APPLICATIONS AND ORDERS IN WINDING-UP PROCEEDING IN NIGERIA: RESOLVED AND UNRESOLVED ISSUES

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Abstract

Winding up refers to the process of liquidation of the affairs of a company, and the appointment of a Liquidator for the purpose of gathering the assets of the wind up company for distribution to persons entitled thereto. The Law on winding up is primarily contained in the Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria 2004. Being that winding up proceedings is basically predicated on the principle of collectivity that subsumes the rights of creditors and other interested persons, there are applications and orders made in winding up proceedings. However, the boundaries and limits of these applications and orders remain uncertain. Therefore, this paper examined some of the applications and issues in winding up proceedings. It was the conclusion and suggestions of the paper that while interlocutory issues and applications are seemingly inevitable in winding up proceedings, the courts in Nigeria have commendably resolved some of the knotty issues.

Key Words: *Company, Insolvency, Liquidator, Petition, Winding up.*

1. Introduction

Winding up is among the prominent mechanism for enforcement of proprietary security, and realization of debts in Nigeria.[1] Winding up is a process by which a company is liquidated and dissolved and its assets, if any, distributed in accordance with the prescribed rules of priority, for the benefit of its creditors, members and the employees of the company.[2] While winding up proceedings is a powerful and veritable tool invoked to recover debts, it is not without its concomitant risks to both the petitioner and the respondent company. Thus, the court of Appeal in *Tate Industries Plc* v *Devcom MB*

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[1] C A Candide-Johnson & A Alex –Adedipe, 'Debt Recovery; Corporate Insolvency –Receivership Winding up and other Arrangements' in O Olanipekun(ed), *Banking: Theory, Regulation, Law and Practice* (Lagos: AU Courant 2016) 431, 447.

[2] *Ibid* 448

Ltd,[3] correctly stated that 'a winding up proceedings is signing the death warrant of company or a pronouncement of the death of the company. It is a very serious matter'.[4] The Supreme Court of Nigeria in *Air Via Ltd* v *Oriental Airlines Ltd*,[5] restated the adverse nature of winding up proceedings thus:

> Furthermore, care and utmost caution must be exercised by the institution of justice in proceedings involving the termination of the life of a company with responsibility not only to the society but also to the section of the public namely, its employees who may be thrown into economic hardship of unemployment. Hence the need for the Court to halt a petition of the type brought by the appellant likely to cause irreversible and incalculable damage especially when the circumstance of the case show that the respondent has disputed the debt alleged to be owed. For the proposition that a court must be slow in terminating the life of a company by way of winding up, this is given credence and support by the Court of Appeal case of *Union Bank of Nigeria Ltd* v *Tropic Food Ltd*.

Winding up proceedings provided as a seamless mechanism for the realization of debts have become complex and full of intrigues. The essence of winding up petition is now defeated with unending interlocutory applications. For instance, in the cases of *Honeywell Flour Mills Plc* v *Ecobank (Nig) Ltd*,[6] and *Unifam Industries Limited* v *Ecobank Nigeria Limited*,[7] the Courts were faced with a lot of applications questioning the competence of the petition. Sometime in May 2019, The Court of Appeal of Nigeria entered judgment on the appeal in the case of *Ecobank (Nig) Ltd* v *Honeywell Flour Mills Plc*.[8]

This paper will examine some of the issues and applications in winding up proceeding in Nigeria, and resolutions and determinations of the courts

1.2 Winding-up of Companies in Nigeria

Winding-up of bodies corporate is within the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria.[9] Hence, the Companies and Allied

[3] 3 [2004] 17 NWLR (pt 901)182
[4] *Ibid* at 225 paras E-G
[5](2004) 4 SC (pt11) 3; [2004] 9 NWLR (pt 878) 298.
[6] [2016] 16 N.W.L.R (pt 1539) 387 Court of Appeal
[7] [2019] 1 NWLR 187 SC
[8]AkinwaleAkintunde, 'Appeal Court Dismisses Ecobank's Winding-Up Petition against Honeywell' LAWYER, This Day Newspaper (Lagos, 28 May 2019) 5, 15.
[9] 1999 (as amended) Second Schedule Part I item 32.

Matters Act,[10] made elaborate provisions for winding up of companies. The winding –up of a company may be effected by the court,[11] or voluntarily,[12] or subject to the supervision of the court.[13] In practice, however, the often resorted modes of winding up in Nigeria is that by the court or voluntarily.

1.2.1 Winding-up by the Court

This is the usual mode of winding-up in Nigeria. Winding up by the Court, otherwise, known as 'Compulsory Winding-Up' refers to liquidation initiated through the invocation of any of the circumstances mentioned in the CAMA.[14] The circumstance that may propel winding up by the court includes: special resolution by the company that it be wound-up;[15] default by the company in delivering the statutory report to the Corporate Affairs Commission or in holding its statutory meeting;[16] the number of members is reduced below two;[17] the company is unable to pay its debts;[18] and under the just and equitable rule.[19] Suffice it to state that winding-up by the Court depicts the liquidation or winding-up of a company by virtue of an order of Court with competent jurisdiction.[20] It is important to state that winding up by the court is mostly invoked on ground of insolvency,[21] and the court exclusive jurisdictions to entertain and determine a winding-up petition is the Federal High Court.[22]

1.2.2 Voluntary Winding-up

Voluntary winding-up signifies winding-up of a company on its own volition, and on the condition of solvency. Voluntary winding-up maybe predicated on the self-will of the

[10] Cap C20 LFN 2004 (CAMA) Part XV
[11] *Ibid* s 401(1)(a)
[12] *Ibid* s 401(1)(b)
[13] *Ibid* s 401(1)(c)
[14] *Ibid* s 408.
[15] (n10) s 408(a).
[16] *Ibid*ss 408(b).
[17] *Ibid* s 408(c).
[18] *Ibid* s 408(d).
[19] *Ibid* s 408(e).
[20] C E Halliday, 'Corporate Rescue and Insolvency Law and Practice in Nigeria in Nigeria: Need for Reform' (Unpublished PhD Dissertation, NnamdiAzikiwe University, Awka 2017) 67.
[21] *Gbedu* v *Itie* [2007] NWLR (pt 1202) 227; C Halliday and M Babalola, 'Quest for Reform of Corporate Rescue and Insolvency Procedure in Nigeria' *PHJBL* 2.1 (2016); 356; SW Mayson and Others, *Mayson, French & Ryan on Company Law* (Oxford: 25thedn, OUP 2008-2009) 662; CS Ola, *Company Law in Nigeria* (Ibadan: Heinemann Educational Books (Nigeria) Plc 2002) 469.
[22] (n10) s 407(1).

company evidenced by a special resolution,[23] or the happening of an event provided in the article of association for the dissolution of the company by a resolution.[24] It is pertinent to state that voluntary winding-up, particularly members' voluntary winding-up, must be supported by a statutory declaration of solvency.[25] But where a voluntary winding-up is not so backed, it transmutes to a creditors voluntary winding-up.[26]

Winding up subject to the supervision of the court refers to winding-up that continues but subject to such supervision of the Federal High Court, and for which other interested persons such as creditors, contributories and so on, are entitled to make applications to the court.[27] Worthy to emphasise that winding-up subject to supervision of court is deemed petition for winding-up by the court in certain circumstance.[28]

In this paper, the analysis will be limited to issues and applications that crop up in winding-up proceedings by the court.

2. Issues and Applications in Winding-up Proceedings

There are issues and applications during winding-up proceedings. While the courts in Nigeria have reasonably resolved some of the issues, other issues still unsettled.

2.1 Determining Insolvency

Insolvency describes a situation when a company is unable to pay its debts,[29] as and when due. However, it is important to state that determining insolvency is not a straight forward and simple process established by definition per se. Thus, is insolvency ordinarily determined against the various classifications of insolvency taking into account the facts and provisions of the Law. The common classifications of insolvency are cash flow insolvency, balance sheet insolvency, regulatory insolvency, and ultimate insolvency. Cash flow insolvency simply defines insolvency in a situation where company is unable to pay its debts as they fall due. In such situation, the overall assets balance of the company may not be in deficit but its cash balance at the point in time not

[23] *Ibid* s 457(b).
[24] *Ibid* s 457(a).
[25] *bid* s 462.
[26] *Ibid* s 462 (4).
[27] (n10) s 486.
[28] *Ibid* s 487.
[29] Ewan *Mckendrick, Goode on Commercial Law* (London: 4th edn, LexisNexis UK and Penguin Books 2010) 912.

sufficient to settle its debts.[30] Balance Sheet insolvency refers to that where the liabilities of the company exceeds its assets, taking into account, not only current liabilities but also, contingent and prospective liabilities.[31] Regulatory insolvency describes a situation where the company at the time in question may not necessarily be suffering from depleted cash flow or deficit balance sheet but unable to meet with monetary thresholds prescribed under an applicable law.[32] Ultimate insolvency denotes a situation where upon a winding up order, there are no sufficient assets to satisfy the claim of the creditors.[33]

Winding up petition is commonly presented on the ground that a company is unable to pay its debts. In order to establish that a company is unable to pay its debts, the provisions in the CAMA to that effect must be satisfied.[34] The salient requirement in the CAMA is a demand by the creditor for the company to pay the sum so due where the sum exceeds N2000, and the company has for three weeks neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.[35]
It is incontrovertible that where the debt is not disputed by the company, the determination of insolvency, and consequential winding-up, is often seamless and uncomplicated. In practice, however, the determination of insolvency is never simple and unopposed. The demand for payment of debt sum is usually challenged and opposed with venom and fury. Debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition.[36] Furthermore, a debt is proved by showing its existence.

Against the above, the Supreme Court of Nigeria in *Unifam Ind. Ltd* v *Ecobank (Nig) Ltd*,[37] stated that for a company to be wound up on the ground of inability to pay its debts, the following ingredients must be present:

i. There must be a debt exceeding N2,000

[30](n1) 432; Ian F Fletcher, *The Law of Insolvency* (London: 2nd edn, Sweet & Maxwell 1996) 485.
[31] (n10) s 409 (c); (n1) 433; L Sealy and S Worthington, *Cases and Materials in Company Law* (Oxford: 10th edn, OUP 2013) 768.
[32]K Ekwueme, 'Failure Resolution' in (n1) 493.
[33]Sealy and Worthington (n31).
[34](n10) s 409.
[35] *Ibid* 409(a)
[36]*Hansa International Construction Limited* v *Mobil Producing Nigeria* [1994] 9 NWLR (pt 366) 77 at 86 para F; EmekaChianu, *Company Law* (Abuja & Lagos: LawLords Publication 2012) 628
[37] (n7) at 200, paras E-G; 202, paras G-H; (n5); *Gateway Holdings Ltd* v *Sterling Asset Management & Trustees Limited* [2016] 9 NWLR (pt 1518) 409 at 514-515, paras E-C

ii. The debt must be due;
iii. The creditor served the company with a demand letter requiring it to pay the sum due; and
iv. The company has, for three weeks after the demand, failed or neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor.

It is trite law that when the debt is admitted or established, followed by a formal demand, and the debt is not paid or settled within three weeks of the demand, the court has no discretion but to wind up the debtor company.[38] Contrary to this position, the issue usually raised in winding up proceedings is the propriety of the petition where the debt is disputed. Dispute of a debt may be the exact amount owed or an outright denial of the debt.

The position of the law is that where a debt is disputed in good faith or substantial ground, the court is enjoined to decline the making of a winding up order,[39] and dismiss the petition. On this issue, the Court in *Onochie* v *Alan Dick & Co Ltd*,[40] and *Hansa International Construction Limited* v *Mobil Producing Nigeria*,[41] stated:

> It does not matter, in my view, in determining the substantiality of the grounds of dispute whether they were raised early enough to deny the debt or they were put forward after a misguided petition to wind up had been instituted. Once the grounds are substantial the Court is bond to take the proper course and dismiss the petition.

The above pronouncement of the Court of Appeal in *Onochie*v *Alan Dick & Co Ltd*, and *HansaIntContst. Ltd* v*Mobii Producing Nig*, is to say the least unsatisfactory. Although the dismissal of a winding up petition may be premised on a dispute of the debt in good faith or substantial ground, a challenge to a winding up petition usually by an 'Affidavit in Opposition' must be filed timeously, and in accordance with the Companies Winding up Rules.[42] While it seems settled that where a debt is disputed *bona fide* or on substantial ground, a winding up petition based on a company's inability to pay its debt

[38]*Ibid*, para H; *Pharma-DekoPlc* v *Financial Derivatives Co Limited* [2015] 10 NWLR (pt 1467) 225 at 252, paras C-E.
[39]*Oriental Airlines Limited* v *Air Via Ltd* [1998] 12 NWLR (pt 577) 271 at 280-281; (n7); *Onochie* v *Alan Dick & Co Ltd* [2003] 11 NWLR (pt 832) 451 at 460, para G.
[40](n 39) at 461, paras C-D.
[41] (n 36) at 87, para G.
[42]2001 (CWR) Rule 25(1).

will not succeed, there is corollary issue of what happens to a winding up petition where the dispute is as to the exact amount owed. In *Weide& Co (Nig) Ltd* v *Weide& Co Hambury*,[43] the Court of Appeal held that 'where a debt is in dispute, the burden is on the creditor to prove not only that a debt is owed but the particular amount owed'.

Interestingly, the Court of Appeal in *Unifam Industries Ltd* v *Oceanic Bank International (Nig) Ltd*,[44] in answer to the question: should a Court refuse to proceed with a winding up proceedings because there is dispute as to the amount owed by respondent (Company) to the Petitioner?, answered:

> Moreover, it seems to me that it would be in many cases, be quite unjust to refuse a winding up order to a petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owing…

In same vein, the Supreme Court of Nigeria in *Unifam Ind. Ltd* v *Ecobank (Nig) Ltd*,[45] affirmed the decision of the Court of Appeal and restated that a winding up petition will not be dismissed merely because there is a dispute as to the actual amount owed by the company to the petitioner. Hence, it is settled that a winding up petition will not be dismissed by the court because there is a mere dispute or dispute as to the exact amount owed by the company. However, in the case of dispute of a debt in good faith or substantial ground, it is now settled that the court may dismiss the petition.

2.2 Dismissal of a Winding-Up Petition on Ground of Abuse of Court Process

In *Unifam Ind. Ltd* v *Oceanic Bank Int'l (Nig) Ltd*,[46] the Court of Appeal pronounced on what constitutes abuse of Court process in the following manner:

> It is a term generally applied to proceedings which are wanting in *bona fide* in the sense that they are brought mainly to annoy, irritate or harass the opponent or are calculated to impede the administration of justice. The abuse lies in the inconvenience and inequities appurtenant to the aim and purpose of the action. The term also connotes that the powers of the court must be used *bona fide* and properly and must not be abused. Let me further say that a court of law which is as well a court of justice will always prevent the improper use of its machinery

[43][1992] 6 NWLR (pt 249) 624 at 640, para H.
[44] [2005] 3 NWLR (pt 911) 83 at 101, paras B-E; *Tandy* v *The Harmony House Furniture Co Ltd* [1964] 3 NSCC 21
[45] (n5) at 201-202, paras G-A
[46] (n44) at 99, paras G-H; (n5) at 201, paras C-F

> and will not allow it to be used as a means of vexatious and oppressive hehaviour in the process of litigation.

It is trite position of law that an abuse of court process occurs where there are different actions based on the same facts between the same parties filed in different courts or even the same court simultaneously in respect of the same right and subject-matter.[47] In the *Unifam Ind. Ltd* v *Oceanic Bank Int'l (Nig) Ltd,* the Court of Appeal found that the petition was not an abuse of court process, which decision was affirmed by the Supreme Court,[48] in that the petition for winding up distinct from the action at the High Court.

In the recent and unreported case of *Honeywell Flour Mills Plc* v *Ecobank (Nig) Ltd*,[49] the Court of Appeal dismissed winding-up petition filed by Ecobank Nigeria Limited against Honeywell Flour Mills Plc for being an abuse of court process . The facts of this case: Honeywell Flour Mills Plc; Anchorage Leisures Limited; and Siloam Global Limited sued Ecobank in Suit No: FHC/L/CS/129/2015, asking the court to declare that they were no longer indebted to Ecobank, having paid an agreed sum of N3.5 Billion, as the full and final payment of their debt to Ecobank.

Despite the pending suit between the parties, Ecobank proceeded to file a winding-up petition against Honeywell on 16 October 2015, in Suit No: FHC/L/CP/1569/2015, along with a Motion *Ex-parte*, praying five orders against Honeywell. But Justice T Tsoho of the Federal High Court, Lagos, refused the application, adjourned the suit, and directed Ecobank to put Honeywell on notice. Instead of putting Honeywell on notice as directed by the court, Ecobank on 9 November 2015, filed another petition against Honeywell in Suit No: FHC/L/CP/1689/2015, over the same subject matter as the earlier petition. The trial judge, Honourable Justice Yunusa made far-reaching *ex-parte* orders in the later petition.

Dissatisfied with the decision of Honourable Justice Yunusa, Honeywell filed a Motion on Notice on 24 November 2015, praying the court to discharge the *Ex-parte* orders, and also dismiss the petition for being an abuse of court process. Honourable Justice Yunusa, in his ruling delivered on 5 December 2015, dismissed Honeywell's application. Being

[47](n44) at 100, paras A-B; *Saraki* v *Kotoye* [1992] 9 NWLR (pt 264) 156; *Fasakin Foods (Nig) Co Ltd* v *Shosanya* [2003] 1 NWLR (pt 849) 237.
[48] (n5).
[49]AkinwaleAkintunde, 'Appeal Court Dismisses Ecobank's Winding –Up Petition against Honeywell' LAWYER, This Day Newspaper (Lagos, 28 May 2019) 5, 15.

dissatisfied with the ruling, Honeywell appealed. The Court of Appeal, Lagos Judicial Division in lucid language held that Suit No: PHC/L/CP/1689/2015: *Ecobank Nigeria Limited* v *Honeywell Flour Mills Plc*, filed on 9 November 2015, constitutes an abuse of the processes of the court, and proceeded to dismiss the petition. Thus, it is settled that where a winding-up petition constitutes an abuse of court process, the petition will be dismissed,[50] and not struck out.

2.3 Advertisement of Petition and Appointment of Provisional Liquidator

The advertisement of petition is a condition precedent for hearing of a petition.[51] The procedure is for the petitioner to apply by way of Motion on Notice for an order to advertise the petition.[52] The method prescribed by rule 19 of the CWR 2001 for the service of a winding up petition is for it to be advertised in the Official Gazette of the Federal Republic of Nigeria, and designated local or national newspapers as may be deemed and ordered by the court as appropriate in the circumstances of any case.[53]
Flowing from the above, it is settled that the advertisement of a petition must precede the hearing of the petition. Furthermore, it is pertinent to state that an advertisement of a petition has to be done within the time prescribed in the CWR, and must contain the prescribed note as in Forms 9 or10.

The essence of an advertisement of a petition relates to it being a prerequisite for the appointment of a provisional liquidator. Provisional liquidator is a person who acts as a liquidator for the purpose of conducting the proceedings in winding up of a company, and performing such duties in reference thereto from any time after the presentation of a petition and before the making of a winding up order.[54] Previously, it was thought that an application for appointment of a provisional liquidator may be made before the advertisement of a petition for the winding-up of a company by the court. But in *General & Aviation Services Ltd* v *Thahal*,[55] the Supreme Court of Nigeria, held that by virtue of

[50]*Unifam Industries Ltd* v *Oceanic Bank International (Nig) Ltd* (n44) at 103; *African Reinsurance Corp*. v *JDP Construction (Nig) Ltd* [2003] 13 NWLR (pt 838) 609; *Kod*e v *Alhaji Yusuf* [2001] 4 NWLR (pt703) 392; *Honeywell Flour Mill Plc* v*Ecobank (Nig) Limited* (n49).
[51] (n42) r 19(2)(a)
[52]Companies Proceedings Rules 2004, r 9.
[53]*Pharma-DekoPlc* v *F.D.C Ltd* (n38) at 248, paras D-E; *Air Via Ltd* v *Oriental Airlines Ltd (n5).*
[54](n10) s 422(2); *General & Aviation Services Ltd* v *Thahal* (2004) 4 SC (pt 4) 109; *Savannah Bank of Nigeria Plc* v *Nigeria Deposit Insurance Corporation* [2006] 9 NWLR (pt 986) 424 at 440.
[55](n54) at 127; *Savannah Bank of Nigeria Plc* v *Nigeria Deposit Insurance Corporation* (n 54) at 441.

rule 21(1) of the CWR 2001, it is only after the advertisement of a petition for winding-up of a company that a provisional liquidator may be appointed.

2.4 Amendment of Petition and Verifying Affidavit

Amendment of a petition involves the alteration of the contents of the petition. The alteration may be for purposes of correcting an error or rectifying a mistake or omission in the petition. But it is arguable whether a petition can be amended considering the specialised and unique nature of winding up proceedings.[56] More so, the CWR 2001 did not expressly provide the procedure for an amendment of a petition.

However, the Court of Appeal in *Makinde* v *Orion Engr. Services (U.K) Ltd*,[57] rightly held that a winding-up petition can be amended including a verifying affidavit attached to the petition, relying on the provisions of the Federal High Court (Civil Procedure) Rules.[58] Thus, where the purpose for an amendment of a petition is to clarify issues in controversy between the parties or to prevent any possible injustice in the matter, and is not to overreach the adverse party, an amendment will be granted.[59] Where the amendment is for a petition fundamentally defective, such defective petition or process cannot be amended.[60] It is mandatory that a petition be verified by an affidavit.[61] It is important to state that compliance with the provisions of the CWR 2001 in respect of form and time within which to file verifying affidavit is strict. For instance, a verifying affidavit is not to be filed with the petition but within four days after presentation of the petition.[62] Yet, it is submitted that defective verifying affidavit can be cured by an amendment.[63] In other words, a defective verifying affidavit is regarded an irregularity curable by an application for amendment.

3. Conclusion and Recommendations

[56] *Pharma-DekoPlc v F.D.C Ltd* (n53).
[57] [2014] 11 NWLR (pt 1417) 1
[58] (n42) r.183.
[59] *Ogidi* v *Egba* [1999] 10 NWLR (pt 621) 42; *Kode* v *Yusuf* (n50) at 412
[60] *N.N.B Plc* v *Denclag* [2005] 4 NWLR (pt 916) 549
[61] (n42) r. 18(1) & (2).
[62] (n42) r. 18(1); *Gateways Holdings Ltd* v *Sterling Asset Management & Trustees Limited* (n37) at 517, paras E-G; 518, paras D-E.
[63] (n42) r.182(1); (n57) at 26.

This paper examined some of the issues and applications in a winding up proceedings in Nigeria, and concluded that while the courts have resolved some of the issues, there are still issues and applications unresolved.

It is the recommendations of this paper amongst others that the CAMA and the CWR 2001 respectively, be amended to incorporate and reflect the findings in this paper. Simply put, it is the recommendations of this paper that:

i. The interpretation *section* of the CAMA should be amended to include a meaning of debt.
ii. The CAMA and the CWR 2001 should be amended to prescribe a time-limit within which an application disputing a debt in a winding-up petition must be made.
iii. Preliminary objections challenging the competence of a winding-up petition, whether on ground of jurisdiction or not, should be abolished. Nevertheless, there should be an express time-limit within which to hear and determine all interlocutory applications in a winding-up petition.

The prescribed time of four days after presentation of a petition within which to file a verifying affidavit in the CWR 2001 should be expunged.