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**THE VIABILITY OF WINDING-UP
PROCEEDINGS AS A MECHANISM FOR DEBT
RECOVERY UNDER NIGERIAN LAW**

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THE VIABILITY OF WINDING-UP PROCEEDINGS AS A MECHANISM FOR DEBT RECOVERY UNDER NIGERIAN LAW

By Hannah Ozieme*

1.0. INTRODUCTION

Debt is an inevitable offshoot of the business ecosystem. To fund day-to-day operations and long-term goals, companies typically take on some degree of debt financing, usually by way of loans. In some instances, these companies are unable to fulfil their repayment obligations to the lenders or creditors from whom the loans are obtained, which necessitates the lenders to take steps to recoup the unpaid sums.

Debt recovery encompasses the various techniques enlisted by a creditor to recoup an unpaid sum. Although there are many debt recovery mechanisms available under Nigerian law, it is not unusual for creditors to adopt winding-up proceedings as a medium of debt recovery. This paper is not exhaustive of the law on winding-up of companies in Nigeria. However, it extensively analyses the utilitarian value of employing winding-up proceedings as a technique of debt recovery under Nigerian law, highlighting its pitfalls and challenges.

This paper concludes that as an insolvency procedure, the aim of winding-up a company is to liquidate and thereafter terminate its existence and not solely to recover debt. Hence, whilst the process of winding-up a company involves settling its collective debt obligations, thus presenting a window of opportunity for individual creditors to recoup outstanding debts, it cannot *stricto sensu* be said to be a mechanism for debt recovery. Therefore, depending on the peculiarities of the creditor in question, winding-up proceedings may not be a feasible mode to recover debt in Nigeria.

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2.0. WINDING-UP OF COMPANIES

2.1. Meaning of Winding-up

Winding-up refers to the process of liquidating and dissolving a company. The objective of winding up proceedings is to liquidate the assets of a company, distribute same according to the legal rules of priority, and thereafter terminate the life of the company.¹

From the foregoing, two stages of winding up can be highlighted, namely:

- a. The Liquidation stage; and
- b. The Dissolution stage.

In the case of *Spring Bank Plc. v A.C.B. International Bank Plc.*,² the Court ratiocinated that the liquidation of a company and the dissolution of the company are two separate concepts. The winding-up of a company is characterized by the administration of a company's property for the benefit of all its creditors and members, which eventually leads to the dissolution of the company. On the other hand, the dissolution of the company terminates the legal existence of the company.

It is essential to understand the distinction between these two stages to appreciate the legal implications of each stage on the legal personality of the company and the propriety or otherwise of its activities.

2.1.1. The Liquidation Stage

Liquidation is the process of gathering the assets of a company for the purpose of determining its collective debt obligations and settling the debts so determined according to the legal rule of priority. A company is said to be in liquidation where a winding-up order has been made or a liquidator has been appointed over its affairs. It is pertinent to note that while a company is in liquidation, it still retains its legal personality and as such can exercise all rights which accrue to it as a legal entity, subject to restrictions imposed by law. For instance,

¹ In essence, it refers to the procedure of gathering the assets of a company, settling the outstanding debts of such company (if there are any) in the order prescribed by law, with the aim of dissolving the company.

² (2016) 18 NWLR (Pt. 1544) 245.

where a winding up order is made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of court.³ This provision does not oust the right of the company to be sued; it implies that an action is maintainable against the company once the leave of court is obtained.⁴ The company also retains its right to sue or proceed against others.⁵ From the foregoing, it is apparent that a company in liquidation is alive, although it is said to be ill.

2.1.2. The Dissolution Stage

A dissolved company has no legal personality and consequently no rights. The law does not recognize its existence. This is because an order of dissolution effects to extinguish the life of the company. The company is said to be dead at this stage.

It is instructive to note that winding-up is not exclusive to insolvent companies. For instance, a solvent company may voluntarily wound-up its affairs, having achieved the objective for its creation.

2.2. Statutory Framework

Winding up proceedings are sui generis. The following are the key laws which regulate winding-up proceedings in Nigeria:

1. The Companies and Allied Matters Act, 2020 (the Act) is the principal legislation which regulates the operation of companies in Nigeria. It repealed the Companies and Allied Matters Act, 1990 (the Repealed Act).
2. Companies Winding-up Rules, 2001 (the Winding-up Rules).
3. The Federal High Court (Civil Procedure) Rules, 2019, which regulates the service of processes in winding-up proceedings. It also applies where there is a lacuna in the Winding-up Rules.⁶

³ *Companies and Allied Matters Act (CAMA) 2020*, section 580.

⁴ In *Abekhe v NDIC* (1995) 7 NWLR (Pt.406) 228 (pp. 242-243, paras. G-D), the court, setting out some instances when a company can be proceeded against where a winding-up order has been made, held that leave to commence or proceed with an action against a company under a winding-up does not at all depend on whether the reliefs sought are such that they are within the contemplation of the winding-up which a liquidator is statutorily empowered to deal with.

⁵ *AADE Ltd. v MV N. Reefer* (2009) 12 NWLR Pt. 1155) 255 (SC).

⁶ See rules 12 and 183 of the Winding-up Rules.

In the event of a conflict between the Winding-up Rules and the Federal High Court Rules, the Winding-up Rules will prevail.

Other sector-specific laws may apply in addition to the above, depending on the industry of the company in question.

2.3. Key Terms in Winding-up Proceedings

1. **Official Receiver:** An Official Receiver is the Deputy Chief Registrar of the Federal High Court, or any other person designated for that purpose by the Chief Judge.⁷
2. **Liquidator:** A person appointed to administer the assets of a company, distribute same, and settle all debt claims against the company before bringing an end to the life of the company. He acts for the benefit of all the creditors and contributories.⁸ The powers of the directors of the company cease upon his appointment.⁹
3. **Provisional Liquidator:** A person who acts as a liquidator pending the appointment of the main liquidator.¹⁰ Any liquidator appointed after the presentation of a Petition to wound-up a company but before a winding-up order is made is a provisional liquidator.¹¹
4. **Committee of Inspection:** a committee which consists of creditors and contributories or other persons to whom the creditors or contributories donate a power of attorney.¹² They assist and checkmate the activities of the liquidator(s).
5. **Special Manager:** A person whose expertise is employed by the Liquidator to assist in the administration of the company's estate.¹³

⁷ CAMA 2020, section 582.

⁸ See section 588, CAMA 2020, for the powers of the liquidator.

⁹ CAMA 2020, section 585(9).

¹⁰ Also, where a winding up order is made and no liquidator has been appointed, the official receiver may be appointed a provisional liquidator. See section 585, CAMA 2020.

¹¹ CAMA 2020, section 585(2).

¹² CAMA 2020, section 597.

¹³ CAMA 2020, section 599.

2.4. Modes of Winding-up under Nigerian law¹⁴

1. Winding-up by the Court (Compulsory Winding-up): As the name implies, this mode of winding-up is essentially regulated by the Court. Certain categories of persons may invoke this form of winding-up, including a creditor¹⁵. This mode of winding up forms the fulcrum of this paper.
2. Voluntary Winding-up: Section 620 of the Act sets out the circumstances under which a company may be wound up voluntarily. There are two variants of voluntary winding-up:
 - a. Members Voluntary Winding-Up: it is instigated and regulated by the members of the company.
 - b. Creditors Voluntary Winding-up: this form of voluntary winding-up is supervised by the company's creditors.
3. Winding-up subject to the supervision of Court: This form of winding-up takes place where the company initially resolves to wind-up voluntarily before the court is approached to supervise the winding-up.

2.4.1. Winding-up by the Court (Compulsory Winding-up)

The reasons or grounds upon which a company may be wound-up compulsorily are as follows:¹⁶

1. Where the company has by special resolution resolved that the company be wound up by the court;
2. Where a default is made in delivering the statutory report to the Corporate Affairs Commission (the Commission) or in holding the statutory meeting;
3. The number of the members of the company is reduced below two in the case of companies with more than one shareholder;
4. The company is unable to pay its debt;¹⁷

¹⁴ CAMA 2020, section 564.

¹⁵ Section 573(1), CAMA 2020, sets out the categories of persons who may present a petition for winding-up. The petition may be presented by all or any of those persons together or separately.

¹⁶ Section 571, CAMA 2020, sets out the various grounds upon which a company may be wound-up compulsorily.

¹⁷ This ground is further expounded below.

5. The condition precedent to the operation of the company has ceased to exist; or
6. The court is of the opinion that it is just and equitable that the company be wound up.

2.4.2. Implications of Commencing Winding-up Proceedings

Regardless of their outcome, winding-up proceedings have a grave impact on the operations of a company as a going concern. The mode of instigating compulsory winding-up proceedings is by filing a Petition to wound-up a company at the registry of the Federal High Court.¹⁸ Winding-up proceedings is deemed to have commenced at the time of presenting the Petition for winding up. However, where a company resolves to be wound-up voluntary before the presentation of the Petition is made, the proceedings is deemed to have commenced at the time of passing the resolution.¹⁹

Upon commencement of winding-up proceedings, the following attendant implications apply:

1. All other actions or proceedings instituted or pending in any court against the company may, upon the application of the company, any creditor or contributory, be stayed or referred to the court hearing the winding-up Petition.²⁰
2. All dispositions of the assets of the company, including its choses in action or any transfer of its shares or alteration in the status of its members are deemed void, unless the court orders otherwise.²¹
3. All attachment, sequestration, distress, or execution put in force against the estate or effect of the company are deemed void.²²

¹⁸ The Federal High Court is the court with jurisdiction to hear winding up proceedings. The relevant division of the Federal High Court is that within whose area of jurisdiction the registered office or head office of the company sought to be wound-up is situate. See Sections 570, CAMA 2020.

¹⁹ CAMA 2020, section 578(2).

²⁰ CAMA 2020, section 575.

²¹ CAMA 2020, section 576.

²² CAMA 2020, section 577.

2.4.3. Procedure for Compulsory Winding-Up

1. **Presentation of Petition:** The Petition is presented at the Federal High Court as in Forms 2, 3 or 4 in the Appendix to the Winding-up Rules by any of the categories of persons mentioned in section 573 of the Act, which includes a creditor. The Petition must establish the ground upon which a winding-up order is sought. For instance, where the inability of the company to pay its debt forms the ground of the Petition, the petitioner must satisfy the conditions of inability to pay debt as prescribed by the Act. The time and place of the hearing of the Petition is detailed on the Petition by the Registrar.²³
2. **Filing of Verifying Affidavit:** Within 4 days after filing the Petition, the petitioner or one of the petitioners, if more than one, shall swear and file an affidavit verifying the Petition as in Forms 7 or 8 of the Appendix to the Winding-up Rules. In the case of a Petition presented by a company, the affidavit shall be sworn by a director, secretary, or other principal member of the company.²⁴ It is not compulsory to file the verifying affidavit on the same day as the Petition,²⁵ thus a verifying affidavit filed within four days after the presentation of a Petition is competent, as well as a Petition presented without an accompanying verifying affidavit. Also, the time for filing the verifying affidavit may be extended by the Court.
3. **Service of Petition on the Respondent:** Where the Petition is not presented by the company, it is to be served on the company at its registered address (if any), or at the principal or last known principal place of business, if any, by leaving a copy with any officer, member, or servant of the company, if any can be found. Where no such officer, member or servant can be found, by leaving it at the registered address of the company or as otherwise directed by the Court.²⁶ Service is evidenced by an affidavit of service filed in forms 5 or 6.²⁷

²³ See rules 15 and 16 of the Winding-up Rules.

²⁴ See rule 18 of the Winding-up Rules.

²⁵ See *Gateway Holdings Ltd v S.A.M. & T. Ltd.* (2016) 9 NWLR (Pt. 1518) 490.

²⁶ See rule 17 of the Winding-up Rules.

²⁷ See rule 17(2) of the Winding-up Rules.

The respondent is required to file a counter-affidavit in opposition to the Petition within 10 days of service of the Petition or for other interested persons, within 15 days after the advertisement of the Petition. Notice of the filing of the said counter-affidavit must be given to the petitioner or his solicitor on the day of such filing. The petitioner is required to file a reply affidavit within 5 days of receipt of such notice.²⁸

4. Filing of an Application to Advertise the Petition by the Petitioner: It is instructive to note that save the Petition, all other applications made to the court in a winding-up proceedings, including the application to advertise the Petition, must be made by motion on notice.²⁹ Applications which do not adversely affect the right or obligation of the counter-party may however be made *ex parte*.³⁰
5. Advertisement of the Petition: Where the court grants the petitioner's application to advertise the Petition, the advertisement is done in Forms 9 or 10 in the Appendix to the Winding-up Rules and is advertised in the gazette, one national daily newspaper, and one other newspaper, once or as many times as ordered by the Court, within 15 clear days before the hearing of the Petition. The object of advertisement is to put the creditors of the company on notice of the Petition.³¹ The advertisement contains the date of presentation of the Petition, the name and address of the petitioner and his solicitor, and a directive that all persons who intend to appear at the hearing of the Petition should serve on the petitioner or his solicitor, a notice of such intention.³²

All persons who intend to appear on the hearing of the Petition must serve on the petitioner, a notice of such intention as in Form 12. This is required to be served not later than five days before the hearing.³³

²⁸ See rule 25 of the Winding-up Rules.

²⁹ See rule 4 of the Winding-up Rules.

³⁰ See *Ecobank (Nig.) Ltd. v Honeywell Flour Mills Plc.* (2019) 2 NWLR (Pt. 1655) 55 (SC).

³¹ *Ezenwa v J. C. Ltd.* (1994) 7 NWLR (Pt. 356) 292.

³² See rule 19 of the Winding-up Rules.

³³ See rule 23 of the Winding-up Rules.

6. Service of Petition on creditors and contributories within 2 days of requesting same and upon payment of the prescribed fee.³⁴
7. Filing of Memorandum of Compliance by the Petitioner and Hearing to Show Compliance with the Winding-up Rules: This is to be done at the next adjourned date after the order to advertise the Petition is made. The Petitioner is required to satisfy the Court that the order of the Court in respect of the advertisement and service of the Petition has been complied with, and that the Affidavit verifying the Petition has been duly filed.³⁵ This is done by means of a Memorandum of Compliance filed before the said adjourned date.
8. Appointment of a Provisional Liquidator: The Court may appoint a provisional liquidator upon the application of the company, a creditor, or a contributory. Upon the appointment of such liquidator, the powers of the directors of the company shall cease, except the Court directs otherwise.³⁶ Where a provisional liquidator is appointed, the Registrar is required to serve on the Official Receiver, a copy of the order of Court appointing the provisional liquidator on the same day the order is made or within five days thereof.³⁷
9. Filing of List of Persons Who Intend to Appear on the Hearing of the Petition: Before the hearing of the Petition, the petitioner is required to collate and file a list of the names and addresses of persons who have indicated their interest to appear on the hearing of the Petition in Form 13 of the Appendix to the Winding-up Rules.³⁸
10. Hearing of the Petition: At the hearing of the Petition, the Court may dismiss the Petition, adjourn the hearing conditionally or unconditionally, or make any interim order or any such order that it deems fit.³⁹ Where a winding-up order is made, the company is said to be in liquidation. A winding-up

³⁴ See rule 20 of the Winding-up Rules.

³⁵ See rule 22 of the Winding-up Rules.

³⁶ See rule 21 of the Winding-up Rules and section 485 (1), (2) and (9), CAMA 2020.

³⁷ See rule 27 of the Winding-up Rules.

³⁸ See rule 24 of the Winding-up Rules.

³⁹ CAMA 2020, section 574.

order operates for the benefit of all the creditor and contributories of the company, as if the Petition were made on the joint Petition of a creditor and a contributory.⁴⁰The leave of court is required to sue a company in liquidation.⁴¹

In practice, an order appointing a liquidator is usually made alongside the winding-up order. However, where no liquidator is appointed on the making of a winding-up order, the Official Receiver becomes the liquidator.⁴² The Official Receiver shall then summon separate meetings of creditors and contributories in order to determine whether an application should be made to the Court for the appointment of a liquidator in place of the Official Receiver.⁴³ At these meetings, a decision is made as to whether or not an application should be made to the Court for the appointment of a Committee of Inspection. Sections 596 and 597 of the Act regulate the appointment and activities of the committee of inspection respectively.

11. Appointment of Liquidator: Where a new liquidator or liquidators are appointed, they are required to give notice of their appointment to the Commission, as well as security to the Court, for such appointment to become effective.⁴⁴ Upon appointment, the liquidator is mandated to gather the assets of the company and distribute same according to the legal order of priority. The powers of the liquidator are set out in detail under section 588 of the Act. It is instructive to note that certain categories of persons are disqualified from being appointed liquidators.⁴⁵

⁴⁰ CAMA 2020, section 581.

⁴¹ See section 580, CAMA 2020. The grant of leave to commence or proceed against a company in liquidation is not dependent on whether the reliefs sought relate to the winding up proceedings. The circumstances in which proceedings would be allowed to continue against a company in liquidation are;

- a. Where the company is a necessary party to an action; or
- b. Where an action is the most convenient method of trying a question; or
- c. Where the claim is for recovery of possession. See *Abekhe v N.D.I.C.*, *supra* n 4.

⁴² CAMA 2020, section 585(3)(b).

⁴³ CAMA 2020, section 585(3)(c). It is instructive to note that more than one person may be appointed liquidator.

⁴⁴ CAMA 2020, section 585(1), (3)(d).

⁴⁵ CAMA 2020, section 676.

12. Publication of Notice of Appointment of Liquidator: Within 14 days of appointment, the liquidator is required to publish in the Federal Government Gazette or two daily newspapers and deliver to the Commission for registration, a notice of appointment.⁴⁶
13. Forwarding of the Winding-up Order of the Court to the Commission: The company is required to immediately furnish the Commission with a copy of the winding-up order.⁴⁷
14. Service of Notice of Winding-up Order on the Official Receiver by the Registrar of the Court: The registrar is required to serve on the Official Receiver in Forms 14 or 15, a copy of the order of Court appointing the provisional liquidator on the same day the order is made or within five days thereof.⁴⁸
15. Delivery of a Statement of Affairs and Verifying Affidavit thereof to the Official Receiver, Setting out the Assets of the Company, as well as its Debts, Liabilities, Etc.: The said statement and verifying affidavit shall be made by a director and a secretary or any other person mentioned in section 583(2) of the Act.
16. Official Receiver's Preliminary Report: As soon as practicable after the winding-up order is made or upon receipt of the above-mentioned statement of affairs, the Official Receiver is required to submit a preliminary report to the court stating:
 - The amount of capital issued, subscribed and paid up, and the estimated amount of assets and liabilities;
 - The causes of the company's failure, if the company has failed;
 - Whether, in his opinion, further investigation is desirable as to any matter pertaining the promotion, formation or failure of the company.⁴⁹
17. Filing of Affidavit Verifying Debt Claims by Creditors in Order to Prove Debt: Creditors are required to prove their debt unless the court directs otherwise. Debt is proven by means

⁴⁶ CAMA 2020, section 654.

⁴⁷ See section 579, CAMA 2020.

⁴⁸ See rule 27 of the Winding-up Rules.

⁴⁹ CAMA 2020, section 584.

of an affidavit verifying the debt, which is delivered or sent through post to the liquidator.⁵⁰ The liquidator examines the proof of debt so delivered and may admit or reject same.⁵¹

18. Settlement of Debt Claims by the Liquidator: The liquidator settles the outstanding debt claims of the company according to the legal order of priority listed below.⁵²

- Secured debts under a fixed charge;
- Costs and expenses of winding up;
- Preferential debts;
- Secured debts under a floating charge;
- Unsecured debts;
- Distribution of balance among the equity-holders.

19. Release of the Liquidator: After successfully discharging the functions of the office, a liquidator may be discharged by the Court, on the strength of a report to be prepared by the Commission on the application of the liquidator.⁵³

20. Dissolution of the Company: On an application by the liquidator after the winding-up of the affairs of the company, the Court shall order the dissolution of the company and the company shall be dissolved accordingly from the date of such order.⁵⁴ An order of dissolution signifies the end of the legal existence of the company.⁵⁵

It is instructive to note that within 2 years of its pronouncement, the said order of dissolution may be avoided by the Court upon the application of the liquidator, or any person interested.⁵⁶

⁵⁰ *Akahall and Sons Ltd. v N.D.I.C.* (2017) 7 NWLR (Pt. 1564) 194. See also the provision of section 655 CAMA 2020, as well as rules 74 - 88 of the Winding-up Rules for the form and content of the affidavit verifying the debt.

⁵¹ See the provisions of rules 89 – 101 for the procedure for admission and rejection of proof of debt by the liquidator, as well as the reversal and varying of the liquidator's decision by the Court.

⁵² The legal order of priority is discoursed extensively below.

⁵³ CAMA 2020, section 595.

⁵⁴ CAMA 2020, section 617 (1).

⁵⁵ See *Spring Bank Plc. v A.C.B. International Bank Plc.*, *supra* n 2.

⁵⁶ CAMA 2020, section 691.

21. Forwarding of order of dissolution by the liquidator to the Commission within 14 days of the pronouncement of the order.⁵⁷

3.0. WHETHER WINDING-UP PROCEEDINGS IS A VIABLE MECHANISM FOR RECOVERING DEBT UNDER NIGERIAN LAW

By virtue of section 571(d) of the Act, a company may be wound-up compulsorily by the Court for inability to pay its debt. This provision insinuates the existence of a debtor-creditor relationship between the company and a creditor. A creditor is one of the persons who are entitled to present a Petition for winding-up.⁵⁸

Section 572 stipulates the circumstances under which a company would be deemed to be unable to pay its debt as follows:

- a. a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving at its registered office or head office, a demand under his hand requiring the company to pay the sum 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;
- b. execution or other process issued on a judgement, 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 considering any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

The circumstance which is most directly relevant to this discourse is paragraph (a) above – the inability of a company to pay its debt.

The elements of paragraph (a) above, which a creditor must satisfy, are set out as follows:

- I. Existence of a debt in excess of N200,000;

⁵⁷ CAMA 2020, section 617(2).

⁵⁸ CAMA 2020, section 573.

2. The debt is due;
3. A formal demand (statutory demand) written personally by the creditor has been served at the company's head office or registered office;
4. The company is unable to pay the debt within three weeks.

It is apparent that the above elements paint an incident for recovery of outstanding debt by a creditor. Thus, the question arises whether a creditor to whom a company is indebted to in a sum exceeding N200,000, which is due and payable, may enlist winding-up proceedings as a mechanism to recover such debt.

It is instructive to note that the essence of winding-up proceedings is to liquidate a company and thereafter bring its life to an end and not to enforce or recover a debt. Hence, the pugnacious attitude of the Court to the use of winding up proceedings as a tool for debt recovery is no surprise. Such Petitions are liable to being struck out by the Court.

In the case of *Oriental Airlines Ltd. v Air Via Ltd.*,⁵⁹ the court held that the relief sought in a winding up Petition is not one for recovery of debt or for breach of contract but one for winding up of a company on account of insolvency or inability to pay debt.

In *Tate Ind. Plc. v. Devcom M.B. Ltd.*,⁶⁰ the court held that the procedure for the winding up of a company should not be converted to a procedure for debt collection in circumvention of the established legal procedure for instituting action in appropriate court for the collection of debt.

Debt recovery is not a relief that can be sought in a winding-up petition. However, the possibility of a creditor recovering an outstanding debt in the process of winding up a company is not extinct. This is because the process of liquidation (which is a necessary incident of the winding-up procedure) involves distributing the assets of the company in accordance with the provisions of law, thus creating a possible pathway for repayment of an outstanding debt to a creditor.

⁵⁹ (1998) 12 NWLR (Pt. 577) 271 (CA).

⁶⁰ (2004) 17 NWLR (Pt. 901) 182 (CA).

3.1. Factors that Determine the Viability of Employing Winding-up Proceedings as a Tool for Debt Recovery under Nigerian Law

Some significant factors which may frustrate the use of winding-up proceedings as a tool for debt recovery are as follows:

- a. Bona fide opposition to debt;
- b. The legal order of priority;
- c. Time factor.

A bona fide opposition to debt may forestall the winding-up proceedings. This is because the law is trite that a winding-up order cannot be founded on a disputed debt.⁶¹ In the case of *Onochie v Alan Dick Co. Ltd.*,⁶² the Court of Appeal stated thus;

In a petition for winding-up, once there is a bona fide dispute as to whether a debt is owed, it would not be the function of the trial court to determine whether there was in fact a debt. In other words, the court will not resolve the dispute, as a determination would only be necessary if the petitioner is working a claim for debt owed.

The ground of opposition to the debt must be genuine and substantial. The manner of disputing the debt should be determined by the form of allegation set forth. Where the petitioner avers to facts without supporting same with substantial documentary evidence, a mere denial would suffice. However, where the petitioner pleads documentary evidence to support his averments, the company would be required to substantiate its denial with more compelling contradictory evidence.⁶³ For instance, a respondent company which acknowledges a debt but alleges that same has been settled would be required to

⁶¹ Please see the cases of *Hansa International Construction Ltd. v Mobil Producing Nigeria* (1994) 9 NWLR (Pt. 366) 76 and *Air Via Ltd v Oriental Airlines Ltd.*, *supra* n 59.

⁶² (2003) 11 NWLR 9 (pt. 832) 451 (CA).

⁶³ See K. Udofia, "An Analysis of the Judicial Approach to Disputed Debts in Winding-up Proceedings in Nigeria", available at <https://www.financierworldwide.com/an-analysis-of-the-judicial-approach-to-disputed-debts-in-winding-up-proceedings-in-nigeria#.YoCbtrrMJEb> (accessed 1 May 2020).

substantiate its assertion with proof of payment of such documents by way of bank draft, receipt, etc.

The probable methods of responding to an allegation of indebtedness by a petitioner are as follows:

- i. Admit the debt;
- ii. Dispute the debt;
- iii. Counterclaim against the debt;
- iv. Set-off against the debt.⁶⁴

A company against whom a petition for winding-up is presented on the ground of inability to pay its debt may dispute such allegation of indebtedness in any of the following ways;

- a. Totally denying the existence of the debt;
- b. Concede that a debt had been created but same has been settled;
- c. Concede that a debt had been created but same is not due and payable;
- d. Contest the accuracy of the sum of its indebtedness. Where the company maintains that the sum of its indebtedness as alleged by the creditor is inaccurate, and goes further to admit the existence of a debt, a Petition for winding up may be duly founded in respect of the sum so admitted, upon satisfaction of the conditions stipulated in section 572 of the Act.⁶⁵ The law creates a burden on the company to establish that it has discharged its obligation in respect of the admitted sum.⁶⁶

It is prudent to dispute a debt timeously, i.e. when the statutory demand was made. However, failure to dispute the debt at the time the statutory demand is made is not fatal to the respondent company's case. In *Hansa's case*⁶⁷ the court held that it is immaterial whether the debt was disputed earlier or upon the presentation of the misguided Petition. Where the debt is disputed in writing at the time the

⁶⁴ See the case of *Air Via Ltd. v Oriental Airlines Ltd*, *supra* n 59.

⁶⁵ However, the mere fact that a party paid part of the sum of money he is alleged to owe as a debt does not without more, establish that he is in fact owing the outstanding sum of money as a debt. See *Air Via Ltd. v Oriental Airlines Ltd*, *supra* n 59.

⁶⁶ *Okoli v Morecab Finance (Nig.) Ltd.* (2007) 14 NWLR (Pt. 1053) 37.

⁶⁷ *Supra* n 61.

statutory demand is made, such written document may be evidenced in the respondent company's counter affidavit in opposition to the Petition to give credence to the company's case.

The remedies available to a Petitioner where debt is disputed are:

1. Action in debt recovery;
2. Action to establish debt.⁶⁸

3.2. Legal Order of Priority

The order of settlement of claims prescribed by law determines the priority rating of the claim of each creditor and by extension, the availability of funds to satisfy such claim. The legal order of priority for distribution of the assets of a company in liquidation is listed below in descending order.⁶⁹

1. Creditors secured by a fixed charge;
2. Costs and expenses of the winding-up;
3. Preferential payments;
4. Creditors secured by a floating charge;
5. Unsecured creditors;
6. Equity holders.

1. Creditors Secured by a Fixed Charge: Section 657(6)(a) of the Act explicitly stipulates that secured creditors are to be given premier consideration in the settlement of claims in winding-up proceedings.⁷⁰ Section 868 of the Act defines a secured creditor as one who has been granted a security interest in any property, asset, or assets for the purpose of securing the performance of a debt or guarantee obligation.

A fixed charge is a type of security created over a definite asset of the company such as land, machinery, etc. When a fixed charge is created over the assets of a company, the company

⁶⁸ See *Pharma Deko Plc. v F.D.C. Ltd.* (2015) 10 NWLR (Pt. 1467) 225; *Oriental Airlines Ltd. v Air Via Ltd*, *supra* n 59; *Tate Ind. Plc. v Devcom M.B. Ltd.*, *supra* n 60.

⁶⁹ See D. Sasegbon, *Nigerian Companies and Allied Matters Law and Practice* (DSc Publications: Lagos, 1990), pp. 827-831, 853.

⁷⁰ This provision is a recent innovation of the Act. As it relates to creditors secured by a fixed charge, the legal order of priority provided by the Repealed Act is retained i.e. fixed charges also enjoy primacy under the Repealed Act. The impact of the innovation of this provision is better felt in the context of floating charges and same is discussed below.

is precluded from dissipating or dealing with the assets subject to the charge during the subsistence of the charge, unless it is authorized to do so by the holder of the fixed charge. A fixed charge holder is entitled to prime consideration in the settlement of claims over all other debts including those secured by a floating charge. However, it is instructive to note that a fixed charge holder may lose such primacy to the holder of a floating charge where the fixed charge was created after the grant of a floating charge, the terms of whose grant prohibits the grant of a later charge having priority over the floating charge, and the creditor in whose favour such later fixed charge was granted had notice of that prohibition at the time the fixed charge was created in his favour. A person is deemed to have notice of such prohibition in a floating charge, where a notice indicating the existence of such prohibition is registered with the commission.⁷¹

Between several creditors secured by duly registered fixed charges, priority is determined by the date of registration of the charges, as opposed to the date of creation of the charges.⁷²

2. **Costs and Expenses of the Winding-up:** These include all costs incidental to gathering of the assets of the company such as liquidators' fee, special managers' fee (if any), etc.
3. **Preferential Debts:** Section 657(1) enumerates the classes of debt which fall under this category as follows:
 - a. All local rates and charges due from the company at the relevant date, having become due and payable within 12 months before that date, and all pay-as-you-earn tax deductions and other assessed taxes, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date, and in the case of pay-as-you-earn tax deductions, not exceeding deductions made in one year of assessment and, in any other case, not exceeding one year's assessment;

⁷¹ CAMA 2020, section 204

⁷² This is inferred from the provision of section 222(1), CAMA 2020, which provides that the registration of a charge serves as a constructive notice of its creation.

- b. Deductions made from the remunerations of employees and contributions of the company under the Pensions Reform Act;
- c. Contributions and obligations of the company under the Employees' Compensation Act;
- d. All wages or salaries of any clerk or servant in respect of services rendered to the company.
- e. All wages of any workman or labourer, whether payable for time or for piece of work in respect of services rendered to the company; and
- f. All accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding-up order or resolution.

The above debts rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.⁷³

4. **Creditors Secured by a Floating Charge:** A floating charge is a security created over the current asset(s) of a company,⁷⁴ e.g., cash, inventory, etc. These assets cannot be made subject to a fixed charge because of their nature. Even though they form the subject of a charge, the company is entitled to make use of them in its daily operations until the charge crystallizes. Once a company goes into liquidation, a floating charge crystallizes into a fixed equitable charge and thereafter, the company is precluded from dealing with those assets without the authorization of the holder of the charge.⁷⁵

As regards the statutory order of settlement of claims in a winding-up, typically, a preferential debt would rank ahead of a debt secured by a floating charge, especially when the assets of the company are insufficient to satisfy the claims of the general creditors.⁷⁶ However, it appears that the introduction

⁷³ Section 657(4)(a), CAMA 2020.

⁷⁴ CAMA 2020, section 203.

⁷⁵ CAMA 2020, section 203(2).

⁷⁶ CAMA 2020, section 657(4)(b). This position is also obtainable under the Repealed Act.

of the provision of section 657(6)(a) by the Act is an attempt to deviate from that scheme of ranking by explicitly providing for the primacy of “secured creditors” (which includes fixed and floating charge holders), so far as it relates to the settlement of claims in a winding-up. The provision is reproduced below for ease of reference:

Section 657(6) – Notwithstanding the foregoing and any other provisions of this Act and any other law applicable in Nigeria where it relates to settlement of claims in the winding-up of a company, claims of –

- a. Secured creditor, as defined under this Act, shall rank in priority to all other claims, including any preferential payment under this Act or any other debts inclusive of expenses of the winding-up.

Section 868 defines “secured creditor” to mean “a creditor who has been granted a security interest in any property, asset, or assets for the purpose of securing the performance of a debt or guarantee obligation.”

Clearly, a creditor secured by a floating charge falls within the purview of the above definition of a secured creditor. The implication of this provision is that a floating charge would rank right after a fixed charge, and ahead of preferential debts and expenses of the winding-up in the statutory scheme of settlement of claims in a winding-up. The practicability of this interpretation is however questionable, as it raises various concerns such as the source of payment of preferential debts and expenses in a case where the assets available to satisfy the claims of the general creditors are insufficient. It is hoped that the purport of this provision would be ascertained by judicial interpretation.

5. Unsecured Creditors: in contradistinction to a secured debt, an unsecured debt is one over which no security is created by the company. The claims of unsecured creditors rank *pari passu*.
6. Equity holders: this term encompasses shareholders as well as all other persons who hold ownership stake in the company. Section 657(6)(b) of the Act provides that equity holders shall

rank last in the statutory scheme of settlement of claims in a winding-up.

In essence, the legal order of prioritization of claims has a ripple effect on the availability of funds to settle the claims of the company's creditors. Thus, the feasibility of a creditor recouping an unpaid sum, whether in part or full, is dependent on its position or ranking in the legal order of priority for settlement of claims in a winding-up. As can be gleaned from the above, the likelihood of a secured creditor to recover an outstanding debt is way higher than that of an unsecured creditor.

3.3. Time Factor

The duration of winding-up proceedings before the Federal High Court at first instance, and subsequently before the appellate courts, is largely uncertain. It is not unusual for winding-up proceedings to run for over a decade at first instance before appellate proceedings are initiated.

4.0. CONCLUSION

In conclusion, it is apparent that the window of opportunity available to a creditor to recoup an unpaid sum is indeed meagre considering the onerous nature of winding-up proceedings, as well as the attendant issues discussed above. Hence, it would not be an overstatement to say that the position of the law on winding-up of companies on the ground of inability to pay its debt is designed as an insolvency procedure to facilitate settlement of the collective liabilities of the company, as opposed to a debt-recovery procedure available to individual creditors.