WHETHER BANKRUPTCY AND WINDING-UP PROCEEDINGS ARE VERITABLE TOOLS FOR DEBT RECOVERY IN NIGERIA*.

1.00 INTRODUCTION

1.01 In every creditor-debtor relationship the interests of the parties are usually antithetical. Whilst the debtor seeks to secure the credit facility he seeks, the creditor, though may be disposed to granting the facility, always treads with caution and ensures that all checks to secure the realisation of his exposure to the debtor, in the event of default, are put in place. Another cause of concern for creditors in debt recovery cases is the best and most efficient[1] means of recovering debts from debtors when they default. It is in this light that this paper intends to x-ray the viability of Bankruptcy and Winding-up proceedings as debt recovery measures.

1.02 Due to the nature and scope of the topic under consideration, the paper is divided into two (2) sections – Sections A and B. Section A deals with the nature, purpose, procedures and end of bankruptcy proceedings. A step-by-step analysis of the procedure involved in bankruptcy proceedings will be undertaken from the stage of applying for the issuance of a Bankruptcy Notice to the tail end, when the debtor is declared bankrupt and his properties enter into administration by Trustees or a Committee of Inspectors to be appointed by the creditors. This section shall conclude by the author disagreeing that bankruptcy proceedings is an effective debt recovery mechanism.

1.03 The scope, nature and purpose of winding-up proceedings forms the fulcrum of discussion in Section B. The various types of winding-up proceedings will be identified and treated. An evaluation of the efficacy of winding-up proceedings as a tool for debt recovery will be undertaken and the conclusion will be reached, based on the discourse herein, that winding-up proceedings, although may serve to spur a debtor to liquidate his debts, same does not, in the strict sense, qualify as a debt recovery procedure.

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1 ''Efficiency'' as used here is in relation to the ''cost-benefit'' implication of bankruptcy and winding-up proceedings especially as it relates to the ''time-value'' expectations of the creditors. An economic understanding of the ''efficiency principle'' is a process that delivers the best possible result within the shortest possible time and with the least cost.

SECTION A

2.00 BANKRUPTCY PROCEEDINGS

2.01 Introduction

2.02 Bankruptcy proceedings are a specialised specie of litigation and entails a mastery of the applicable laws and rules for effective usage. 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 employees[2]. This was the rationale behind the enactment of the extant Bankruptcy Act[3] (hereinafter simply referred to as ''the Act'') and is the principal purpose for the institution of a bankruptcy petition. The reasoning above can be gleaned from the long title[4] of the Act, which reads:

> ''An Act to make provisions for declaring as bankrupt any person who can not pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practising any regulated profession (except as an employee).''

2.03 Despite the above, bankruptcy proceedings can be gainfully employed, by creditors, to recover debts owed to them by debtors upon the compliance with certain conditions precedent and the commission of any of the acts of bankruptcy provided under the Act.[5] In its debt recovery complexion, bankruptcy proceedings are a specialised legal proceeding employed by either a creditor (to recover his exposure to a debtor) or a debtor (to obtain financial reliefs, by means of judicial process, from his debtors.)[6]

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2 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.

3 Cap. B2, Laws of the Federation of Nigeria, 2004.

4 According to S.O. Imhanobe ''Understanding Legal Drafting and Conveyancing'' (2002) Academy Press, Lagos,p. 82, a long title is ''meant to highlight the spirit and principal object of the statute. The draftsman from the aggregate information contained in the drafting instruction inserts it. It should be wide enough to cover the entire purpose(s) of the statute.''

5 See generally Ss. 1 and 4 of the Act.

6 See the definition of Bankruptcy in Blacks Law Dictionary, 8th Edition, Thomson West, USA p. 156, where bankruptcy was defined as ''A statutory procedure by which a (usu. Insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganisation of liquidation of the debtor's assets for the benefit of creditors''.

2.04 There are basically two variants of bankruptcy proceedings: the first is a Creditor Bankruptcy Proceedings and the other is a Debtor Bankruptcy Proceedings. In both cases, the end[7] is to obtain a Receiving Order against the assets of the debtor to be used to liquidate the debts owed to his creditors.[8] The major difference between these two forms of bankruptcy proceedings is the objective each seeks to achieve and the benefit to party. In the case of a debtor bankruptcy proceedings, it seeks to provide a protective measure for the debtor against his creditors. Conversely, in the case of the creditor bankruptcy proceedings, it seeks to provide an avenue for the recovery of debts within the contemplation of the Act. However, in practice, it is rare to find debtors who institute bankruptcy petitions against themselves (in Nigeria there has been no reported case of debtor bankruptcy petition). Although, one of the benefits of a debtor taking out a bankruptcy petition against himself when he is unable to pay his debts, is that he saves himself from the possibility of negative publicity which a creditor bankruptcy petition may occasion. For instance, a creditor may apply to serve the bankruptcy petition on the debtor by substituted means e.g by publication under Section 7(1)(b) of the Act. The grant of an order for service of the bankruptcy petition by publication will definitely impact on the reputation and goodwill of the debtor negatively. The other possible benefit is that it provides him the opportunity to secure a court ordered restructure of the timelines for the liquidation of his debts.

2.05 The fact must be made clear that bankruptcy petitions are a specie of insolvency litigation. In this wise, it is pertinent, before going any further, to differentiate between the two (2) insolvency proceedings in Nigeria – bankruptcy and winding-up proceedings.[9] The distinctions between these two (2) distinct insolvency proceedings will be made clearer when their ''subject'' and ''purpose'' are inquired into. The subject distinction is exposed when the question is asked: ''Who is the subject of a bankruptcy or winding-up proceedings?'' A careful consideration of this question will reveal that whilst the former proceedings is a proceeding in *personam* the latter is not. A bankruptcy proceedings is principally aimed at adjudging the debtor a

7 The ''end'' of bankruptcy proceedings in this context is illustrated from the perspective of debt recovery. Otherwise the principal object is to declare the debtor bankrupt.

8 See ss. 7 and 8 of the Act.

9 Winding-up proceedings will be discussed at Section B of this paper.

bankrupt whilst a winding-up proceedings aims at liquidating a company for its inability to pay its debt(s). Therefore, a bankruptcy petition is an assault against a person whilst a winding-up petition is an assault against a company. The ''purpose'' distinction of these two (2) proceedings will be seen when the question is asked: ''What are the ends to be achieved by bankruptcy and winding-up petitions?''. As have been mentioned above, bankruptcy proceedings seek to achieve the following purposes:

i. Adjudging a debtor as bankrupt (this is the principal purpose)[10]; and

ii. Obtaining a Receiving Order against the assets of the debtor to be used to liquidate the debts owed to his creditors.[11]

2.06 The above is not the case with a winding-up proceedings. A winding-up proceeding is not an outright debt recovery proceeding, but principally a company liquidation proceeding.[12] The distinction being made above was put thus:

> ''There are two recognised insolvency proceedings in Nigeria. The first is Bankruptcy where the debtor is an individual or a partnership firm. The second is winding up where the debtor is a limited liability company.
>
> In both Bankruptcy and winding up proceedings, possession of the property of a debtor is coercively taken and brought under judicial administration of the trustee or official receiver for the benefit of his creditors generally. However the major difference in the two proceedings is that bankruptcy focuses on the individual debtor while winding up focuses on the company leaving out the individual directors and shareholders.''[13]

10 For the consequences of being adjudged a bankrupt on a debtor see Section 126 of the Act.

11 See Ss. 7, 8, 126 and 127 of the Act.

12 In the case of Oriental Airlines Limited vs. Air Via Limited (1998) 12 NWLR (Pt. 577) 271 at 280 – 281, the Court held 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 the collection of debts''. See also the case of Hansa International Construction Ltd. vs. Mobil Producing Nig. Ltd (1994) 9 NWLR (Pt. 336) 76 at 86.

13 Olisa Agbakoba & Associates ''Bankruptcy Proceedings As a Tool for Debt Recovery'' C.L.E.S Vol. 1 No. 1 p. 3.

2.07 **Mode of Commencing Bankruptcy Proceedings**

2.08 In commencing a bankruptcy proceedings, the requirements of the Bankruptcy Act (*supra*) must be strictly observed, failing which, the petition may be struck out.[14] There are conditions precedent to the commencement of a bankruptcy proceeding. They are provided under Section 4 as follows:

> ''4. **Conditions on which creditor may petition**
> (1) Subject to the provisions of section 7 of this Act, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless-
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> (a) the debt owing by the debtor to the petitioning creditor, or if 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 some certain future time;
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within three 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 dwelling-house or place of business in Nigeria, or has carried on business in Nigeria, personally or by means of an agent or manager, or is within the said period has been a member of a firm or

14 See the unreported decision of the Federal High Court in the case of John Ayodele Omananyi vs. Mrs. M.V. Majekodunmi Suit No: FHC/L/BK/1/92 delivered by Honourable Justice A.A. Daudu on 22nd April, 1993.

partnership of persons which has carried on business in Nigeria by means of a partner or partners or an agent or manager.''

These conditions are cumulative. All of them must be present before the creditor can validly commence a bankruptcy proceeding.

2.09 It is important to state that these conditions, by themselves, are incapable of grounding a bankruptcy proceeding unless the debtor commits any of the acts of bankruptcy provided for under Section 1 of the Act. Once a debtor commits any of the acts of bankruptcy listed under Section1 and the conditions precedent to the commencement of bankruptcy proceedings provided under Section 4 are met, a creditor is on sound footing to institute a bankruptcy petition. It is apt reproduce the provisions of Section 1 of the Act for clarity. The Act provides, at Section 1, as follows:

''1. **Acts of bankruptcy**
A debtor commits an act of bankruptcy in each of the following cases-

(a) if a creditor-

(i) has obtained a final judgment or final order against him for any amount, and executed thereon not having been stayed, has a bankruptcy notice served on him; and

(ii) does not, within fourteen 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 judgment debt or sum ordered to be paid, and which he could not set up in the action in

which the judgment was obtained or the proceedings in which the order was obtained;

and for the purposes of this paragraph and of section 4, any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; or

(b) if execution against him has been levied by 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:

Provided that, where an inter-pleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled or abandoned, shall not be taken into account in calculating such period of twenty-one days; or

(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 make a conveyance or assignment of his property to a trustee or 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 or any other Act be void as a fraudulent preference if he were adjudged bankrupt; or

(i) if, with 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.''

2.10 It is important to use this opportunity to debunk the general belief, by most legal practitioners, that before a bankruptcy petition can be presented to a court the creditor must have obtained a final judgment in his favour, which judgment remains unliquidated in whole or in part. This opinion was expressed by Olisa Agbakoba & Associates[15], thus:

> ''Under the current state of law in Nigeria a creditor Bankruptcy proceedings can only be used to *enforce* payment of debts. It cannot be applied to *establish* a debt like in England except in the unlikely event that the debtor on his own initiates a debtor Bankruptcy

15 Ibid p. 7

proceeding. In a creditor proceeding, the indebtedness of a debtor must be established first in a separate judicial proceeding before the Bankruptcy proceeding is commenced. In other words two separate proceedings are required.

After the creditor has obtained a final judgment or final order against the debtor and or levies execution of the judgment or order and the debt remains unsatisfied, an *act* of Bankruptcy is said to have occurred entitling the creditor to initiate Bankruptcy proceedings.

Failure to observe these principles will prove fatal to the bankruptcy proceedings.''

2.11 With due respect to the learned author, this position is erroneous and not borne out of the provisions of the Act for the following reasons.

i. The nine (9) acts of bankruptcy provided under Section 1 of the Act are not cumulative and do not draw life from Section 1(a)(i)(ii) and (b) of the Act. It is to be stressed that any of the nine (9) acts of bankruptcy provided under Section 1 of the Act can ground a bankruptcy petition.

ii. By the Act as well as the Bankruptcy (Proceedings) Rules made pursuant thereto, a creditor is allowed to prove the indebtedness of the debtor to him by way of evidence after a Receiving Order is made by the court. However, the only debts which are provable within a bankruptcy proceeding are those arising from contract, promise or breach of trust. Sections 7(2) and 32(1)(2)(3) and (4) of the Act provides as follows:

''7. **Creditor's petition and order thereon**

(2) At the hearing, the court shall require proof of-

(a) the debt of the petitioning creditor;

(b) the service of the petition; and

(c) the act of bankruptcy, or if more than one act of bankruptcy is alleged, acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition."

''32 **Description of debts provable in bankruptcy**

(1) Demand in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy against the debtor shall not prove in bankruptcy for any debt or liability contracted by the debtor by the debtor subsequently to the date of his so having the notice.

(3) Save as aforesaid, all debts and liabilities, present and future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.''

Rule 73(1)(2)(3) of the Bankruptcy (Proceedings) Rules, provides thus:

> ''73. **Affidavit verifying debt.**
>
> (1) ''A debt may be proved by delivering or sending through the post in a prepared letter to the Official Receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt.
>
> (2) The affidavit may be made by the creditor himself, or by some person authorised by or on behalf of the creditor; and if made by a person so authorised it shall state his authority and means of knowledge.
>
> (3) The affidavit shall contain or refer to a statement of account showing the particulars of debt, and shall specify receipts, agreements or any document, if any, by which the same can be substantiated.''

2.12 The above clearly shows that, it is not mandatory for a creditor to have obtained judgment in his favour before instituting a bankruptcy petition. A creditor, as have been shown above, may be allowed to prove his entitlement to certain classes of debts even after a receiving order had been made by a court and during the administration of the debtor's properties. This was our contention, on behalf of the Creditor, Fidelity Bank Plc, in the case of Suit No: FHC/L/BK/02/2011: Re: High Chief (Dr.) Raymond Aleogho Dokpesi vs. Ex-parte: Fidelity Bank Plc, where the debtor, High Chief (Dr.) Raymond Aleogho Dokpesi, filed a Notice of Preliminary Objection challenging the competence of the bankruptcy petition against him by the creditor on the grounds, *inter-alia*, that the creditor had not obtained a final judgment against him before commencing the bankruptcy proceeding.[16] Reliance was

16 Suit No: FHC/L/BK/02/2011: Re: High Chief (Dr.) Raymond Aleogho Dokpesi vs. Ex-parte: Fidelity Bank Plc was a bankruptcy case conducted by the law firm of Joseph Nwobike, SAN & Co. at the Federal High Court, Lagos Division before Honourable Justice M.B. Idris. See also Suit No: FHC/BK/4/2010: Re: Chief Cletus Madubugwu Ibeto vs. Ex-parte: Afribank Nigeria Plc also conducted by the law firm of Joseph Nwobike, SAN & Co. at the Federal High Court, Lagos Division before Honourable JusticeE. Abang.

placed on Rule 73(2)(3) of the Bankruptcy (Proceedings) Rules, by the creditor, in urging the court to hold that a creditor could file a bankruptcy petition without first and foremost obtaining a final judgment. Unfortunately, the court did not have the opportunity to pronounce on the debtor's objection as the parties reached an out-of-court settlement of the matter before the objection was heard. It can only be hoped that, one day this issue will be the subject of judicial pronouncement in due course.

2.13 **Is Bankruptcy Proceedings Suitable for Debt Recovery?**

2.14 As have been stated above, bankruptcy proceedings, although not an outright debt recovery mechanism, can be so employed. The instances wherein bankruptcy proceedings can be used for debt recovery are limited to the following:

i. cases where a final judgment has been obtained by a creditor but the judgment sum remains, wholly or partly, unliquidated (whether or not execution has been levied); and

ii. cases where the creditor has not obtained a final judgment against the debtor but bases his claims on a debt arising from a contract, promise or breach of trust.[17]

In these two (2) instances, a bankruptcy petition may function as a debt recovery mechanism. The position being canvassed here was put aptly thus:

> ''Subject to the statutory conditions, any individual within the jurisdiction of a bankruptcy court owing a debt or debts, the amount of which, or the aggregate amount of which, is equal to or exceeds the bankruptcy level, the payment of which may be enforced against him personally, may be made bankrupt.''[18]

* Since our major concern in this section of the paper is bankruptcy proceedings as a vehicle for debt recovery, the procedure discussed herein relates to creditor bankruptcy petition as against debtor bankruptcy petition.

17 See Section 32 of the Act.

18 Halsbury's Laws of England, (2002 Re-issue) 4th Edition, Vol. 3(2) p. 14 para. 8.

2.15 What is required of the creditor when his claim falls within the ambit of the two (2) classes of debts which can be recovered by means of a bankruptcy proceeding is to comply with the procedural requirements contained in the Act and the Bankruptcy (Proceedings) Rules in submitting his petition to the court.

2.16 ***Procedure for instituting a bankruptcy proceedings**

i. Upon the commission of any of the acts of bankruptcy stated in Section 1 of the Act by the debtor and the existence of all the conditions precedent listed in Section 4 of the Act, the creditor applies to the Registrar of the Federal High Court, within the jurisdiction where the debtor lives, for the issuance of a Bankruptcy Notice. This application must be accompanied with a certified true copy of the judgment or order of court wherein the debtor is a judgment debtor (in the case that the creditor intends to realise a judgment debt). In cases provided under Section 32 of the Act where the creditor has not obtained any judgment or order against the debtor, the creditor is required to provide some form of evidence of the contract, promise or breach of trust from which the debt arose[19].

ii. If the Registrar is satisfied with the evidence produced before him, he will issue a Bankruptcy Notice against the debtor. The Notice will direct the debtor to, if he has no counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or contractual debt being claimed, pay same over to the judgment creditor within fourteen (14) days[20] or such other time as may be stated in the notice. The Notice will also contain a statement informing the debtor of the consequences of his failure to comply with the Notice. The Notice shall also have attached to it, all the evidence presented to the Registrar for the issuance of same.[21]

19 See Section. 2 of the Act and Form 1 of the Schedule thereto.

20 See generally Ss. 1(a)(i)(ii); 2(a)(b) of the Act; Rule 19 of the Bankruptcy (Proceedings) Rules and Form 2 provided in the Schedule to the Act.

21 See Rule 18 of the Bankruptcy (Proceedings) Rules.

iii. The creditor is also required to also file his Petition alongside the Bankruptcy Notice.[22] The Petition will be supported by an affidavit of truth/verifying affidavit and Notice of Presentation of Petition.[23]

iv. The Bankruptcy Petition must be served within three (3) months of issuance unless time is extended by the court for service.

v. If the debtor does not pay the sum claimed or dispute the claims of the creditor by filing an affidavit setting up a counter-claim, set-off or cross-demand, the court may make a Receiving Order in favour of the creditor. This receiving order, in essence, makes the debtor a bankrupt[24].

vi. However, if the debtor intends to dispute the petition, he is to file a Notice of Intention to Oppose Petition not less than three (3) days before the hearing date of the petition. The Notice will provide the grounds upon which the debtor intends to challenge the petition and be served on the creditor or his counsel, as the case may be.[25] The debtor is also expected to file an affidavit disputing the debt or setting up a counter-claim, set-off or cross-demand, if he so wishes.[26]

vii. If the debtor disputes the debt and/or sets up a counter-claim, set-off or makes a counter-demand, the court will adjourned the matter to a further date for both parties to be heard. The debtor shall be expected, at such hearing, to satisfy the court that he has a genuine counter-claim, set-off or counter-demand against the creditor, whilst the creditor will be expected to justify his claims as contained in the Bankruptcy Petition.[27] The court may, if necessary, take evidence in proof of the petition.[28]

viii. It is pertinent to note that, the counter-affidavit filed by the debtor to the Bankruptcy Petition also serves as an application, by the debtor, to

22 See Rule 22 of the Bankruptcy (Proceedings) Rules.
23 See Section 7 of the Act and Rule 31 of the Bankruptcy (Proceedings) Rules.
24 See Section 7 of the Act.
25 See Rule 30 of the Bankruptcy (Proceedings) Rules.
26 See Rule 20 of the Bankruptcy (Proceedings) Rules.
27 Ibid.
28 See Section 32 of the Act and Rules 72 and 73 of the Bankruptcy (Proceedings) Rules.

the court to set-aside the Bankruptcy Notice already issued to the creditor and discharge him of all liability under the Petition. His alleviates the need for the debtor to file any other application seeking for these orders.[29]

ix. After the hearing of the Bankruptcy Petition, court may either find in favour of the petition and consequently make a Receiving Order on behalf of the creditor[30] or find against the petition and consequently make orders discharging the debtor from liability and setting aside the Bankruptcy Notice.[31] If a Receiving Order is made, same will be published in the Federal *Gazette* and in a national newspaper.[32]

x. The effect of the court making a Receiving Order is that, the debtor is required to submit an inventory of his assets to his creditor(s) or an Official Receiver appointed by the court. The creditor(s) or Officer Receiver will then distribute the said assets to the creditor(s) in order of priority and as provided for under the Act.

2.17 It is to be made clear that the making of a Receiving Order against a debtor is quite prejudicial to his interests. This order has the following consequences:

i. the debtor will be required to submit a list of all his assets as well as a statement of his affairs, whether in Nigeria or elsewhere, to the Official Receiver[33];

ii. the list of assets to be submitted by the debtor, as stated above, must give details of all properties held in the debtor's name or under any alias or by his/her wife/husband, children or held in trust for him, with full particulars of the manner and date of its being acquired;

iii. the list of assets must be submitted to the Official Receiver within fourteen (14) days of the making of the receiving order. The Court may extend this time if cogent reasons for doing so exists. A creditor may,

29 See Rule 20(2)(3) of the Bankruptcy (Proceedings) Rules.

30 See Section 7 of the Act and Order 45 of the Bankruptcy (Proceedings) Rules.

31 See Rule 21 of the Bankruptcy (Proceedings) Rules.

32 See Section 14 of the Act and Rules 47 and 48 of the Bankruptcy (Proceedings) Rules.

33 An Official Receiver is a person appointed to that office by the Minister of Finance under Section 72 of the Act after the publication of the Receiving Order in the Federal *Gazette*.

upon application and payment of the necessary fees, be given a copy of the debtor's list of assets[34]; and

iv. the list of assets will be accompanied by a verifying affidavit sworn to by the debtor deposing to the truthfulness of the list he has submitted.[35]

2.18 It is important to note that, upon the submission of the list of assets by the debtor to the Official Receiver, the latter becomes vested with the control and assets to the exclusion of the former. Again, if there are landed properties in the name of the debtor, the Official Receiver shall notify the Chief Lands Officer of the state where the land is situate attaching the receiving order and asking that the register of lands be rectified to reflect the new state of affairs (i.e. the making of the receiving order).[36] It is important to state that, it shall amount to contempt of court for the debtor to submit a false list of assets to the Official Receiver.[37]

2.19 Upon the appointment and submission of the debtor's list of assets to the Official Receiver, all the assets of the debtor become vested in the Official Receiver to the benefit of the Creditors. The Official Receiver will then be expected to, either before or after the submission of the debtor's list of assets (but preferably before), call a meeting of all the creditors of the debtor for the purpose of:

i. considering whether a proposal for a composition or scheme of arrangement made by the debtor for the settlement of his debts (if any such proposal has been made by the debtor) is to be accepted; or

ii. in the case no proposal as in (i) above has been made, whether it is expedient that the debtor be adjudged a bankrupt; and

iii. if the debtor is to be adjudged a bankrupt, the mode of dealing with the debtor's properties as contained in the debtor's list of assets.

2.20 After the creditors have met to deliberate on the debtor's list of assets (and any proposal for a composition or scheme of arrangement made by the

34 See Section 16(4) of the Act.

35 See Section 16 of the Act and Rule 50 of the Bankruptcy (Proceedings) Rules.

36 See Rule 48 of the Bankruptcy (Proceedings) Rules.

37 See Section 16(3) of the Act.

debtor), the Official Receiver will notify the court that these steps had been taken. Pursuant to this notification, the court will fix a date for a public examination of the debtor. The debtor will be required to attend such examination. The purpose of this examination will be for the court and, indeed, all stake holders (creditors, trustees, etc) to examine the debtor's conduct, dealings with his assets which led to the bankruptcy proceedings.[38] At the end of this public examination, the transcript of the proceedings will be read over to the debtor and he will be required to sign same. It is at this public examination that the debtor is required to submit his proposal for a composition or scheme of arrangement or any other proposal for the payment of his proven debt (already submitted to his creditors at the creditor's meeting) to the court. If two-thirds (2/3) of the creditors accept the proposal made by the debtor, the court will approve same and the Receiving Officer will issue the debtor a Certificate evidencing this approval. By so doing, the debtor will be discharged in bankruptcy.[39] However, if:

i. the creditors at the first meeting, or any adjournments thereof, by ordinary resolution resolve that the debtor be adjudged a bankrupt; or

ii. pass no resolution at all over the composition or scheme of arrangement proposed by the debtor; or

iii. the creditors are unable to meet to discuss or, although the creditors met, but were unable to get a two-thirds (2/3) majority necessary to accept/approve the composition or scheme of arrangement proposed by the debtor within fourteen (14) days after the public examination or within any other time which the court may allow; then

iv. the court shall adjudge the debtor a bankrupt and his properties shall become immediately divisible among his creditors and shall vest in a Trustee or a Committee of Inspection be appointed and constituted by the creditors.[40] The Trustee or Committee of Inspection (as the case may be) shall be responsible for disposing the debtor's properties and settling the claims of the creditors in order of priority; and

38 See generally Section 17 of the Act.

39 See Sections 18 – 19 of the Act.

40 See Sections 20, 21 and 22 of the Act.

v. the order declaring the debtor a bankrupt shall be published in the federal *gazette* and two (2) newspapers.[41]

The record of the public examination conducted by the court may be used as evidence against the debtor in subsequent proceedings.[42]

2.21 After a trajectory exposition of the technical and, indeed, cumbersome procedure involved in getting a debtor to be declared bankrupt, it will not be difficult to conclude that, although bankruptcy proceedings can be used as a debt recovery mechanism, same is not efficient[43] and profitable. This conclusion cannot be said to be surprising especially as we have earlier made it clear that, bankruptcy proceedings though can be employed as a debt recovery process, does not have debt recovery as its principal objective.[44] This position is buttressed by the fact that a creditor who intends to recover a debt by means of bankruptcy proceedings must wait until the debtor is declared bankrupt before he can dispose the debtor's properties to liquidate the debtor's (now bankrupt's) indebtedness to him subject to other secured debts the debtor may have been obligated to other parties, such as a mortgagee[45]. Again, the creditor has no guarantee that the properties of the bankrupt will be enough to liquidate his exposure especially when there are other creditors competing for a share in his assets. All these make bankruptcy proceedings unattractive to a creditor seeking to recover debts from his debtor.

SECTION B

3.00 WINDING-UP PROCEEDINGS

3.01 According to the Black's Laws Dictionary, 'winding up' is the process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution.[46] In other words, winding up is a legal process by which a company may be dissolved or its existence brought to an end. To

41 See Section 20(2) of the Act.
42 See Section 17(9) of the Act.
43 For the meaning of ''Efficiency'' as used here, see footnote 1.
44 See footnotes 2, 3 and 4 above.
45 See Re Caine's Mortgage Trusts (1918) WN 370; Re Johns, Worrel vs. Johns (1928) 1 Ch. 737.
46 Black's Laws Dictionary, 8th Edition, Thomson West, USA, page 1631

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. Therefore, the words 'winding up' and 'liquidate' are often used interchangeably. 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, 1990 on the winding up of companies must be strictly complied with in form and substance.[47] 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.[48]

3.02 There is no doubt that the subject of Companies winding up is very wide, and all aspects cannot be covered by a paper of this nature. The scope of this paper is to examine the extent to which winding up proceeding can be used as a means of debt recovery in Nigeria and whether it is a veritable tool to be utilized for that purpose. Statutory as well as judicial authorities on this point shall be considered in the course of this section of the paper. There are several ways by which a company may be wound up under the Act but, we shall focus, for the purposes of this paper, on winding up by the court.[49]

3.03 **<u>Circumstances in which a company may be wound up</u>**

3.04 Section 408 of the Act provides that a company may be wound up 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;

47 Bille vs. Rivers Steel Ltd. (1995) FHCLR 29 at 34, Per Sanyaolu, J.

48 Sections 401 – 536 of the Act (Sections 532 – 536 of the Act deals with winding up of unregistered Companies). The Companies Winding up Rules, 2001 and the Companies Proceedings Rules made pursuant to the Act also regulate Winding-up proceedings in Nigeria.

49 See Section 407of the Act.

(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."

3.05 For the purposes of this paper, our interest is on Section 408 (d) above, i.e. where the petition is presented on the ground that the company is unable to pay its debt. I shall return to this anon. For an order of winding up to be made by the Court, the Petitioner 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.

3.06 **When a company is unable to pay its debts**

3.07 Section 409 of the Act defines the circumstances 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 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 the 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."

3.08 It is clear from the above 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. To quote Evans Lombe J. in Re Javelin Promotions Ltd. (2003):[51]

> "A winding up petition is not a legitimate means of collecting debts."

3.09 Similarly, the Court of Appeal, per Musdapher, JCA (as he then was), in the case of Oriental Airlines Ltd. vs. Air Via Ltd[52], held 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."

3.10 Notwithstanding the above, it is 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

50 Winding up petition/proceedings
51 EWHC 1932 (Ch).
52 (1998) 12 NWLR (Pt. 577) 271 at 280-281.

business and corporate image of the company concerned. However, the salient point remains that, the purpose of winding up proceedings is not meant to be used as a vehicle for the recovery of debt. In this regard, it is advised 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.

3.11 Winding up petition applies to corporate debtors (companies) 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 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. 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. It is possible that he might even not get enough to cover the cost of the proceedings.[53]

3.12 **Who may present a winding up Petition?**

3.13 By 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;

53 See Section 494 of the Act on preferential payments.

(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 authorised by the instrument under which he was appointed; or

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

3.14 Since the scope of this paper is to examine whether or not winding up proceeding/petition is a veritable tool for debt recover, it is important to concern ourselves to the power of a creditor to present a winding up petition. From Section 410 (1) of the Act reproduced 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[54].

3.15 **COMMENCING A WINDING UP PETITION**

3.16 In Nigeria, a winding up proceeding is commenced by making an application to the Federal High Court.[55] The application for winding up of a company is by way of a petition.[56] 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. The statutory demand notice requiring the company to pay its

54 See Black's Laws Dictionary, Eight Edition, page 396 for definition of a creditor.

55 See Section 407 of the Act and Section 251 (1) (e) of the Constitution of the Federal Republic of Nigeria, 1999 (as altered). By those provisions, it is the Federal High Court that has exclusive jurisdiction to make an order winding up a company.

56 See Section 410 of the Act.

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).[57]

3.17 Compulsory winding up is the legal process by which a liquidator is appointed by order of the court to 'wind up' the affairs of a company. At the end of the process, the company ceases to exist. It must however be noted that, the fact that a company is wound up does not mean that the creditors of the company will necessarily get 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.[58]

3.18 **Forms and contents of a winding up Petition**

3.19 The applicable Rules regulating the practice and procedure of winding up is the Companies Winding up Rules, 2001 made pursuant to Section 635 of the Companies and Allied Matters Act, 1990. The point must be made here that, recourse may be had to the Federal High Court (Civil Procedure) Rules, 2009 where no provision is made in the Companies Winding up Rules. Rule 183 of the Companies Winding up Rules, 2001 provides as follows:

> "In any proceedings in or before the Court where no provision is made by these Rules, the Court's (Civil Procedure) Rules shall apply."

3.20 Rule 15 of the Companies Winding up Proceedings Rules, 2001 (hereinafter referred to as "CWR 2001") provides that every petition shall be in Form 2, 3 or 4 as prescribed by the Rules. The Forms are to be adopted subject to any variation as the circumstances of each case may require. The Petition must contain averments, the basis upon which the order of winding up is sought, otherwise, the petition will be struck out.

3.21 **Presenting a Petition**

3.22 A petition is presented when same is filed at the registry of the Federal High Court. After filing the petition, the Chief Judge or any other Judge in charge,

57 See Section 409 (a) of the Act. See also, Gulf Bank of Nigeria Limited vs. Credit Factors and Finance Company Limited (1997) 2 FHCLR 404 at 406.

58 See Section 420 and 480 of the Act; The Insolvency Service at www.insolvency.gov.uk (last visited on 17/4/2013).

as the case may be, will assign the matter to a court and appoint the time and place where the petition is to be heard. The notice of the time and place appointed for the hearing of the petition are then endorsed on the petition.[59]

3.23 **Verification of Petition**

3.24 By Rule 18 of the CWR, 2001, it is mandatory that every petition must be verified by an affidavit referring to the petition and such a verifying affidavit must be made by the person or one of the persons petitioning where there is more than one petitioner. Rule 18 provides as follows:

> "Every petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one or, in case the petition is presented by a company by some director, secretary, or other principal officer thereof, and shall be sworn to and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statement in the petition."

3.25 From the text of Rule 18 reproduced above, it appears that a petition not accompanied by a verifying affidavit at the time of filing/presentation of the petition is competent since the said Rule did not make it mandatory that the verifying affidavit must accompany the petition at the time of filing/presentation. However, in practice, the verifying affidavit is usually attached to the petition at the point of filing/presentation of the petition. It is doubtful if a petition without a verifying affidavit will be accepted at the Court's Registry for filing. It is submitted that, even though, as we have seen above, that it is not mandatory for a verifying affidavit to accompany a petition at the point of presentation/filing, it is prudent to accompany a petition with a verifying affidavit at the point of filing for obvious reasons. This will ensure that there are no oversights which may lead to the dismissal or striking out of the petition for failure to verify the petition.

59 14 See Rule 16 of the CWR 2001.

3.26 The position of the law is that, where no verifying affidavit is filed verifying the contents of the petition at the hearing of the petition or where one is filed but does not properly or adequately verifies the petition, the petition is liable to be struck out. That was the decision of the Supreme Court in the case of Farmart Shipping Line Ltd vs. Establishment De Commerce General.[60] In that case, although a verifying affidavit was indeed filed, the Supreme Court held that same did not refer to the petition but spoke generally of paragraphs of an affidavit and on that basis, the Supreme Court struck out the petition.

3.27 It is clear from the above decision of the apex court in Nigeria that, the requirement of a verifying affidavit to a petition is fundamental and non-compliance with same has the consequence of the petition being struck out. In the light of the above, it is submitted that the practice of filing a verifying affidavit at the same time of filing/presenting a petition should be encouraged as a way of obviating the situation where a petition is struck out for failure to file a verifying affidavit to the petition.

3.28 **Service of Petition**

3.29 By Rule 12 of the CWR 2001, the service of processes in any winding up matter shall be in accordance with the procedure laid down for the service of civil process in the court under the Court's (Civil Procedure) Rules.[61] In addition to the above, Rule 17 of the CWR, 2001 provides for how a petition is to be served after same has been presented and assigned a court, date and time to be heard. Because of the importance attached to the issue of service, it is necessary to reproduce the provisions of Rule 17 (1) of the CWR 2001 which deals with service of a petition. It provides as follows:

> "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 thereat 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,

60 (1971) 7 NSCC 256 at 261-262.

61 In this case, the Federal High Court (Civil Procedure) Rules, 2009. See Rule of the CWR, 2001.

officer or servant of the company there, or in case no such member, officer or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer or servant of the company as the Court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the Liquidator (if any), appointed for the purpose of winding-up the affairs of the company."

3.30 After the petition and other processes have been served, Affidavit of Service as in Form 5 or 6 as prescribed by the Rules shall be filed.[62]

3.31 **Advertisement of Petition**

3.32 After the Petition has been duly filed and assigned to a court and the date and time when it would be heard has been fixed, the next step is to seek an order of court to advertise the petition. The application for an order of court to advertise the petition is by Motion on Notice served on every person against whom an order is sought in the petition. The Motion is served not less than five clear days before the day named in the notice for hearing of the motion.[63] Rule 19 (1) of the CWR 2001 provides that, no petition shall be advertised unless the Judge hearing the petition or a Judge before whom the petition is first mentioned in open court so orders. Once the Court grants the order for the petition to be advertised, the petition shall be advertised fifteen (15) clear days before the hearing of the petition. That is, the petitioner must give at least fifteen clear days between when the petition is advertised and the date fixed for hearing of the petition.[64]

3.33 The petition shall be advertised once or as many times as the Court may direct in the Gazette and in one national daily newspaper and one other newspaper circulating in the State where the registered office, or principal or

62 Rule 17 (2) of the CWR 2001.

63 See Rule 4 of the CWR 2001.

64 Rule 19 (2) (a) of the CWR 2001.

last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the Court.[65]

3.34 The advertisement shall also state the following:

i. the day/date on which the petition was presented;

ii. the name and address of the petitioner;

iii. the name and address of the petitioner's solicitor; and

iv. a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitor, within the time and manner prescribed by the Rules and any advertisement of a petition for winding up of a company by the Court which does not contain such note shall be deemed irregular. The advertisement of petition shall be in Form 9 or 10 as prescribed by the CWR 2001 with variations as circumstances may require.[66]

3.35 Although Rule 19 (2) (c) states that any advertisement of a petition for winding up of a company by the Court not in accordance with provisions of the said Rule shall be deemed irregular, it is noted that not every irregularity or defect that will invalidate a winding up proceeding already begun, especially where no injustice has been occasioned thereby. See Rule 182 (1) of the CWR 2001. In Halsbury's Laws of England, it was stated thus:

> "The advertisement may be invalidated by a material error in it, for example as to the company's name, the day of hearing, the title of the petition or if the note requiring persons who intend to appear on the hearing of the petition to give the prescribed notice is omitted from the advertisement; but where the mistake is accidental and no one is likely

65 Rule 19 (2) (b) of the CWR 2001.

66 Rule 17 (2) (c) and Rule 19 (4) of the CWR 2001.

> to be deceived, the Court in the exercise of its discretion may disregard the mistake."[67]

3.36 It is submitted that, under Rule 182 (1) of the CWR 2001 the Court seised with a winding up petition can actually exercise a wider discretion than the limited position stated in Halsbury's Laws. For ease of reference and clarity, the provision of Rule 182 (1) of the CWR 2001 is reproduced hereinbelow:

> "No proceeding under the Act or these Rules shall be invalidated by any formal defect or any irregularity, unless the Court before which an objection is made to the proceeding, is of the opinion that injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

3.37 It is clear from the above that, where there is any irregularity in the advertisement of a petition, such irregularity may invalidate the proceeding unless where it appears to the Court that injustice has been caused by such a defect or irregularity and such injustice cannot be remedied by an order of the Court.

3.38 **Appointment of a Provisional Liquidator**

After the advertisement of the petition for the winding up of a company by the Court, the Court may, upon the application of the Petitioner, and upon proof of sufficient ground, appoint a Provisional Liquidator.

3.39 **Hearing to show compliance with Rules**

3.40 After the petition has been advertised, the petitioner or his solicitor will, on the next adjourned date, satisfy the Court that the petition has been duly advertised, that the prescribed affidavit verifying the statement therein and the affidavit of service (if any) have been duly complied with by the

67 Halsbury's Laws of England, Fourth Edition, page 1565, paras 2223

petitioner.[68] Unless the Court is satisfied that the provisions of the Rules have been complied with by the petitioner, no order, other than the one already made in respect of advertising of the petition, shall be made.[69]

3.41 Upon the advertisement of the petition, every person who intends to appear on the hearing of the petition will give to the petitioner notice of his intention in accordance with the Rules as in Form 12. The person who files a Form 12 shall state whether he intends to appear at the hearing to support or oppose the petition.[70]

3.42 **Hearing of the Petition**

3.43 On or before the day fixed for hearing of the petition, the petitioner shall file in the Court's Registry, a copy of the list of persons who intends to appear at the hearing of the petition (or if no notice of intention to appear has been given, a statement in writing to that effect).[71]

3.44 The Respondent served with a petition is required to file its affidavit in opposition to the petition within ten (10) days thereof and in the case of any other party, within fifteen (15) days of the date on which the petition was advertised, and notice of the filing of every affidavit in opposition to the petition shall be given to the petitioner or his solicitor on the day on which the affidavit is filed.[72] The petitioner has five (5) days within which to file his reply affidavit to the affidavit in opposition to the petition from the date of receipt of such affidavit in opposition.[73]

3.45 After hearing the winding up petition, the Court may either make an order dismissing the petition or make the order of winding up as prayed. Where the petition is presented on the ground of default in delivering statutory report, the Court may direct the delivery of the statutory report or the holding of a meeting to the Corporate Affairs Commission.[74]

68 See Rule 22 (1) of the CWR 2001.
69 See Rule 22 (2) of the CWR 2001.
70 See Rule 23 of the CWR 2001.
71 See Rule 24 (2) of the CWR 2001.
72 See Rule 25 (1) of the CWR 2001.
73 See Rule 25 (2) of the CWR 2001.
74 29 See Section 411 (1), (2) & (3) of the Act.

3.46 **Order to Wind-up a Company**

3.47 Where the Court makes an order for the winding up of a company, a copy of the order is forwarded by the company or as may be prescribed by the Court, to the Corporate Affairs Commission which shall make a minute thereof in its books relating to the company.[75]

3.48 It should be noted that, where the Court makes an order for winding up, that order operates in favour of all the creditors and of all contributories of the company as if made on the joint petition of a creditor and of a contributory.[76]

3.49 **PROCEEDINGS AFTER THE WINDING-UP ORDER HAS BEEN MADE**

3.50 Broadly speaking, the process for liquidation is as follows:

- Appointment of liquidator(s).
- The Liquidator collects the assets of the Company, including uncalled capital on shares, and pays the creditors in order of priority.
- The Liquidator distributes any surplus funds to the shareholders.
- The Company is then formally dissolved.

3.51 **Appointment of Liquidator(s)**

3.52 After the Court makes a winding-up order, the Court may appoint one or more Liquidators for the purpose of conducting the proceedings in winding-up the company and performing such duties in reference thereto as the Court may impose and where there is a vacancy, the Official Receiver[77] shall by virtue of his office, act as liquidator until such time as the vacancy is filed.[78]

3.53 By the provisions of Section 491 of the Act, the Liquidator is required to within 14 days of his appointment, publish in the Federal Gazette and in two (2) newspapers and deliver to the Commission for registration a notice of his appointment in the prescribed form[79].

75 See Section 416 of the Act.

76 See Section 418 of the Act for the effect of a winding up order made by the Court.

77 The Chief Registrar of the Federal High Court is the official receiver. See Section 419 of the Act.

78 See Section 422 of the Act.

79 The Commission means the Corporate Affairs Commission (CAC) established by Section 1 of the Act.

3.54 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.[80]

3.55 **Dissolution of the Company**

3.56 On completion of his work, the Liquidator will 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 provides as follows:

> "(1) 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.
>
> (2) 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."

3.57 **IS WINDING UP PROCEEDING A VERITABLE TOOL FOR DEBT RECOVERY?**

3.58 The consensus of judicial authorities in Nigeria is to the effect that winding-up petition/proceeding is not a means for the recovery of debt from a company.[81] As we have hereinabove stated, where a company is doing well

80 See Sections 423 – 431 of the Act. See also, Kwara State Min. of Agr. Nat. Resources vs. Societe General Bank (1996) FHCLR 555.

81 See Oriental Airlines Ltd vs. Air via Ltd. (1998) 12 NWLR (Pt. 577) 271 at 280-281. See also the cases of Hansa Int'l Construction Ltd vs. Mobil Producing Nig. (1994) 9 NWLR (Pt. 336) 76 at 86; Nigeria Industrial Development Bank Ltd. vs. Fembo Nigeria Limited (1997) 2 FHCLR 501 at 502.

but is unwilling to pay its debts, the threat of a winding-up petition could be enough to persuade of force the company into settling its debt with the creditor so as to avoid the devastating effect the publicity of a winding petition will have on the Company's business and image.

3.59 In the distribution of the assets of a company under liquidation, the Act has made provisions as to the ranking of claims. Of importance is the provision of Section 494 of the Act which provides for preferential payments. When all the assets of the Company has been realised, including those represented in uncalled share capital, the distributable assets of the company is ascertained by reckoning without the assets over which, there is any kind of charge, or which forms security in favour of a creditor or creditors. In other words, the assets held as security by a secured creditor does not form part of the realisable assets of the company. As regards the preferential payments under Section 494 of the Act and the debts covered by security, the secured creditors' claims rank, in relation to their security and in priority over those of preferential debt creditors.[82.]

4.00 **CONCLUSION**

4.01 It is clear from the foregoing that, the procedures relating to the commencement of bankruptcy and winding-up proceedings (insolvency proceedings) are quite cumbersome. As we have seen, 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. It appears from the provisions of Section 422 of the Companies and Allied Matters Act that the decision whether or not to make a winding-up order is at the discretion of the Court. The process does not stop at obtaining the order of the Court. As have been demonstrated herein, after the order of declaring a debtor bankrupt (in the case of bankruptcy proceeding) and making a winding-up order (in the case of winding-up proceedings) the process continues until the realisation of the order of the Court.

82 Nigerian Companies and Allied Matters Law and Practice by Deji Sasegbon, page 853. See the case of Richards vs. Kidderminster Overseers, Richards vs. Kidderminster Corporation (1896) 2 Ch. 212

4.02 In view of the cumbersome nature of insolvency proceedings in Nigeria and judicial authorities on the point, it is submitted that, insolvency proceedings are not veritable tools for the recovery of debts in Nigeria. Apart from the situation mentioned hereinabove, 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 means for debt recovery.

4.03 Again, the fact that there is no guarantee that the creditor that presented the petition will fully realise the debts owed him by the debtor is another reason why these proceedings should not be deployed solely as a debt recovery vehicles.