CSCanada
Canadian Social Science
Vol. 10, No. 5, 2014, pp. 61-69
DOI:10.3968/4151

ISSN 1712-8056[Print]
ISSN 1923-6697[Online]
www.cscanada.net
www.cscanada.org

The Legal Regime of Bankruptcy and Winding up Proceedings as a Tool for Debt Recovery in Nigeria: An Appraisal

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Received 6 January 2014; accepted 15 April 2014
Pulished online 18 April 2014

Abstract

Nigeria does not have a comprehensive policy or law on bankruptcy. Individuals are declared bankrupt while corporate bodies are insolvent in the event of individuals' inability to meet his/her total liability. A corporation may be wound up if it is unable to pay for its debt. Bankruptcy and insolvency are used in our legal theory. But the paper examines legislation on bankruptcy laws and its proceedings which have to be amended to meet the current global economic growth, so that investors may have confidence on our legal system in order to recover their debts in case of corporate insolvency or regulation legislated upon bankruptcy. Bankruptcy deals with the creditor and debtor when the debtor is unable to pay the debt of a creditor and declares bankrupt. The article recommends corporate insolvency leading to winding up and liquidation of a corporate entity and settlement of all other related issues including cross-border claims and counter claim settlement and cross-border corporate insolvency should be codified and our jurisdictions should allow the debtor and the creditor to renegotiate on the basis of their respective rights and obligations at any time using ADR mechanisms.

Key words: Bankruptcy; Winding up; Liquidation; Debt recovery; Jurisdictions; Creditor and debtor; Insolvency; Negotiations; Litigation and ADR mechanisms

Leonard C. Opara, Livinus I. Okere, & Chinwendu O. Opara (2014). The Legal Regime of Bankruptcy and Winding up Proceedings as a Tool for Debt Recovery in Nigeria: An Appraisal. *Canadian Social Science, 10*(5), 61-69. Available from: http://www.cscanada.net/index.php/css/article/view/4151 DOI: http://dx.doi.org/10.3968/4151

INTRODUCTION

Bankruptcy is a legal status of an insolvent person or an organization as well as an individual who cannot pay up the debts they owe to creditors. In most jurisdiction bankruptcy is ordered by a court order or often times initiated by the debtor to be declared bankrupt. The term bankruptcy is not same as insolvency because in some countries including the United Kingdom, bankruptcy is limited to individuals, and others forms of insolvency proceedings like liquidation, winding up and administration are applicable to companies. However in the United States of America the term bankruptcy is used more formally to insolvency proceedings.

In modern times, the law and debt restructuring provides for the principal focus of modern insolvency legislation and business debt restructuring practices no longer rests on the elimination of insolvent entities. But the restructuring of the financial and organizational method of debtors experience in financial distress calls for the support and renegotiation of their business and services for the substance of the developing economy.

1. DEFINITION OF BANKRUPTCY

Bankruptcy Law is designed to provide relief and pretention to debtors who have gotten over their heeds. It also provides a fair means of distributing a debtor's assets among all creditors. This, the law attempts to protect the rights of both the debtor and the creditor. In Nigeria Bankruptcy refers to the inability of an individual to pay his debts. A person cannot declare himself bankrupt except by the court after considering a petition brought before it for that purpose. It is only the court that has the power to declare an individual bankrupt.

It is only after a petition has been heard or ordered by a court declaring a debtor his inability to pay his debts owed to the creditors, the person or the debtor cannot be declared bankrupt until the court makes an adjudication

order to that effect and appoints a trustee in bankruptcy to take over his properties or estates. The individual person who is bankrupt, corporate entity or organization does not have enough assets and liability to cover the debts owed. The debtors files court proceedings to aid or grant them payment reschedule or wipe-out the debts totally. However, in some cases, the debtor shall give control of all the assets to the court appointed trustee in bankruptcy.

Bankruptcy is a legal proceeding by which the affairs of a bankrupt person are turned over to a trustee or receiver for administration under the bankruptcy laws.

Bankruptcy Act is to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee). Bankruptcy law is designed to accomplish the main goals:

(i) To provide relief and protection to debtors

(ii) To provide again means of distributing a debtor's assets among all creditors.

Thus, the law attempts to protect the rights of debt the debtor and the creditor, this duty of the court to administer the estate of the debtor in bankruptcy. Bankruptcy may be grouped into (a) voluntary bankruptcy (b) involuntary bankruptcy.

2. DIFFERENCE BETWEEN INSOLVENCY AND BANKRUPTCY

Insolvency is the ability not to pay one's debt. It is also the inability to pay debts as they become due, is known as equitable insolvency. A balance sheet insolvency, which exists when a debtor's liabilities exceed assets, is not the test. Thus, a debtor may voluntarily petition for him to be declared bankrupt where his assets may be more than their liabilities. This occurs sometimes when the debtor's liquid cash becomes a problem to be solved. A corporate body can be insolvent or unable to pay his creditors, assets and liabilities may be deposed to pays their debts. The Companies and Allied Matter Act (CAMA) 1990 provides that companies cannot be bankrupt but insolvency.[1]

Bankruptcy is the state of being or act of becoming bankrupt. Bankrupt is one who breaks or fails in business. Bankruptcy also deals with any person who cannot pay his debts of a stated amount and to disqualify the person from holding certain elective and other public offices or from practicing any recognized and regulated profession except those who are employees. Bankruptcy involves both the debtor and creditor and a creditor can obtain a final judgement order against him for any amount, and execute same on him after service of bankruptcy notice on the person.[2] The person may be declared bankrupt if be.

[1] Section 650 of CAMA 1990 and S. 122 (c & d) Investments and Securities Act 2007.

[2] Section 1. (a) CAP B2 LFN 2004.

Debt recovery, also known as debt collection, involves the attempt to collect debt from consumers who owe money to a creditors, company or bank. In Nigeria the issues of recovery of debts from debtors to creditors are mainly filed in the Federal High Court depending on the jurisdictions where the individual or parties entered the contract. However, in other jurisdictions like in the United States the collection of debts fall under the federal Fair Debt Collection Practice Act (FDCPA) of 1977.

3. CAUSES OF BANKRUPTCY

The causes of bankruptcy are credit in form of loans to business and individuals who cannot purchase most equipment for production except on credit facilities. The easy availability of credit has made some debtors indebted. Bankruptcy law has been developed to protect such debtors, while at the same time protecting creditors' rights at least to the extent possible under the debtor's circumstances. The lender liability and the lending institutions seeking to get back their loans from the debtors through the use of harassment and duress as tactics to ensure the payment of their claims are some of the major causes of bankruptcy.

Bankruptcy law necessarily favours debtors and thus gives rise to issues of fairness. Is ethical for example, to take advantage of protection under bankruptcy law when law was originally designed as the "**last result"?** Should debtors be allowed, be avoid permanently, the debts they owe by taking refuge under bankruptcy law, even when they are solvent? These are ethical questions that must be faced by our society to create an advanced economy in the world of business.

4. THE BANKRUPTCY ACT

The outline of the Acts of bankruptcy includes when a debtor commits an act of bankruptcy as stated on the Act[3] in the following cases:

If a creditor

(a) has obtained a final judgement or final order against the debtor for any amount, and execution notice served on him and

(b) does not, within fourteen (14) days after service of the notice, comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgement debt or sum ordered to be paid, and which he could not set up in the action in which the judgement was obtained or the proceedings in which the order was obtained.

a. Also in accordance to Section 4, it is only the creditor who has been entitled to enforce a final judgement or final order who has obtained a final judgement or final or

b. If execution against the debtor has been levied be seizure of his goods under process in an action or proceedings in the court, and the goods have either been sold or held by the bailiff for twenty one days.

[3] Section 1 (a-i) CAP B2 LFN 2004

c. if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

d. if he suspends or gives notice that he is about to suspend payment of his debts to any of his creditors, or

e. if under a credit agreement the creditor becomes entitled to file a bankruptcy petition or

f. if, in Nigeria or elsewhere, he makes a conveyance or assignment of his property to a trustees for the benefit of his creditors generally or

g. if, in Nigeria or elsewhere, he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof, with an intent to defeat or delay the claim of his creditors; or

h. if, in Nigeria or elsewhere, he makes any conveyance or transfer of his property or any part thereof, or created any charge thereon, which would under this way other Act be void as fraudulent preference if he were adjudged bankrupt; or

i. if, wise intent to defeat or delay the claims of his creditors, he departs out of Nigeria, or being out of Nigeria remains out of Nigeria, or departs from his dwelling, or otherwise absents himself or begins to keep house.

5. PERSONAL BANKRUPCY

Individual commercial operators, individual who are members of the management of a company subject to and ministration or liquidation proceedings, and permanent representatives of companies sitting on the board of a company subject to such proceedings may be put into personal beneficiary by the court any time during the proceedings.[4]

Personal beneficiary may be ordered when the person concerned has:

• Removed the accounts from the company, embezzled or concealed part of the company's assets, or fraudulently acknowledge non-existent debts.

• Exercised a commercial activity in his own personal interest

• Used the credit or assets of the company as if they were his own.

• Fraudulently obtained a composition agreement that has subsequently been declared null and void or

• Committed certain acts in bad faith or has been guilty of inexcusable negligence or has seriously infringed commercial rules and practice[5]

The latter category of acts include the exercise of a commercial activities or management functions when under a prohibition to do so, failure to keep proper accounts; the deliberate delaying of a declaration of insolvency by using methods that cause further damage to the company.[6] Furthermore, the court may declare members of the management to be in personal bankruptcy when they have committed other serious faults or are blatantly in competent when they have failed to make a declaration of insolvency within 30 days or when they have failed to pay debts of the company that they have been ordered to pay.[7]

When personal bankruptcy is ordered, the national rules of criminal procedure may require a publication to be made in the criminal record of the person concerned, and a public must also be made in the RCCM, the OHADA legal journal and a local legal journal.[8]

When members of the management have being declared in personal bankruptcy, he is automatically prohibited from;

i. Engaging in commerce and in particular from managing, administering, or controlling companies;

ii. Exercising any public elective function or voting in such election

iii. Exercising any administrative or judicial function, or any representative function within a professional organization.

The court determines the duration of such prohibitions, which cannot be less than three (3) years or more than ten (10) years.[9] On certain conditions the prohibitions may however be lifted before they have run their term, for example when the company's liabilities have been paid off or when there is unanimous consent of the creditors.[10]

6. CRIMINAL BANKRUPTCY

The Uniform Act of OHADA provides for the two types of Criminal Bankruptcy namely:

a. Simple and

b. Fraudulent for particular services, acts committed either by individual commercial operators or by shareholders in certain types of companies who are indefinitely and jointly and severally liable for their company's debts.[11] The management may be made subject to criminal bankruptcy even if they have also been made subject to the extension of administration or liquidation proceedings.

Criminal proceedings may be begun by the state, by the administrator or liquidator or by any creditor acting in his own name or if as authorized by supervising judge, on behalf of the body of creditors.[12] The criminalities applicable to criminal bankruptcy are defined in each member state's national criminal law.

Simple Bankruptcy is incurred when the business is insolvent and when the person concerned has:

a. made undertakings that are two onerous in view of the financial situation and has not received sufficient consideration to exchange;

[4] Articles 194 of OHADA
[5] Article 196 of OHADA
[6] Article 197
[7] Article 198
[8] Article 202 of OHADA
[9] Article 203
[10] Article 204 & 205 of OHADA
[11] Article 227
[12] Article 234

b. in attempt to delay a determination of insolvency, made purchases a view for selling the goods at less than market value or has used furious methods to obtain funds;

c. failed, without any legitimate reason, to declared insolvency within thirty (30) days,

d. prepare incompetent or improper accounts, or

e. has twice been in a situation of insolvency within five (5) years, and the proceedings have been terminated for insufficiency of assets.[13]

However, other management members may be found guilty of offences that are assimilated to simple bankruptcy and that gives rise to some penalties if the person concerned has;

a. used funds belonging to the company in hazardous or fictitious operations.

b. after the company has become insolvent, paid off one creditor to the detriment of others

c. concealed or removed his own assets or has fraudulently acknowledge non-existent debts, with a view to removing some or all his assets from the scope of any proceedings against him in the context of the proceedings involving the company or

d. been guilty of any of the other actions mentioned above for other categories of persons subject to simple bankruptcy.[14]

7. FRAUDULENT BANRUPTCY

Bankruptcy fraud is a white collar crime which may occur in the following ways:

i. concealed the accounts

ii. embezzled or squandered some or all the of the assets

iii. fraudulently acknowledge non-existent debts

iv. exercised a commercial profession which prohibited from doing so

v. paid off a creditor after the business has become insolvent, to the detriment of other creditors or

vi. gives a creditor particular advantage, for example in exchange for the vote in the creditors meeting.[15]

Fraudulent bankruptcy is also incurred when the business is not insolvent but subject to preventive settlement proceedings,[16] if the person concerned has;

a. in bad faith presented accounts that are inaccurate or incomplete or

b. performed certain prohibited acts without authorization from the president of the court.[17]

Other management members may be held to be guilty of offences assimilated to fraudulent bankruptcy on grounds similar to (**mutalis mutandis)** those applicable to individual operators and the shareholders with unlimited liability.[18]

[13] Article 228
[14] Articles 230 & 231 of OHADA
[15] Article 229
[16] If a court has ruled before-res jurisdiction.
[17] Article 227
[18] Article 230

The criminal court, and not the commercial court, has jurisdiction with regard to criminal bankruptcy. However, in Nigeria, it is the Federal High Court that has jurisdiction to bankruptcy issues whether civil (commercial) or criminal nature. The proceedings may be commenced by the Public prosecutor (AG Federation or State) by a private plaintiff, by the administrator or liquidator (Official Receiver) or by any creditor acting his own name or on behalf of the body of creditors.[19]

8. BANKRUPTCY PROCEDURES

Bankruptcy proceedings are, in essence, punitive in nature and are employed to ensure that persons who cannot meet their financial obligations are disqualified from holding public offices, occupying managerial positions and practicing regulated professions, except they are engaged as employers.[20] This was the rationale behind the enactment of the extant Bankruptcy Act [21](hereinafter referred to as the Act) and is the purpose for the institution of a bankruptcy petition. The reasoning above can be derived from the long title of the Act which states:

An Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee as observed by Dr.Nwobike.[22] In order for the process of bankruptcy to begin, the debtor must have first committed an act of bankruptcy. An act of bankruptcy raises an assumption of the insolvency of the debtor, and enables a creditor (or a debtor himself) to petition for the debtor's bankruptcy.

The procedures are as follows:

(a) An act of bankruptcy has been committed

(b) A petition based on an available act of bankruptcy may then be presented by a creditor or group of creditors (or the debtor may present a petition against himself to be declared bankrupt)

(c) A receiving order making the official receiver, the receiver of the debtor's property will be made, if the petition is proved to the satisfaction of the court.

(d) A statement of affairs will be drawn up by the debtor.(e) A meeting of creditors shall be held to discuss the statement and decide whether to proceed with the bankruptcy or accept any composition or scheme of arrangement which he may offer.

8.1 The Schemes of Arrangement and Composition

Section 18 of the Bankruptcy Act[23] provides that where

[19] Article 234.
[20] For the consequences of being adjudged a bankrupt on a debtor see Section 126 of the bankruptcy Act, Cap B2, Laws of the Federation of Nigeria, 2004.
[21] Cap. B2, Laws of the Federation of Nigeria, 2004
[22] Dr. Joseph Nwobike, "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria"
[23] Cap. B2 LFN 2004

a debtor intends to make a proposal for a composition in satisfaction of his debtor or a proposal for a scheme of arrangement of his affairs, he shall, within seven days of submitting his statement of affairs or within such time thereafter as the official receiver may fix, loge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors and seeking out particulars of any sureties or securities proposed.

From the above proviso of the Act, the scheme of arrangement shall follow the following procedures:

a. Official receiver who shall hold a meeting of creditors before the public examination of the debtor is contained and send to each creditor before the meeting a copy of the debtor's proposal with a report. However if at the meeting a majority in number and not less than two thirds (2/3) in value of all the creditors who have proved resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors, and when approved by the court shall be bending on all creditors.

b. The debtor may at the meeting amend the terms of his proposal, if the amendment is in the opinion of the official receiver calculated to benefit the general body of creditors.

c. Any creditor who has proved his debt may assent to or dissent from the proposal by a letter addressed to the official receiver so as to be received by him not later than three (3) days proceeding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting.

d. The debtor or the official receiver may, after the proposal's accepted by the creditors, apply to the court to approve it, and notice of the time appointed for leaving the application shall be given to each creditor who has proved.

e. The application shall not be heard until after the conclusion of the public examination of the debtor and any creditor who has proved his case may be heard by the court in opposition to the application, notwithstanding that he may, at a meeting of creditors, have voted for the acceptance of the proposal.

f. On case of approving a composition or scheme by joint debtors, the court may, if it thinks fit and on the report of the official receiver that is expedient so to do, dispense with the public examination of any of the joint debtors if they are or any one of them is prevented from attending the examination by illness or other sufficient cause or absence from Nigeria but one at least of such joint debtors shall be publicly examined.

g. The court shall before approving the proposal, hear a report of the official receiver as to the terms and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

h. If the court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the count shall refuse to approve the proposal.

i. If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge where he is adjudged bankrupt, the court shall refuse to approve the proposal, unless it provides reasonable security fort the payment of not less than twenty-five (25%) percent on all the unsecured debts provable against the debtor's estate.

j. In any other case, the court may either approve or refuse to approve the proposal.

k. If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposal composition or scheme, or by the terms being embodied in an order of the court.

l. A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors, so far as it relates to any debts due to them from the debtor provable in bankruptcy.

m. A certificate of the official receiver that a composition or scheme has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity.

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o. The provisions of a composition or scheme under this section may be enforced by the court on application by any person interested, and by disobedience of an order of the court made on the application shall be deemed a tempt of court.

p. In case of default made in payment of any installment due in pursuance of the composition or scheme, or if it appears to the court on satisfactory evidence that the composition or scheme cannot, in consequence of legal difficult tees or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application of the official receiver or the trustee or by any creditor, adjudge the debtor bankrupt and annul the composition or scheme, but without prejudice to the validity of any sale, disposition or payment duly made or thing duly done under or in pursuance of the composition or scheme.

q. Where the debtor is adjudged bankrupt under subsection (16) of this section, any debt provable in their respects, which has been contracted before the adjudication, shall be provable in the bankruptcy.

r. If under or in pursuance of a composition or scheme a trustee is appointed to administer the debtor's property or arrange his business or to distribute the compensation S.27 and part iv of the Bankruptcy Act shall apply as if the trustee was a trustee in bankruptcy and as if the terms "bankruptcy", bankrupt "order of adjudication" included respectively on composition or scheme of arrangement, a compounding or arranging debtor and an order approving the composition or scheme.

Section 18 (20) [24]of the Act provides that no composition or scheme should approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankruptcy.

8.2 The Creditor's Rights to Petition

By virtue of Section 4(1) of the bankruptcy Act[25] and subject to the provisions of Section 7 of the Act, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless on the following grounds:-

a. The debt owned by the debtor to the petitioning creditor, or of two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, is not less than **N2, 000**.

b. The debt is a liquidated sum payable either immediately or at same certain future time.

c. The act of bankruptcy on which the petition is grounded has occurred within three (3) months before the presentation of the petition; and

d. The debtor is ordinarily resident in Nigeria, or within a year before the date of the presentation of the petition, has ordinarily resided or had a challenging house or place of business in Nigeria, or has carried on business in Nigeria, personally or by means of an agent manager, or is or within the said period has been a member of a firm or partnership of persons which has carried on business Nigeria by means of a partner or partners or an agent or manager.

Furthermore, Section 4(2) of the Act states that if the petitioning creditor is a secured creditor he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security.

The provision in Section 4(3) of the Act does not in any form or without prejudice to any other rights of the debtor, prevent a creditor who is entitled to present a bankruptcy petition on or before the end of December, 1992 shall not be disentitled from presenting a petition by virtue of the provisions of S.4 (4) (c) of this Act if the petition is presented at the expiration of a period of six (6) months.

9. DISCHARGE OF BANKRUPT

Section 28 (1) of the Act provides that at any time after being adjudged bankrupt, apply to the court for an order of discharge and the court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. This implies that bankruptcy is not an irredeemable or a permanent condition.

The application shall, except when the court in accordance with rules under this Act otherwise directs, be heard in open court.

Section 28 (2) of the Act states that where the bankrupt does not of his own accord within such time as the court may deem reasonable apply for discharge, the court may, of its own motion or on the application of the official receiver or the trustee or any creditor who proved, its case make an order to discharge the debtor in accordance with the provision of the act. Section 31 of the Act further provides that a bankrupt is automatically discharged after the lapse of five (5) years from the date a receiving order was made against him. In other words it means that after the expiration of five years an order is made the person is discharge of bankrupt.

It follows from the above that Bankruptcy discharged refers to a court order that ends bankruptcy proceedings as old debts and hence releases the debtor from the responsibility of repaying certain types of debt.

10. WINDING-UP PROCEDURES

A company's life time can be brought to an end by a process known as winding up. The process of winding up or liquidating a company is the legal means of ending the life of that company. Thus the Black's Laws Dictionary defines "winding up" as the process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution. To liquidate means, to sell all of a company's assets, pay outstanding debts, and distribute the remainder to the shareholders, and then go out of business. In other words, the terms "winding up" and "liquidation" are used to mean the same in the corporate law practice by the legislation. Winding up proceedings are special proceedings, the result of which terminates the life of a company and as such the provisions of the law set out in the Companies and Allied Matters Act, Laws of the Federation, 2004 on the winding up of companies must be strictly complied with in form and substance. Part XV of the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004 ("the Act") makes provisions for winding up of companies in Nigeria

It is important to note that the subject of Companies winding up is very open, and all aspects cannot be covered by a paper of this magnitude. The extent of this paper is to describe the winding up proceeding and how it can be used as a means of debt recovery in Nigeria and whether it is a veritable tool to be used for debts recovery for that purpose. Both legal authorities and statues shall be examined in the course of this paper. There are many ways by which a company may be wound up under the Act such as by court, voluntary or subject to the supervision of the court but, we shall deal more, for the purposes of this paper, on winding up by the court.

10.1 The Methods or Ways in which a Company May Be Wound Up

According to Section 408 of the Act provides that a company may be wound up if:

[24] Cap B2 LFN 2004
[25] Cap B2 LFN 2004

(a) the company has by a special resolution resolved that the company be wound up by the court;

(b) default is made in delivering the statutory report to the Commission or in holding the statutory meeting;

(c) the number of members is reduced below two

(d) the company is unable to pay its debt;

(e) the court *is* of the opinion that it is just and equitable that the company be wound up.

From the Act stated above this article is to present the purposes of Section 408 (d) above, i.e. where the petition is presented on the ground that the company is unable to pay its debt, then the winding up proceeding is filed in the court for an order of winding up to be made by the Court, the creditor in a winding up proceeding must show that the petition is brought *bona fide* and based on any one or more of the grounds stated above especially to show how the company is indebted to him or the credit facility granted to the company.

10.2 Winding by the Court or Compulsory Liquidation

According to Section 408 of the Act it provides the circumstances in which a company may be wound up compulsorily if:

(a) the company has by a special resolution resolved that the company be wound up by the court;

(b) default is made in delivering the statutory report to the Commission or in holding the statutory meeting;

(c) the number of members is reduced below two

(d) the company is unable to pay its debt;

(e) the court *is* of the opinion that it is just and equitable that the company be wound up.

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10.3 Where a Company Is Unable to Pay Its Debts

By virtue of Section 409 of the Act defines the means under which a company is said to be unable to pay its debt, as follows:

"A Company shall be deemed to be unable to pay its debts if:

(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2, 000.00 then due has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay die sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) execution or other process issued on a judgment, Act or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) the court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts."

It is pertinent to state that from the above provisions and indeed the entire provisions of the Act dealing with winding up of companies as well as the Rules made pursuant thereto that, winding up proceeding is not intended to be used as a vehicle for debt recovery. However, over the years, the process[50] is being used by creditors as a means to recover debts owed them by debtor companies. Many creditors have succeeded in having their debts paid using the winding up proceeding no doubt, but that in itself does not detract from the fact that winding up proceedings is not intended to be used as a tool for debt recovery and is not a legitimate means of debt recovery as observed by Dr. Nwobike in his work. Furthermore those who use this method to recover debts against a corporate personality think it is the best practice but it is wrong. This is due to the fact that our supreme court has not pronounced a contrary view and asks the creditors to refund the money or revoke the winding up of the affected corporate bodies.

The winding up under the principle of inability to pay debts is a matter of interpretations. But it is essential to state that a company may be wound up where it is unable to pay its debts, but the court will not make an order where the sole purpose of the petition is to put pressure on the debtor.

However, the Court of Appeal, per Musdapher, JCA (as he then was), in the case of Oriental Airlines Ltd. vs. Air via Ltd[26], held inter alia that: "The machinery of a winding up petition should not be converted to an engine for debt collection in circumvention of the established legal procedure for instituting action in appropriate courts for collection of debts."

From the above, Dr. Nwobike(2013) observed that, threatening a winding up petition and indeed the actual filing of a petition as a means of recovering debt from a corporate debtor can be a powerful tool *albeit* with its attendant risks. Experience have shown that, the mere threat of a winding up petition is sometimes enough to elicit a response from a corporate debtor as the publicity involved in a winding up proceedings can be devastating to the[27] business and corporate image of the company concerned. However, the true position is that, the purpose of winding up proceedings is not meant to be used as a vehicle for the recovery of debt. We are of the view that, before a creditor considers using winding up petition/proceeding solely for the purposes of debt recovery, the risks involved should be taken into consideration as well. Thus the use of ADR mechanisms can as well achieve results in this area.

Winding up petition applies to corporate debtors (companies) or corporate sole rather than individual debtors. In other words, winding up petition cannot be issued against an individual as in the case of a bankruptcy petition. Generally, the first step is to issue the statutory demand to the debtor company. The statutory demand

[26] (1998) 12 NWLR (Pt, 577| 271 at 230-281.
[27] Ibid

requiring the company to pay its debts must be signed by the creditor (in the case of a corporate creditor, the demand must be signed by a director or any other principal officer). By the provision of Section 409 (a) of the Act, the debtor company has three weeks within which to pay or respond to the demand to the satisfaction of the creditor. If at the expiration of the statutory period the company fails or neglects to pay, a winding up petition can then be issued against the company for its inability to pay its debt. Dr. Nwobike in his argument stated the above position in compliance with the provision of the Act. It is pertinent to state that, after a winding up order is made, the assets of the company are sold and distributed among the various creditors of the company in accordance with the provisions of the Act by the liquidator. However, the fact that a particular creditor issued the petition on the basis of which the order is made does not mean that he will have priority over whatever funds that may be available for distribution.[28] It is possible that he might even not get enough to cover the cost of the proceedings.[29]

10.4 The Filling of a Winding up Petition Process

By the provision of Section 410 (1) of the Act, a winding up petition may be presented by either of the following:

(a) the company;

(b) a creditor, including a contingent or prospective creditor of the company;

(c) the official receiver;

(d) a contributory;

(e) a trustee in bankruptcy to, or a personal representative of a creditor or contributory;

(f) the Commission under Section 323 of this Act;

(g) a receiver if authorized by the instrument under which he was appointed; or

(h) by all or any of those parties, together or separately.

Since the scope of this paper is to appraise the legal regime whether or not winding up proceeding/petition is an essential tool for debt recovery, it is important to concern ourselves to the power of a creditor to present a winding up petition. From the provision of Section 410 (1) of the Act stated above, it is clear that, a creditor, being one to whom a company is indebted, is entitled to present a winding up petition against a company on the ground that the company is unable to pay its debts[30].

11. COMMENCING A WINDING UP PETITION

Presently in Nigeria, a winding up proceeding is commenced by making an application to the Federal High Court[31] which is the court that has jurisdiction to hear any petition. The application for winding up of a company is by way of a petition.[32] Before a petition is filed in court, the creditor must be able to establish that the debt owed by the Company exceeds N 2000.00 and that the Company has failed and refused to pay the debt after the statutory demand notice has been issued and served on the company. It is important to state here that unlike bankruptcy proceedings where two or more creditors is permitted by law to bring an action. The statutory demand notice requiring the company to pay its debt must be signed by the creditor, (in the case of a corporate creditor, the demand must be- signed by a director or any other principal officer of the company)[33]

A compulsory winding up means a legal procedure by which a court appointed liquidator wind up the affairs and activities of a company. After the process of winding up, the company does not exist anymore and the name of the company is struck out from the register of companies at corporate affairs commission (CAC). It is important to state that the closure or liquidation of a company by a court does not give any legal right or assurance that the creditors of the company may be paid. This is because the object of winding up a company is to ensure that all the company's affairs have been dealt with properly.

It is important to state that the winding up proceeding provides for the service of the petition on the registered address of the corporate entity or principal officer of the debtor company may receive the processes and that it has to be advertised or published in any of the national daily for the public and those who have interest in the affairs of the company to be aware that the company is in the process of winding up. The Act provides in the provisions of Rule 17 (1) of the CWR 2001 which deals with service of a petition stipulates as follows:[34]

Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office thereto the principal or last known principal place of business of the company, if any, if such can be found, by leaving a copy with any member, In the event of a winding up procedure by a court at any time after the petition for liquidation of the company before a winding up order may be granted by the court, the creditor or the company or contributory individual(s) may approach the court for a stay of proceedings pending against the company. When a winding up order has been made, no action may be started against the company or proceeded with except with the leave of the court. The leave of court may be very difficult to be obtained after a winding up order has been issued the best is for the petitioner respondent or appellant to

[28]Ibid

[29]See Section 494 of the Acton preferential payments.

[30]See Black's Laws Dictionary, Eight Editions. P^S6 3% for definition of a creditor.

[31] See Section 4l) 7 of the Act and Section 251 (1) (e) of the Constitution of the Federal Republic of Nigeria,(as amended). By those provisions, it is the Federal High Court that has exclusive jurisdiction lo make an order winding up a company

[32]See Section 410 of the Act.

[33] (l'*71] 7 NSCC 25b a[261-262.

[34] In this case, the: Federal High Curt (Civil Procedure) Rules, 2011. See Rule of the CWR, 2001.

seek redress in an appellate court to set aside the decision of the trial court if there is miscarriage of justice.

In summary, the primary function of the Liquidator is to administer the assets of the company under liquidation, sale of the assets and realisation of all debts of the company in liquidation for the purpose of distributing same among the various creditors and other shareholders of the Company and to finally dissolve the Company after the affairs of the Company have been completely concluded in accordance with the applicable Act.

12. DISSOLUTION OF THE COMPANY

It is the duty of the Liquidator to apply to the Court for an order dissolving the Company. The order of dissolution made by the Court will then be forwarded by the Liquidator to the Commission within fourteen (14) days when the order was made. Section 454 (1) and (2) of the Act states as follows:

(i) If the affairs of a company have been fully wound up and the liquidator makes an application in that behalf, the Court shall order the dissolution of the company and the company shall be dissolved accordingly from the date of the order.

(ii) A copy of the order shall, within 14 days from the date when made, be forwarded by the liquidator to the Commission who shall make in its books a minute of the dissolution, of the company.

From the above provision of the statues, the word commission refers to in the proviso is the Corporate Affairs Commission which regulates the activities of companies in Nigeria, then the notice from the liquidator to them of the court's order is to enable the commission to delist the dissolved company from the registrar of companies.

SUMMARY

It is evident from the foregoing that, the procedures relating to the bankruptcy and winding-up proceedings (insolvency proceedings) are quite tasking. As stated therein, the process starts from the issuance of all statutory notices, filing valid processes in the Court, complying with all relevant provisions of the applicable Acts and Rules, obtaining the orders sought from the competent court. The CAMA which is the law that governs and regulates the activities of both the creditors and the corporate entity in their transactions. Thus it is the court that will give the order or judgement in the bankrupt (bankruptcy proceeding) and making a winding-up order (winding-up proceedings) the process continues until the implementation of the order of the Court.

In Nigeria and its judicial processes the act of bankruptcy and the rate of liquidation of companies can be attributed to the mode in which debtors and creditors take their fate to court during insolvency proceedings are not legitimate ways for the recovery of debts in Nigeria. A review of our legislation especially the rules applicable to bankruptcy and dissolution of companies has to be amended in order to encourage, where a company is persuaded to settlement its debt on the threat or presentation of a bankruptcy or winding-up proceeding, the proceedings should not be encouraged as a legal means for debt recovery.

RECOMMENDATIONS

The issue of debt recovery by individual or corporate bodies be it bankruptcy or insolvency proceedings in Nigeria without recourse to the legislations thereto, parties may seek to resolve to alternative dispute resolution (ADR) to settle out of court and to reduce the cost of litigations and the delay that the courts may cause them. However, in the individual bankruptcy, they decide to forget or forgive the debtor. Even though, the company is wound up and liquidators are appointed they may not recover the total debts owed to the companies by the debtors thereby incurring more expenses and liability on the company that they want to savage from its shareholders or stakeholders as the case may be. We are of the opinion that claims arising from debts as well bankruptcy charges can only encourage investors or creditors if a peaceful resolution are agreed by parties and time frame is given to debtors to pay or settle the creditors because judgement obtained against a debtor is not immediately settled and may resolve to enforcement through the law enforcement agencies.

REFERENCES

Statues

(a) The Companies and Allied Matters Act Cap C20, Law of the Federation, 2004.

(b) The Federal High Court (Civil Procedure) Rules 2011.

(c) Cap B 2, Laws of the Federation of Nigeria 2004

(d) Company Winding Rules 2001

(e) Cap B1 Bankruptcy Rules, Laws of the Federation 2004

(f) The Constitution of Federal Republic of Nigeria, 1999 as amended.

Articles

Whether bankruptcy proceeding and winding up as a veritable tool for debt recovery. by Dr. Joseph Nwobike.

Olisa Agbakoba & Associates. Bankruptcy Proceedings as a Tool for Debt Recovery.

CL.E.S Vol. 1 No. 1 p. 3

Books

Nigerian companies and allied matters law and practice. by Deji Sasegbon.

Halsbury's. *Law of England*, Fourth Edition.

Black's laws dictionary, Eight Editions.

Companies law in Nigeria under the companies and allied matters act. by Ephraim M. Asomugha.

Principles of executorship, trusteeship and bankruptcy law. by Leonard C. Opara & Prnice Lukman Jayeola Agunbiade.