IMPLEMENTING BANKRUPTCY LAW IN NIGERIA; HINDRANCES AND SOLUTION OPTIONS♦.

INTRODUCTION

There are a number of options open to creditors to recover their debts form a defaulting debtor. Where the debtor is not a corporate body, a bankruptcy proceeding is one of the options that may be considered by the creditors. When it is realized that, even though there is no accurate statistics, it seems to be the case that a good part of business activities are carried on through the unorganized private sector, then the importance of bankruptcy law comes to the fore.

It appears, however, that after about twenty-four years of enactment of the *Bankruptcy Act*[1], the provisions of the law are not being utilized. The fact that reports of bankruptcy case are conspicuously missing from the pages of the various law reports in Nigeria is an ample testimony to the unpopularity of bankruptcy. Many reasons have been adduced for this, among these are; that bankruptcy proceedings is alien to culture of

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[1] *Cap 30 LFN, 1990. Hereinafter referred to as Cap 30 The Bankruptcy Rules (hereinafter referred to as the Rules) was only made in 1990.*

Nigerians; that the provision of the *Bankruptcy Act* are too technical and complex; that legal practitioners are not acquainted with the law on bankruptcy proceeding; and that the remedy of bankruptcy is an extreme remedy.

Some of these reasons will be briefly examined and subsequently the main outline of the law relating to practice of bankruptcy proceedings and the way some of the aspects of the law constitute hindrances to the implementation of bankruptcy law will be made apparent. The paper will be concluded with some suggested solutions.

WHAT IS BANKRUPTCY?

Bankruptcy has been described as the proceeding though which the state, through an officer appointed for the purpose, takes possession of the property of a debtor so that it may be realized and, subject to certain preferable claims and priorities, distributed among the creditors of the affected debtor2.

In a similar vein, bankruptcy has been defined as the status of a debtor who has been declared by judicial process to be insolvent or unable to

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2 *Walker; The Oxford Companion to Law, p.111*

pay his debts as they fall due out of his assets3. It is obvious from this definition that declaration of status of bankruptcy involves judicial mechanism. Therefore the role of the judiciary in bankruptcy proceedings cannot be overemphasized.

It is apposite to point out that the word bankruptcy was not defined in *Cap 30* as well as its amending *Act 4*. Rather, there is provision for what is 'acts of bankruptcy'5. The acts of bankruptcy are a description of circumstances that may warrant the presentation of bankruptcy petition. Be that as it may, bankruptcy may be said to be state of insolvency involving a judicial determination affecting the property and status of the debtor.

OBJECTIVES OF BANKRUPTCY LAW.

With respect to the import of bankruptcy law, it has been commented that the law of bankruptcy provides for the development of a plan, which allows an insolvent debtor to settle his indebtedness among his creditors, and allows the interests of all creditors to be treated with some measure of

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3 *Crystal and Nicholson; Bankruptcy Law and Practice (London, Oyez Publishing) p. 1*

4 *Bankruptcy (Amendment) Act No 109 of 1992.*

5 *See section 1 of Cap 30 as amended by Section 2 of Bankruptcy (Amendment) Act No 109 of 1992.*

equality. Furthermore, it allows certain debtors to free themselves of their accumulated financial obligation after their assets are distributed even though the debts have not been paid in full6.

Flowing from the foregoing, the purpose of bankruptcy proceedings has been said to be;

> *"...protecting the debtor from undue pressure by certain creditors, of preserving fairness among the creditors, and finally, of discharging the debtor from his liabilities and enabling him to start afresh"7*

It is apposite to state that the law relating to bankruptcy is basically statutory8 and according to Crystal and Nicholson9, bankruptcy sets in motion a statutory system which has *"two primary objects"* identified thus;

> *"The first is to vest all the property which the debtor has at the commencement of the bankruptcy or acquires before his discharge in a trustee for distribution amongst his creditors equitably according to their rights. The second is to release the debtor from liability to those creditors".*

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6 *http;//www.law.cornell.edu/topics/bankruptcy.html*

7 *Walker; op cit, p.111*

8 *Akanle; Bankruptcy Law and Practice, p.1.*

9 *bid*

In the view of the same authorities10, the terms of the release of the bankrupt depend on his conduct before and during the bankruptcy. This is because the court has the power to suspend, refuse or attach condition to the release of a debtor if it discovered that his conduct is reprehensible. It was therefore opined that the duty of the court in this regard underpins the third object of bankruptcy law which is that of "*promoting a higher standard of commercial morality and protecting a higher standard of commercial morality and protecting the public from the abuse of commercial credit*"11. It is submitted that rationale for the provision of the Bankruptcy Act12 on public examination of debtor13 is to promote the third object of bankruptcy law as identified above by Crystal and Nicholson. The objective is particularly important in the context of the murky waters of Nigeria business environment where many debtors spend creditors money on luxury items rather than investing the advances made to them in accordance with the purpose for which the advances were granted.

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10 *ibid*

11 *ibid*

12 *Cap 30 Laws of the Federation of Nigeria, 1990. Hereinafter referred to as Cap 30.*

13 *See Section 17 of Cap 30.*

DIFFERENCES BETWEEN INSOLVENCY, WINDING UP AND BANKRUPTCY.

Whereas common to bankruptcy and insolvency is a situation of inability to repay back debt by a creditor, there are differences between the two. In the case of insolvency the debtor is not subjected to any form of legal disability, whether private or official and he still retains some from of control and management over the remaining portions of his property. In the case of bankruptcy, however, the debtor ceases to administer his property, business or trade as same will be put under the control of trustee appointed for that purpose14. Therefore, insolvency is a question of fact to be determined from the surrounding circumstances, but bankruptcy is entirely a matter of law15.

In distinguishing bankruptcy from insolvency, Sales [16]opined thus;

> *"The former term should only be applied subsequent to the making of the adjudication order, since such an order alters the legal status of the debtor, and operates to deprive him of the ownership of all his property, with certain minor exceptions."*

[14] *Akanle; op cit p.1*

[15] *ibid*

[16] *The Law relating to Bankruptcy, Liquidations and Receiverships p.2*

Further to the above, bankruptcy may also be contrasted with winding up in that winding up arises in connection with insolvency of companies and is regulated by *Companies and Allied Matters Act*17 while bankruptcy deals with only individuals and partnership firms and is regulated by *Cap 30*.

LEGAL REGIME FOR BANKRUPTCY IN NIGERIA?

As noted earlier, bankruptcy is a creation of statute18 and therefore the law is primarily statutory19. In Nigeria the primary legislation on bankruptcy is *Cap 30 as amended by Bankruptcy (Amended) Act 20.*

The primary rules of procedure are set out in *Bankruptcy Rules 1990*21. The Rules is to be supplemented by Federal High Court Rules "with such modifications as to bring it into conformity with the provisions" of *Cap 30* where the Rules is silent on "any Rules or procedure to be followed in bankruptcy proceedings"22.

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17 *Cap 59 LFN 1990 (as amended)*

18 *The first English Act on bankruptcy dated back to 1542.*

19 *Walker; op cit p.111 expressed the view that the law is "entirely statutory" but the truth is that in common law jurisdiction like ours case-law will still play important role as a source of law even where a subject matter is a creation of statute.*

20 *Act 109 of 1992*

21 *Made pursuant to sections 15(2), 34, 110 and 111 of Cap 30. Hereinafter referred to as the Rules.*

22 *Rule 158 of the Rules.*

Case-law is also a source of bankruptcy law. It is however observed that there is dearth of cases on bankruptcy in the various Nigerian law reports. In the circumstance, English decisions interpreting the provisions of the *1914 English Bankruptcy Act* on which *Cap 30* is based will be of persuasive authority.

SCOPE OF APPLICATION OF CAP 30.

This issue arises in the context of interpretation of *Section 108 of Cap 30*. He section prohibits the making of receiving order under the Act against any association or company registered under *Cap 59*.

It is beyond cavil that companies as well as incorporated trustees, being an association registered under parts A and C of *Cap 59* respectively is excluded from receiving order under *Cap 30*. What is not immediately apparent is whether the provision will exclude partnerships and sole proprietorship registered under part B of *Cap 59*. Akanle23 argued that the provision of the section will also exclude partnerships and any association registered under part B (i.e Busines Names) of *CAMA*.

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[23] *op cit, p.195*

It is, however, pertinent to point out that it is the name of partnership or trade name of an individual that is registered under part B of *Cap 59* and not partnership qua an association. As such, registration of name of partnership is not registration of an association within the meaning of *Section 108 of Cap 30*.

Furthermore, the laws of the states govern formation and legal incidence of partnership and it is not all partnership that requires registration. Registration of partnership and business names is only required where the partners are carrying out business other than in their own names. Therefore, if the view of Akanle24 is held to be correct, the logical and legal implication will be that partnerships which names are registered under *CAMA* will be excluded from bankruptcy proceedings under *Cap 30*, while those unregistered will be caught by the provision of *Cap 30*. It is submitted that this dichotomy of treatment could not have been intended by the legislature.

UNPOPULARITY OF BANKRUPTCY PROCEEDING.

As noted earlier Bankruptcy practice is not yet popular in Nigeria[25] and the factors accountable for this state of unpopularity are intertwined with

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[24] *supra.*

[25] *See Inroduction to this paper.*

the issue of hindrances to the implementation of bankruptcy law in Nigeria and they are therefore examined anon;

Cultural Issue

One of the reasons adduced for unpopularity of bankruptcy proceedings is that the concept of bankruptcy is not indigenous to Nigeria and that it is the product of a foreign culture[26]. With respect, while it is true that bankruptcy law as is known in Nigeria originates in England[27], the same is also true of other legal concepts which are now well entrenched in our law and enjoying widespread practice. The truth is that the generality of our law are entrenched on principles and practice of English law and with the introduction and practice of capitalism in Nigeria, the legal and institutional framework for its working have been incorporated and therefore should be made operational.

It may well be that it will be uncharitable to wish the declaration of another as a bankrupt, that result is inevitable This is because inextricably linked with success is failure.

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26 *Hon. Justice T.A Odunowo (Rtd); Keynote Address delivered at Seminar on Bankruptcy Law and Practice held on 29-30 April, 1991.*

27 *Walker; The Oxford Companion to Law, p.111. The first English Act was enacted in 1542.*

Technical and Complex Provisions

The provision of *Cap 30* is replete with lengthy provisions, with provisos qualifications and exceptions. As will be demonstrated below some of the provisions of *Cap 30* and the Rules may potentially conflict with right to fair hearing. Certain provisions of the Rules also sought to amend and or enlarge the substantive provision of the Act[28].

Acquaintance with The Law

Absence of awareness of the provisions of the law and its usefulness may also account for the lack of implementation of the law on bankruptcy[29]. It may be observed that bankruptcy law is not part of the curriculum of the faculties of law and the Nigerian law school and that there is dearth of Nigerian literature either in form of books or learned monograms on the subject matter. Therefore, in advising on the various recovery options many practitioners may not even touch on bankruptcy as an option.

Extreme Remedy

The option of bankruptcy is an extreme one and creditors may not be disposed to the remedy. The reasons for this are aptly put by Sales[30] ;

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28 *See for instance discussion below on adjudication of bankruptcy.*

29 *Hon. Justice T.A Odunowo (Rtd); op cit.*

30 *The Law relating to Bankruptcy, Liquidations and Receiverships p.1*

"Creditors as a class are long suffering. They frequently prefer to exhaust all alternatives before proceeding to extremes; and when action becomes necessary, self-interest dictates some remedy which will enable them to recover their debts (e.g by execution, after having obtained judgment) for their own benefit, rather than, by the bankruptcy proceedings, to pull the chestnuts out of the fire for the benefit of other creditors, since such proceedings involve the equitable distribution of the insolvent's estate amongst his creditors generally."

As can be seen from the foregoing, many factors may therefore be attributed for the unpopularity of bankruptcy practice in Nigeria.

JURISDICTION AND VENUE RULE.

Prior to the promulgation of the *Constitution (Suspension and Modification) Decree*31, there was controversy as to whether the exclusive jurisdiction conferred on the Federal High Court with respect to bankruptcy matters32. However, by the provision of the *Decree33 and Section 251(1)(j) of 1999* Constitution, it is now beyond doubt that the

31 *No 107 of 1993*

32 *See Akanle; op cit, pp 15-17.*

33 *Now repealed*

Federal High Court is vested with exclusive jurisdiction in respect of bankruptcy proceedings.

With respect to the appropriate venue for the institution of bankruptcy proceedings, the Rules appeared to give primacy to the place where the debtor carried on business rather that where he resides. Thus a petition is required to be filed in the division of the Federal High Court where the debtor carried on business for the greater part of the six month immediately preceding the presentation of the petition even where the petitioner no longer resides in such a division. (Rule 17)

It is to be observed that the provision of the Rules as to venue is rather laconic and grossly inadequate as for instance it does not provide for situations where the debtor carries on business in several judicial divisions. Secondly, there is no justification for bankruptcy proceedings not to be instituted in the division where the debtor resides, particularly where he no longer resides in the judicial division where he carries on business. Hardship and inconvenience may well result where the debtor will have to be made to defend bankruptcy proceeding in a judicial division other than the one he resides.

Neither the Rules nor the Act provides for the consequences of instituting proceedings in a wrong judicial division. However, the Rules provides that

generally non-compliance with any of the Rules does not render a proceeding void unless the court otherwise directs34. It is suggested that the court adopts the same stance in bankruptcy proceedings as in other civil proceedings that institution of an action in a wrong venue does not have the jurisdictional competence of the court35.

LOCUS STANDI TO INSTITUTE BANKRUPTCY PROCEEDING.

A debtor or a creditor may institute bankruptcy proceeding. Where the petitioner is a debtor, it appears that it suffices for such a debtor to merely allege that he is a debtor and he is unable to pay his debt. The allegation in the petition is deemed to be an act of bankruptcy and the debtor is not required to have previously filed a declaration of his inability to pay his debts36. It is required that the debts on which the petition is based may be for any amount but such an amount must be presently payable37.

The court is vested with discretion to refuse to make a receiving order on a debtor's petition in certain circumstances38. It has also been held that receiving order will not be made where the debtor has no reasonable

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34 *(Rule 157(1)*

35 *(refer to judicial authorities)*

36 *(Section 8(1) of Cap 30*

37 *(Re a Debtor (No. 17 of 1966) [1967] Ch. 590.*

38 *(See proviso to section 8(1) an section 8(2).*

grounds for alleging that he is unable to pay his debt39. Debtor's petition can only be withdrawn with leave of court40.

For creditor to have a standing to present a valid petition, the creditor's petition must disclose the following;

I. That the debtor has committed an act of bankruptcy.

II. That the creditor is entitled to present the petition within the ambit of the provision of Cap 30 as amended.

These two requirements will be examined *anon*.

Acts of Bankruptcy

Under Cap 30, the following four cases were regarded as constituting acts of bankruptcy by a debtor;

1. Creditor obtaining final judgment or final order against a debtor41.
2. Levying of execution on debtor's goods42.
3. Debtor's declaration of inability to pay his debts43.
4. Debtor's presentation of bankruptcy petition44.

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39 *(See Re Betts, ex parte Official Receiver [1901] 2 K.B 39.*

40 *Section 8(3*

41 *See Section 1(a) of Cap 30*

42 *See section 1(b) of cap 30*

43 *See section 1(c) of cap 30*

44 *See section 1(c) of cap 30*

The above categories of acts of bankruptcy were much narrower than the *English Bankruptcy Act of 1914*[45]. However, by an amendment of cap 30 the categories of act of bankruptcy were extended to include the following[46];

1. Debtor's suspension or giving notice that he is about to suspend payment of his debts to any of his creditors.
2. Where the creditor become entitled to file a bankruptcy petition under a credit agreement.
3. Debtor making of a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditor generally.
4. Debtor making 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.
5. Debtor making any conveyance or transfer of his property or any part thereof, or creating any charge thereon which would under cap 30 any other Act be void as a fraudulent preference if he were adjudged bankrupt.

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[45] *See Akanle; op cit p. 7 et seq.*

[46] *See section 2 of Bankruptcy (Amended) Act No 109 of 1992.*

6. Where a debtor, with intent to defeat or delay the claims of his creditors departs out of Nigeria or being out of Nigeria remains out of Nigeria or departs from his dwelling47.

It is pertinent to point that parties to a credit transaction man specify the circumstances under which the creditor will become entitled to file a bankruptcy petition, in which case where such circumstances occurred the debtor will be deemed to have committed act of bankruptcy48. It is suggested that solicitors can make use of this provision by inserting appropriate bankruptcy clauses in credit agreements.

Entitlement to present petition

In addition to the requirement of disclosing acts of bankruptcy, the creditor must satisfy the following requirements;

1. that the amount of debts owed by the debtor is not less than ₦2,00049;
2. that the debt is a liquidated sum and is payable immediately or at a future time50;

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47 *See generally, Sales; op cit, p. 5 et seq for a discussion of acts of bankruptcy.*

48 *Section 1(e) of cap 30 as amended.*

49 *See Section 4(1)(a) of cap 30.*

50 *See Section 4(1)(b) of cap 30. It is required that the debt must be a liquidated sum both at the date of the act of bankruptcy and at the*

3. that the act of bankruptcy upon which the petition is predicated occurred within three months before the presentation of the petition51; and
4. that the debtor is ordinarily resident in Nigeria or within a year before the date of the petition has resided, have a dwelling house or place of business, carried out a business in Nigeria or a member of a firm or partnership in Nigeria52.

Secured Creditors

Where the petition is being presented by a secured creditor, it is provided that the petition shall state either that the secured creditor is willing to give up his security for the benefit of the creditors if the debtor is adjudged bankrupt or an estimate of the value of his security in the latter case the secured creditor may be allowed to present the petition as it he were an unsecured creditor to the extent of the balance of the debt due to him after deducting the estimated value53.

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date of the presentation of the petition; Re Debtors (No.669 of 1926) [1972] 1 Ch. 19.

51 *See Section 4(1)(C) of cap 30.*

52 *See section 4(1)(d) of cap 30.*

53 *Section 4(2) of cap 30.*

The practical effect of the above provision is that secured creditor who is unwilling to give up his security for the creditors and whose value of security is equal to or in excess of the amount of the debt owed by the debtor. Therefore, bankruptcy proceeding may not be a viable or preferred alternative for a secured creditor.

PERIOD OF LIMITATION

It appears that a petition for bankruptcy will be incompetent if filed after three months of the occurrence of the act of bankruptcy upon which the petition is predicated54. Therefore, in *Re Maund*55, the court refused to amend a bankruptcy petition by adding as petitioners after three months have elapsed from the date of the act of bankruptcy upon which the additional petitioners is to be joined.

In the context of prevailing business and legal practice in Nigeria and considering the fact that the creditor may opt first to explore other alternatives before resorting to bankruptcy proceeding, it is submitted that the prescribed three-month limitation is a serious hindrance to implementation of bankruptcy law in Nigeria. In the words of Akanle;

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54 *Section 4(1)(c) of the Act.*

55 *[1895] 1 Q.B. 195 at 197.*

"The statutory prescribed period of three months is rather short, and its practical effect will be fatal to creditors, (sic) claims which ordinarily would have been actionable under the Act."

PROCEEDINGS SUBSEQUENT TO PRESENTATION OF PETITION

Subsequent to the presentation of the presentation of petition56, a creditor is required to furnish the court with evidence of the debt, service of petition and act or acts of bankruptcy57. Upon satisfaction with the evidence on these matters, the court may make a receiving order58. It is submitted that even though the word "if satisfied with the proof" is used in *Section 7(2)*, the standard of proof is as in other civil cases, that is, on the preponderance of evidence or standard of probability59.

The Official Receiver60 is obliged to publish the name, address and description of the debtor, the date of the receiving order and the date of the petition in the Federal Gazette61. The propriety of putting the

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56 *For formal requirement of a petition see section 7(1) and rules 15 and 16 of the Rules.*

57 *Section 7(2) of cap 30.*

58 *Sections 3 and 7(2) of cap 30.*

59 *Odulaja v Haddad (1973) 1. SC 357*

60 *see sections 72-75 on Official Receiver.*

61 *Section 14 of cap 30.*

obligation to publish notice of receiving order is doubted. Rather is is suggested that it should be the petitioner that should be made to publish the advertisement.

It is provided that a meeting of creditors should be held soon after the making of the receiving order, "for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be accepted, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property"62.

The debtor is also required to submit his statement of affairs in a prescribed form verified by affidavit to the official receiver within seven days of the receiving order in the case of debtor's petition and fourteen days in the case of creditor's petition63. Consequences for failure to file statement of affairs is serious as the debtor may be punish for contempt or adjudged bankrupt on the application of the Official Receiver or any debtor64.

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62 *Section 15(1) of cap 30.*

63 *See section 16(1) &(2) of cap 30 and rules 50 & 51 of the Rules.*

64 *Section 16(3) of cap 30.*

PUBLIC EXAMINATION OF DEBTOR [65]

Sequel to the expiration of the time for submission of the debtor's statement of affairs, the Official Receiver shall apply to the court for the appointment of date and time for the public examination of debtor66. A particular provision that is of concern and may well constitute an hindrance to implementation of bankruptcy law in Nigeria is *Section 17(5) of Cap 30* which provides, inter alia;

> *"…for the avoidance of doubt no legal practitioner shall be or allowed to take part in the examination of the debtor or appear on his behalf at such examination".*

It may be contended that the provision does not contravene *Section 36(6)(c) of the 1999 Constitution* which is restricted to criminal prosecution. However, it will be difficult to demonstrate that the provision does not contravene the omnibus provision on right to fair hearing in *Section 36(1) of the 1999 Constitution*. Furthermore, the rationale for the above provision is suspect. Hon. Justice Niki Tobi67 captures the hindrance posed by the above provision thus;

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65 *See section 17 and rules 52-59 of the Rules.*

66 *Section 17(2) and rule 52 (1) of the Rules.*

67 *Bankruptcy Petitions and Proceedings; Text of a paper delivered at the seminar on Bankruptcy Law and Practice on 29-30 April, 1991 p. 13 et seq.*

"Somebody who is exposed to a bevy of searching and probing questions from such level of persons should not be denied legal representation at all. He needs the representation".

The consequence of failure by a debtor to attend court ordered examination is that he may be arrested and put in custody. In addition, books, papers money and goods in his possession may be seized and kept in custody68.

ADJUDICATION OF BANKRUPTCY

It may be possible for a debtor to escape adjudication of bankruptcy after a receiving order is made if the court approves proposal for composition or scheme of arrangement by the debtor69. Be that as it may, the court adjudged a debtor bankrupt in any of the following circumstances;

1. If the creditors by ordinary resolution resolved at any of their meeting that that the debtor be adjudged bankrupt;
2. If the creditors pass no resolution;
3. If the creditors do not meet; or

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68 *Section 25(1)(d) of cap 30.*

69 *See sections 18 and 19 of cap 30 and rules 60-67 of the Rules on substantive and procedural rules on composition or scheme.*

4. If a composition or scheme is not approved within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow70.

It appears on a literal reading of *Section 20 of Cap 30* that adjudication of bankruptcy is to be made subsequent to the making of the receiving order. It is also obvious from the circumstances enumerated in the section that by necessary implication adjudication of bankruptcy can only take place after the making of the receiving order. However, rule 95(1) provides that the court may adjudge a debtor bankrupt "at the time of making a receiving order" or subsequently. It is submitted that the rule is inconsistent with the letters and spirit of *Cap 30* to the extent that it permits adjudication of bankruptcy at the time of making a receiving order.

Furthermore, rule 95(2) allows for application for adjudication of bankruptcy to be made *ex parte*. Considering the effect of a bankruptcy order on the property and status of the debtor, it is beyond cavil that the provision rule 95(2) will infringe a debtor's right to fair hearing[71].

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[70] *Section 20(1) of cap 30. See also rules 95-98 of the Rules.*

[71] *Adjudication of bankruptcy involves determination of civil right of obligation within the meaning of section 36(1) of the 1999 Constitution. See Fawehinmi v LPDC [1985] 2 NWLR (pt 7) 300*

It may also be observed that rule 96(2) provides that order of adjudication may also be made in the following circumstances;

1. where a quorum of creditors has not attended the first meeting of creditors or one adjournment thereof; or
2. where the court is satisfied that the debtor has absconded or does not intend to propose a composition or scheme.

These two additional grounds are not provided in *Cap 30* and *Cap 30* did not provide that additional grounds for making order of adjudication is to be made by way of subsidiary legislation. In the premise, these two additional grounds may have no basis in law.

SERVICE OF PROCESS

In view of the importance of service to process, it may be relevant to consider the issue of appropriateness and constitutionality of provision of the Rules that deem as service on the firm, service on one person in any control and management of the partnership[72].

Firstly, it may well be subjective and therefore difficult to determine the person having the control of the business of the partnership. Secondly, both the receiving order and adjudication order affect the partners in

[72] *Rule 36(a).*

personal capacity[73] and it is the partner and not the firm that will be adjudged bankrupt[74]. The provision on service on a firm may well constitute infraction of right to fair hearing[75].

Therefore, it may be in the interest of the petitioner to get each and every partner served with any notice or process issued in order to avoid the constitutional issue of due process. In addition, it may be pointed out that that some partnerships have foreign partners. Thence, where the foreigner is abroad, there cannot be due process if he is not personally served. There may well be the problem of ensuring that partners in control will inform others of the bankruptcy petition or notice.

MULTIPLICITY OF PROCEEDINGS

It may sometimes happen that two or more bankruptcy petitions are presented against the same debtor. Where this is the case, *Cap 30* provides that the court may consolidate the proceedings or any of them

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[73] *See sections 5,20, 24 & 55 of cap 30.*

[74] *See rules 38 &40.*

[75] *See A.G. Bendel State v Aideyan [1989] 4 NWLR 646.*

on such terms as it thinks fit[76]. It is to be noted that this provision is rather laconic. There is thus required more elaborate provision on this issue.

RECOMMENDATIONS AND CONCLUSIONS

As is obvious from the foregoing discourse, there is still much to be done in the way of enhancing bankruptcy practice in Nigeria. It is suggested that in considering the various solutions emphasis must be placed on the careful balancing for the interests of the debtor and the creditor.

Firstly, there is need for legislative intervention by way of amendment of *Cap 30* or enactment of a new law to correct some of the inadequacies pointed out and some others. In particular, the new law can draw from the development in other countries like England where there has been robust practice of bankruptcy law. The area of potential conflict of the law with the Constitution also need be addressed. Provision of the law should also be elegantly drafted in simple, lucid and accessible manner.

Secondly, there is need for improvement of the existing Rules as it is seriously deficient in some areas as for instance in the area of bankruptcy proceedings involving partnerships when compared with similar provisions

[76] *Section 98 of cap 30.*

in the UK. The procedure under the Rules must also not be expensive or too technical.

Third, there is need to bring the existence of the law to the knowledge of practitioners and the general public as well as the implication and the rights and liabilities of persons under it. The law and practice of bankruptcy may be introduced into the curriculum of law faculties, Nigerian law school and professional courses of bankers and accountants.

The judiciary will also have to play important role in interpreting the provision of the law on bankruptcy in an elaborate manner with a view to the emergence of a corpus of Nigerian case-law capable of engendering interest of practitioners and the lending public in bankruptcy law. The court should also exercise power of adjournment in such a way that will be conducive to expeditious determination of bankruptcy petition. This will go a long way in instilling confidence that bankruptcy proceeding is a viable option for debt recovery.