit Insurance Company (NDIC) announced on Friday 5th of August 2011, that it was exercising its statutory powers to establish three bridge banks to assume the deposits and liabilities of Afribank Plc, Spring Bank Plc and Bank PHB. Afribank Nigeria Plc was taken over by MainStreet Bank Limited, Keystone Bank Limited assumed the assets and liabilities of Bank PHB, and Enterprise Bank Limited was licensed to run Spring Bank Plc.

According to the NDIC, the deposits and liabilities of the failing institution by the bridge banks to ensure the interest of depositors and to prevent have dire consequences for depositors and undermine public confidence were unlikely to meet the 30 September 2011 deadline given by the CB banks to recapitalize.

Bridge banks are entities set up by banking regulators to administer the assets and liabilities of a failed bank pending transfer of the bridge bank to a buyer or liquidation of the bridge bank where a buyer cannot be found. Bridge banks are creatures of the Nigeria Deposit Insurance Corporation (NDIC) Act, 2006. Section 39 of the NDIC Act provides that:

> **"The Corporation, in consultation with the Central Bank of Nigeria, may organize and incorporate, and the Central Bank shall issue a banking license to one or more banks, to be referred to as bridge banks which shall be insured institutions to assume such deposits and/or liabilities, and shall purchase such assets of a failing insured institution and perform any other function or business as the Corporation may determine".**

The Central Bank of Nigeria (CBN) also announced in the afternoon of the same August 5, 2011 through a press statement[2] that it was aware of, and supports, the decision of the NDIC. The CBN further announced the revocation of the licences of Afribank Plc, Spring Bank Plc and Bank PHB, three of the eight banks placed under CBN management in August 2009, following the sanitization of the banking industry by the apex bank.

Events moved swiftly, and on Saturday, 6th of August 2011, Nigeria's state-owned Asset Management Company of Nigeria (AMCON), announced it would be taking over the three bridge banks from the NDIC, injecting sufficient capital to allow the three newly established institutions to meet the minimum capital adequacy requirement of N25 billion, as well as any further capital required for their operations. In effect, the AMCON became the new shareholder in these institutions, which are now reportedly capitalized well above the CBN's required minimum benchmark.[3]

Although nationalized, AMCON has insisted that it will not run the banks indefinitely, and plans to sell the institutions to interested investors, perhaps a few years down the line when greater value may be realized, helping to pay in part for the bail-out costs associated with the nation's banking crisis.

Background:

In July 2009, the CBN and NDIC carried out a special examination of all 24 deposit banks in Nigeria, with the aim of assessing their health, with particular focus on liquidity, capital adequacy, risk management and corporate governance practices. Ten (10) banks were adjudged to be in grave states with deficiencies in capital adequacy. Of these, eight (8) also had significant deficiencies in liquidity, risk management practices and corporate governance policies. The Managing and Executive Directors of these 8 were immediately replaced, and all the 10 banks were bailed out by the injection of fresh capital totaling about N620 billion, in the form of Tier 2 Capital.[4]

The 2009 bank sanitization was carried out by the apex bank under powers conferred on it by section 35 of the Banks and Other Financial Institutions Act, 1991 (BOFIA), which provides that:

> "where, after an examination under section 33 of this Act[5] or otherwise howsoever, the Bank is satisfied that the bank is in a grave situation as regards the matters referred to in section 33(1) of this Act, the Governor may by order in writing exercise any one or more of the powers specified in section 35 (2) of this section."

It has been two years since the CBN commenced efforts to sanitise the Nigerian banking system with the aim of making them domestically safe and globally competitive. While a couple of the banks have been successfully recapitalized, others (except the recently nationalised banks) are in advanced stages of negotiation with strategic investors in pursuance of the September 30th recapitalization deadline set by the CBN.

The improbability of the three failing banks to meet the 30 September 2011 recapitalisation deadline given by the CBN was stated as the major cause for the action taken by the regulators on the 5th of August 2011.

Given the nature and implications of these actions by the regulators, and the public outcry which followed, this article will quickly consider whether the CBN, NDIC and AMCON acted within the ambits of their power.

Legality of the Nationalisation of the banks

While it is unclear which of the regulatory bodies struck first, the sequence in which they acted may have some fundamental bearing on the sanctity or otherwise of their actions. The Central Bank of Nigeria, being the main regulator of the Nigerian banking system, is empowered by the BOFIA to grant and revoke banking licences as provided under sections 2 and section 12 of the BOFIA respectively. Section 12 specifically provides for the grounds upon which the CBN may revoke a banking license some of which are (i) where a bank has insufficient assets to meet its liabilities; and (ii) failure to comply with any obligation imposed upon it by or under the BOFIA or the CBN Act.

Juxtaposed with section 12 of BOFIA is the provision of section 36 of the BOFIA which provides that:

> "If after taking such of the steps stated under section 35 [taking over the management of a failing bank] or such other measures as in the opinion of the CBN may be appropriate in the circumstance, the state of affairs of the bank concerned does not improve, the CBN *may* turn over the control and management of such bank to the NDIC on such terms and conditions as the CBN may stipulate from time to time (***emphasis ours***)".

It may not be too far off the mark to question whether following the trend of CBN's action from July 2009 till August 5, 2011, revocation of the license of the three banks was the appropriate line of action or turning over the control and management of the banks to the NDIC pursuant to the dictates of Section 36 of BOFIA.

In light of these statutory provisions, two key issues are identifiable:

a. The first is that the CBN may revoke the licence of these banks under section 12 of the BOFIA in which case, it would have to rely on one of the grounds under the section;

b. The second issue is that section 36 provided a course of action for a bank taken under management by CBN pursuant to the provisions of section 35 of the BOFIA, which was the status of the three failing banks as at 05 August 2011.

Implications of Section 36 of the BOFIA

As mentioned above, section 36 authorises the CBN to turn over the control and management of a failing bank whose state of affairs does not improve after management by the CBN pursuant to section 35 to the NDIC.

Note however that the concurrence of the CBN to NDIC's action of the 5th of August, 2011 was not done pursuant to its powers under section 36 of the BOFIA, as section 38 of BOFIA provides that where the NDIC has assumed control of the business of a bank pursuant to section 36 of the Act, the NDIC shall remain in control of and continue to carry on the business of the bank *in the name and on behalf of the bank* until such a time as in the opinion of the CBN, it is no longer necessary for the NDIC to remain in control of the business of the bank (emphasis ours).

Clearly, what happened on the 5th of August was that the three banks ceased to exist as their licenses were revoked, not that CBN handed over control of the banks to the NDIC under section 36, as, going by the provisions of section 38, NDIC would have been obliged to continue to carry out the business of the banks in the name and on behalf of the banks.

It is arguable that section 36 of the BOFIA was not mandatory and handing over the control of the ailing banks to the NDIC was purely at CBN's discretion. After all, section 38 provided that "…the CBN *may* turn over the control and management of such bank to the NDIC on such terms and conditions as the CBN may stipulate from time to time". It is thus arguable that CBN was within the ambit of its authority to revoke the licenses of the bank, rather than turn them over to the NDIC.

Grammatically, "may" is used to denote the permissive sense; but it is an established principle of Nigerian law that depending on the context of the usage, "may" may as well be construed in a mandatory sense. In ***Ude v. Nwara***[6] Nnaemeka-Agu, JSC (as he then was) said:

> ***"'May' should be construed as mandatory i.e meaning 'shall' or 'must'. I believe that it is now invariable practice of courts to interpret 'may' as mandatory whenever it is used to impose a duty…"***

Although there has been public outcry regarding the decision taken by CBN on the 5th of August, 2011, the authors of this article are of the view that although section 36 of the BOFIA does not impose a duty on CBN to turn over the control and management of such bank to the NDIC, that the 'may' in section 36 is used in the permissive sense and CBN was within its rights to revoke the license of the three banks in exercise of its revocation rights under section 12 of the BOFIA.

Establishment of bridge banks by the NDIC

While it is without cavil that the NDIC may establish the bridge bank to assume the assets and/or liabilities of a failing bank,[7] it is also important to question whether the NDIC can turn over such bridge bank to the AMCON, being a government establishment.

Section 39 (1) of the Nigeria Deposit Insurance Corporation Act (NDIC Act)[8] specifically provides as follows:

> **"the Corporation in consultation with the CBN, may organize and incorporate, and the Central Bank shall issue a banking license to one or more banks, to be referred to as bridge banks which shall be insured institutions to assume such deposits and/or liabilities, and shall purchase such assets of a failing insured institution and perform any other function or business as the Corporation may determine"**

Section 39(6) (b) of the NDIC Act provides that the operation of a bridge bank shall terminate upon (amongst others) the sale of the majority of the equity of the bridge bank to any person other than the NDIC and another bridge bank.

As must be observed, the climax of the recent nationalisation was the acquisition of the bridge banks created by the NDIC by AMCON, via a subscription agreement with each of the three banks.

The Asset Management Corporation of Nigeria was established in 2010 for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria; and for related matters.

Section 4 of the AMCON Act 2010[9] provides that the objects of AMCON shall be to assist eligible financial institutions to efficiently dispose of eligible bank assets; efficiently manage and dispose of eligible bank assets acquired by the Corporation; and obtain the best achievable financial returns on eligible bank assets or other assets acquired by it.

Going further, Section 5(b) of the AMCON Act lists as one of the functions of the Corporation the purchase or otherwise investment in eligible equities on such terms and conditions as the AMCON, with the approval of the board of the CBN may deem fit. The essential question we see fit to ask is: are the shares of the three bridge banks "eligible securities" within the ambit of the AMCOM Act?

The AMCON Act does not define the expression 'eligible equities'. It may however not be out of place to have recourse to other Nigerian laws that may provide some guidance as to the "eligibility" of securities for an entity like AMCON to invest in.

Section 2 The Trustee Investments Act[10] (TIA) provides a list of the securities in which trustees may invest. These include securities created or issued by or on behalf of the Government of the Federation; securities declared by the President by notice in the Federal *Gazette* to be securities to which the TIA applies; securities created or issued by certain Federal Government agencies; and debentures and fully paid-up shares of any company incorporated by and registered under the Companies and Allied Matters Act, *other than a private company* (emphasis ours). Section 2 (2) also provides that the price of the debentures or shares of the class in question must be quoted on the Nigerian Stock Exchange. It is instructive to note that section 171(2) (b) and (c) of the Investments and Securities Act 2007 also requires that the shares, bonds, debentures etc that may be invested in by a manager of a scheme fund must be listed on a securities exchange.

Borrowing from these provisions, it is doubtful that the "eligible" securities under the AMCON Act would – without more – include shares of company not listed on the Nigerian Stock Exchange. We are not aware that the shares of the bridge banks were publicly quoted at the time of the acquisition by AMCON.

Over an beyond the above, even Nigerian banking and securities practice is replete with limitations on the percentage of equity of a single company that a bank or other company in which the public have some form of interest may invest in.

We are also of the view, that to suggest that AMCON is empowered by virtue of the enabling statute to invest in all the equity of three bridge banks may be stretching the objectives and function a bit wide. Nothing in the AMCON Act specifically grants the AMCON the right or power to acquire banks, but rather to acquire eligible bank assets. “eligible bank assets” are defined to mean the assets of eligible financial institutions specified by the CBN Governor as being eligible for acquisition by the AMCON pursuant to section 24 of the AMCON Act.

It may also be interesting to note that the long title of the AMCON Act specifically states as follows:

> **“an act to establish the Asset Management Corporation of Nigeria for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria; and for related matters”.**

One of the cardinal principles in the interpretation of statutes is the principle that, “the express mention of a thing is the exclusion of another”. Given that the long title of an Act does not replace the specific provisions of the Act, the long title is useful in the interpretation of ambiguous provisions in a statute. In fact, the Supreme Court of Nigeria held in ***Bello & ors. v. A.G. Oyo State***[11] that resort may be had to the long title of an enactment as an aid to resolving ambiguities that may arise from the plain and ordinary words of a statute. Therefore, where an enactment mentions the things upon which to operate, everything else (not enumerated) must necessarily and by implication be excluded from its operation and effect.

Flowing from the above therefore, and from the other provisions of Nigerian law which tend to limit eligible securities to publicly quoted securities, it may be argued that the subscription by AMCON for all the share capital of the bridge banks, may not be within its stated objectives and functions as set out in its enabling law.

Conclusion

Without doubt, the banking regulatory authorities’ actions over the last two years have very far-reaching effects, and the issue of legality is one that cannot be swept under the carpet. As stakeholders of the nationalised banks continue to agitate for redress, it will be interesting to see where the courts will rest the matter, if it should arise. It is therefore germane that the regulators’ actions be on all fours with the relevant statutory provisions. Only by so doing, can any lasting meaning be made of their actions.

No matter what legal conclusions are reached by the Nigerian courts, it cannot be gainsaid that the actions of the regulators will continue to deepen the Nigerian banking industry and all stakeholders, including shareholders, depositors, and even regulators will continue to be under intense pressure to consider the legal implications of their actions, exercise prudence, enshrine good corporate governance, transparency and commitment to stimulate confidence across the entire scope of the banking industry.

[2] See the CBN press statement titled: 'Re: Resolution of Recapitalisation through Bridge Banks' http://www.cenbank.org/Out/2011/pressrelease/gvd/Bridge%20Bank%20Press%20Statement%20by%20CBN.pdf

[3] The breakdown of the AMCON deal with regulators and bridge banks for a stake in the nationalised bank as reported shows that Main Street Bank (Afribank) received N285billion while Keystone Bank (Bank PHB) got N283 billion. The remaining N111 billion went to Enterprise Bank (Springbank). With this move, each of the banks is said to be 15% above the required capital adequacy ratio for Nigerian banks

[4] For further understanding of the background to this development, see the NDIC press release of Friday 05 August 2011: 'RESOLUTION OF FAILING BANKS THROUGH THE ESTABLISHMENT OF BRIDGE BANKS'

[5] Section 33 of the BOFIA gives the CBN the power to carry out special examination or investigation of the books and affairs of a bank. It would appear therefore that the exercise carried out by the CBN in 2009 was executed in furtherance of this provision. It was in exercise of this power, that the CBN carried out the 2009 special examination on banks.

[6] [1993] 2 SCNJ 47

[7] Section 39 of the NDIC Act

[8] Cap N102, Laws of the Federation of Nigeria (2004)

[9] Asset Management Corporation of Nigeria Act 2010

[10] Cap T22, Laws of the Federation of Nigeria (2004)

[11] (1986) 5 NWLR (pt. 45) 828. See also Vacher& Sons Ltd vs London Society of Compositors and others (1913) All ER 241.

20B Kingsley Emu Street, Lekki Scheme 1, Lagos, Nigeria

Info@seftonfross.com