INSOLVENCY AND JUDICIAL CAPACITY: CHALLENGES OF THE AFRICAN COURTS

PAPER DELIVERED BY HONORABLE JUSTICE M. B. IDRIS

- PRELIMINARIES:

Let me begin by appreciating the organizers of this conference for inviting me to deliver this paper. I feel highly honoured to be invited to deliver this paper. The mandate given to me in this session is to assess the challenges that African courts are facing in the handling of insolvency cases, such as judicial training, organizational structure, decision making process as well as social issues of transparency among others. Having these challenges in mind, I’ve been asked, as a judicial officer, to explore the means of dealing expeditiously with debt recovery and debt enforcement cases from the point of view of creditor recovery. I’m also to highlight some of the technological and administrative reforms in the region that are aimed at improving transparency, judicial accountability and performance. In my paper, I intend to use Nigeria as point of reference while other countries in the African region will form basis of analytical and comparative appraisal.

- INTRODUCTION:

The basic aim of corporate insolvency law and practice, across jurisdictions, is to protect creditors by providing facilities and procedures designed to allow them to enforce their claims against the company. Sometimes, the need to balance the interest of competing groups in corporate insolvency may become daunting amidst compelling exigencies of the case. Balancing the respective, and mostly competing needs and demands of the creditors seeking justice could be overwhelming. In developing countries in Africa like Nigeria, as elsewhere, the justice of the case may demand deploying equitable jurisdiction of the court to promote what in other jurisdiction is referred to as “rescues”. This approach is becoming increasingly valued in developed countries like the United Kingdom, as the society recognizes the need to minimize
unemployment resulting from corporate insolvency. The court may sometimes wield the big stick to either control or punish directors and other principal actors of the defaulting company responsible for the financial collapse of the company.

"Company Rescue" is a procedure introduced under the Insolvency Act, 1985 (UK) - an entirely new concepts in the UK company law – the Administration Order. It is intended to provide an alternative to liquidation for companies unable to pay their debts, either rehabilitating the company or continuing it as a going concern or by providing a better way of either realizing its assets or effecting a scheme or compromise with its creditors. This is what in that jurisdiction is referred to as “company rescue”. By ‘company rescue’ an administrator is appointed by the court to control all the company’s assets in an attempt to achieve the purpose of the administrative Order.

If an administration order is made, the company has a breathing space from any winding up orders, appointment of receivers or other financial processes. The order is made when the court is satisfied that the company is or likely to become unable to pay its debts and that such an order would be likely to achieve one or more of the following purposes:

- The survival of the company, and the whole or any part of its undertaking as a growing concern;
- The approval of a voluntary arrangement with creditors;
- The sanctioning of a scheme of arrangement under the Companies Act: and
- A more advantageous realization of the company’s assets than would be effected on a winding up.

Company rescue is a procedure not applicable in most jurisdictions in Africa. However, the law provides institutional mechanisms by way of respite for companies in distress due to debt. Unlike company rescue, the Nigerian law allows recourse to other viable alternatives as against insolvency proceedings or winding up, which hardly produces desired result. This becomes so as failure to pay debt might be a form of ‘rescue strategy’ or ‘therapeutic’ healing process or measures for the defaulting company thus making it expedient for Judges to have a deeper and more technical understand of the
THE NOTION OF ‘INABILITY TO PAY DEBT’:

An essential feature of commerce is the availability of credit. A company incurs debts and other liabilities in its day-to-day operation. This is an indispensable aspect of commerce. The Companies and Allied Matter Act Cap C20, LFN 2004, (hereinafter referred to as “CAMA”) itself empowers a company to borrow money for the purpose of its business or objectives, and this may include mortgaging or charging its undertaking or part of its undertakings, property, uncalled capital or any part thereof and issue debentures, debenture-stock and other securities whether outright or security for any debt liability or obligation of the company or any third party. Thus, pursuant to these provisions, companies are to carry out the above, and are to create debentures.

The CAMA also provides other options under part XVI. These are options open to a company that finds itself in a traumatic condition or conditions (not only unable to pay its debt) but also it may be by arrangement or compromise (this, in literal terms, means a situation whereby a creditor or a shareholder consents to compromise some rights exercisable against the company). There are others like amalgamation or merger, forming a third company specifically for taking over the business of two companies or better still, to take over or be taken over by another company. The above shows that the law might not delight in the ‘death’ of companies and may thus allow for “therapeutic healing.”

As a judge, the provisions of section 409 has been used, and sometimes misused and/or abused by legal practitioners who, for varying personal or commercial reasons have concentrated on the provisions that “kill” rather than “revive” a company. Virtually all petitions for winding up and the letter of demand which precedes it contain copious reference (and sometimes quotation) of the above section like the Goliath sword waiting to slaughter. Experience has shown that section 409 is not enough to seek the demise of a company. Unwillingness to pay debt must be distinguished from inability to pay debt, as it may be an operational policy to space out repayment or a strategy for reconstruction (the motive of which is to give the company a chance of respite to consolidate).
Inability to pay debt is the basis of insolvency proceedings. The applicable law, the nature and facts of the case, the need for justice amidst competing interests of the parties- the defaulting company, the creditors or group of creditors and the nature of debt among others exigencies would determine the judicial approach to be deployed to the particular case. This often makes it crucial to understand when a debt is actually due and inability to pay such debt which has resulted in insolvency proceedings.

Section 409 provides that a company shall be deemed to be unable to pay its debts if—

‘(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2,000 then due has served on the company by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

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

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

From the above section, paragraph (a) will necessarily include the following:

- There must be a debt exceeding the sum of N2,000;
- A written demand for repayment has been made;
- The company has neglected to pay after a period of three weeks from the day of the demand;
- The debt is a sum of money acknowledged as owing by the company or at any rate seen objectively from the facts as owing:
• The debt is money due by a certain and express agreement, or through a lawful transaction; and

• The debit is not disputed in good faith.

Paragraph (b) contemplates a situation in which a judgement, decree or order of any court (of competent jurisdiction) issued in favour of a creditor of the company is returned unsatisfied (in whole or part). However, inability to levy execution may be due to various reasons and factors.

Where a company informs a judgement creditor that it has no property on which the creditor can levy execution, that may suffice as evidence of the company’s inability to pay its debts so as to relieve the creditor of the necessity of issuing execution in order to bring himself within this section where execution on a creditor’s judgement against the company is returned unsatisfied. Similarly, in most African jurisdictions, where a company gives a bill of exchange in payment of a debt and the bill is dishonoured and continues unpaid, that may be satisfactory evidence of inability to pay. Also a company which has its assets contrived in investment which is not immediately or currently attainable, or does not have assets available to meet its current liabilities is commercially insolvent and liable to be wound up. However, one should bear in mind that the mere fact that a company owes large sums of money is not and can never be sufficient proof of its inability to pay its debts.

Paragraph (c) above contemplates a view of the assets and debts owed by the company, and the income of the company on the one hand and debts owed by it and other liabilities of the company on the other. The court, however, can only take a proper view of the contingent and future liabilities of the company when both sides of the balance sheet are before it. Paragraph (c) involves the following:

(a) if out of its liquid resources it cannot pay its debts as they accrue due, though it could pay them over a period by a steady realization of all its assets;

(b) if, though it can pay accrued debts out of liquid resources it has no reasonable prospect of paying all its debts, both accrued and prospective, by a steady realization of all its assets assuming that it immediately ceases to carry on its business except for fulfilling
existing contracts, and it earns no further profit.

The above represents a more realistic basis for ascertaining the concept under consideration. However, in all these instances the petition may be brought and have always been brought simply on the ground of inability to pay or refusal to pay debts after demand.

**JUDICIAL ATTITUDE TO THE NATURE OF PROOF AND DEMAND REQUIRED UNDER SECTION 409 OF THE CAMA**

The attitude of Nigerian courts, as shown from cases (in addition to the statutory ingredients of debt exceeding N2,000, demand, refusal to pay for three weeks and indisputability of the debt), has been to insist that the debt must be one that is seen objectively or acknowledged as owing. According to Sir William James, VC in *Re Imperial Guardian Life Assurance Society*: “A winding up petition is not to be used as machinery for trying a law action. The debt owing ought to be a sum of money due by certain and express agreement as money owing to one person from another which does not only involve the obligation of the debtor to pay but the right of the creditor to enforce and receive payment. The court in *Weide and Co (Nig) v Weide and Co Hamburg* held that where a debt is in dispute, the burden is on the creditor to prove:

- That a debt is owed; and
- The particular amount owed.

Where a plaintiff fails to prove the existence of a debt, he does not qualify as a creditor and a court of law not being a charitable institution will not give judgement to him on a debt not proved. The Court of Appeal opined that it is after the debt has become due and the creditors have demanded from the company to pay the sum due that the debtor is expected to either pay the sum or to secure or compound it to the reasonable satisfaction of the creditor.

Before the court makes the order for winding up, it must examine the petition for winding up and the affidavit verifying the statements herein and hear every person who complies with Rule 23 of the Companies Winding Up Rules has been sufficiently made out, especially under section 409. The requirement of demand under section 409 also calls for examination in view of
the method in which demands are made under section 409 in an attempt to show “inability to pay
debt” so as to wind up a company in insolvency proceedings.

By section 409(a), a demand under the hand of a creditor of a company is mandatory. Though no statutory form of demand is prescribed in Nigeria, however, demand should be firm and final showing-

- The amount owed and the consideration for the debt;
- The address for payment and further communication, if any;
- Consequence of non-compliance with the demand; and
- Service by leaving it at a registered office or head office and under the hand of the creditor.

The above is to the effect that a demand under the hand of a creditor of a company for non-payment of which the company will, under paragraph (a), be deemed to be unable to pay its debt, must, where the creditor is also a company, be authenticated under section 37 by being signed by a director, secretary or other officer of the company. A solicitor who is trained by a company is not an officer of the company, and a demand signed by a creditor company’s solicitor is not a demand under the hand of the creditor and does not satisfy the requirements of this section. A demand sent by post is also insufficient for the purposes of the above paragraph. However, when a solicitor co-signs with the officer (s) of company or is a director or secretary of the company it will be valid.

**PROGRESSIVE THOUGHT ON THE ISSUE OF INABILITY TO PAY DEBT**

With the above line of cases and the significance of the provisions of the CAMA, it is not the intention of the law that section 409 should be used as a sword rather than as a shield in the hands of a creditor or its solicitor(s). The options under the law should explored to the fullest bearing in mind that unwillingness to pay due to reasons discussed above, may not be conclusive evidence of inability to pay under the Act. CAMA does not take delight in winding up a company pursuant to section 409 without strictly following the requirements of proof of debt,
A critical view of the provisions of the CAMA clearly shows that winding up petitions on the ground of inability to pay debt pursuant to sections 408(d) and 409 cannot be the only remedy available to a creditor. In its nature, a winding up order operates in favour of all the creditors and all the contributories of the company as if made on the joint petition of a creditor and of a contributory. In effect, a winding up petition is for all the creditors of the company regardless of the amount owed to each creditor, and all must be put on notice and invited to claim against the company being wound up. The asset of the company realized is shared among the creditors. In essence, winding up on the ground of inability to pay debts may not be a viable option after all.

The global trend is to develop and allow for the development and survival of companies especially in African jurisdictions when death of a company means that of many families and those dependent on the employees of the affected company. The societal effect of increase in the rate of unemployment has already reached a disastrous level and cannot afford to escalate. It may be advisable for Nigeria and other African countries to observe and learn from other jurisdictions and to seek to deploy more alternatives by way of “rescuing” a defaulting company rather than nailing it to the cross. Although solicitors may be eager to bring petitions due to the expected professional fees, a living company could maintain retainership and regular briefs to the solicitor which is far and exceedingly better than the former considering its multiplier effects. This is not an attempt to encourage defaulters, but that the option under sections (408) and 409 of CAMA in Nigeria, as a representative example of provisions in other countries in Africa, should be cautiously resorted to. If at all insolvency proceedings become unavoidable, the requirements of the law should strictly be complied with in enforcing debt.

Ethically speaking, a judge must not be seen to be encouraging a party at the expense or to the determinant of another irrespective of whether or not the case borders on insolvency. Justice is a tripod- justice for the creditor, debtor and society. This explains why enforcement of debt is a socially sensitive proceeding that must be cautiously approached and engaged by judges as further illustrated below.
**ENFORCEMENT OF DEBT**

It is common practice in insolvency cases for the creditors to approach the court for the appointment of a receiver and/or receiver-manager. The Federal High Court in Nigeria, for example, has an inherent jurisdiction to appoint a receiver in order to put the property or asset of the defaulting company in safe hands until the rights of those interested in it can be determined. In particular, where the property of the defaulting company involves a business, the court can also appoint a manager of that business.

Receivership is by far the most demanding insolvency procedure from practitioner’s point of view. The receiver is normally appointed by a secured lender under the terms of his floating charge, invariably at a time of acute crisis for the company. According to a writer, the logic is that, for the receiver to be effective, he must be able to do what the directors of the defaulting company has failed to, or unable to do, and must do so speedily and effectively under extreme pressure from creditors, guarantors, directors, the workforce, and often the lender himself. The receiver owes duties of one sort and another to all, and his task therefore calls for a high degree of professionalism.

The objective of corporate insolvency law and procedure is to facilitate the recovery of companies in financial difficulties. This is realized in only a small percentage of cases, usually as a result of the appointment of an administrator or administrative receiver (receiver or receiver-manager). Sometimes an administrator or administrative receiver is able to restore the company to profitable trading and hand back control of the company to the directors. But the most common outcome of insolvency proceedings, of whatever kind, is cessation of the company’s business as a result of voluntary arrangement and/or winding up.

Recovery might not be the sole objective of insolvency proceedings. The aim might be to suspend the pursuit of right and remedies by individual debtors, to divest the directors of their management powers, to provide for the avoidance of transfers and transactions which unfairly prejudice the general body of creditors, to procure an orderly distribution of the estate, and to provide a fair and equitable system for the ranking of claims. The nature of the debt or insolvency might necessitate proceedings for the purpose of investigation of causes of the company’s failure and impose responsibility for culpable management, its directors and officers.
Insolvency might also be to protect the public against improper trading by delinquent directors, to ensure the integrity and competence of insolvency practitioners or where liquidation becomes inevitable, to dissolve the company.

In most jurisdictions in Africa as elsewhere, there are four distinct legal regimes for handling insolvency of a company, namely:

- Administrative receivership (in Nigeria this is called ‘receivership’);
- Administration (this is known as ‘Receiver Manager’ in some jurisdictions like Nigeria);
- Winding-up (liquidation). This may be voluntary, based on the order of court (Court-ordered winding-up) or winding-up by creditor(s); and/or
- Compromises, composition and arrangements with creditors.

Several insolvency procedures and rules exist across jurisdictions in Africa, but the nature and roles to be performed by Receivers or ‘Official Receivers’ vary in the region. In Mauritius, the Official Receiver’s roles have been enhanced and expanded to that of directorship level under the Registrar of Companies. In Uganda, the Official Receiver has also been given enlarged role and placed as an independent organ. He is appointed by the Minister under the Ugandan Insolvency Law compared to the position under the Nigerian law. It has been argued that like Uganda and Mauritius, insolvency practice should be taken seriously and Official Receivers under the Nigerian law appointed by the Federal High Court should also be upgraded to the status of Deputy Chief Registrar. This is because insolvency is a strictly regulated process in other jurisdiction, and effective delivery of justice in creditor’s recovery proceedings would depend on the competence and skills brought to bear by officials such as Official Receivers with specialized skills and competence in the application of insolvency law and practice.

Globally, insolvency law and practice have well established principles that often inhibit the maximization of creditor recovery in African and other jurisdictions. One of such principles is that corporate insolvency recognizes rights accrued under the general law prior to liquidation. This principle is of cardinal importance to the extent that insolvency proceeding does not of itself
terminate contracts or extinguish rights, though it does inhibit the pursuit of remedies. Another principle is that only assets of the debtor company are available for its creditors. Security interest and other real rights credited to the insolvency proceeding are unaffected by the winding-up. Also, the creditor takes the assets subject to all limitations and defences. Another implication of insolvency is that the pursuit of personal rights against the company is converted into a right to prove a dividend in liquidation. This means the creditor loses sole right and competes with other creditors in insolvency even as unsecured creditors rank *pari passu* and members of a company are not as such liable for its debts. All these principles and the fact of each case will determine the outcome of judicial proceedings in insolvency cases, aside other operational and administrative factors examined below.

As a Judge, experience has shown that, in most cases, the appointment of receiver or manager may not solve the problem. Winding-up a defaulting company may also hardly ever lead to full and total recovery of debts. The court must, therefore, subject to initiating suitable and appropriate proceedings by the creditor, also deploy in addition other remedies and judicial means of maximizing the benefit of recovering debt from the defaulting company from all available assets and properties. And this may make it inevitable to deploy other judicial (civil) remedies and proceedings such as summary judgment procedures, by way of undefended action and by judicial attachment of any or all funds traceable to the account of the defaulting company before insolvency proceedings, as further expatiated below.

- **DEBT ENFORCEMENT BY WAY OF SUMMARY JUDGMENT, UNDEFENDED LIST AND GARNISHEE PROCEEDINGS**

Expeditious debt recovery may entail deploying basic civil proceedings of summary judgment, undefended action and/or garnishee proceedings to track and attach whatever the creditors could lay hands upon in the interim, as a back-up to, supplemental thereto and/or alternative to (often) technical, aggressively fought and needlessly contentious winding-up and insolvency proceedings.

Recovering debt from defaulting debtors often poses enormous technical, legal and
procedural challenges. Debt may resort from inevitable business undertakings and related exigencies. Debt situations can arise in a number of ways, ranging from simple loan agreements to complex loan transactions. Contingency debt is however different from regular debt. A contingency debt is not due until the crystallization or happening of the (contingency) event forming the basis of the agreement.

Debt situation is preventable, particularly by taking precautionary measures by scrutinizing the background and nature of business of a prospective debtor to ascertain ability to repay debt and/or by demanding a credible guarantor for the loan. The loan agreement may also include appropriate clauses stipulating incidences of breach, demand, interest, recovery options such as arbitration, mediation and other methods of alternative dispute resolution or debt recovery by litigation and extra-judicial means through recovery agents, anti-corruption agencies or financial crimes commissions, the Police and others.

A creditor has a number of options for recovering his money from a debtor. One of the most (frequently) used options is resorting to legal action. The Nigerian law allows courts to assume jurisdiction in respect of debts ranging from simple to complex debts. For example, where the debt is not being disputed by the debtor, the creditor may institute actions for summary judgment either under the rules of undefended list procedure or summary judgement procedure rules.

- SUMMARY JUDGMENT: LAW AND PROCEDURE

Typology of summary judgment is a matter of law. The rules or law provide for summary judgment under Order 11 of the *High Court of Lagos State (Civil Procedure) Rules 2012*; summary judgment under the undefended list; summary judgment on admission; and summary order for account. For speedy judgment, a Claimant who is suing for recovery of a debt, a liquidated money demand, or any other claim may ask for summary judgment.

Summary judgment means a judgment given in favour of a party without a full trial of the action. It is used for straightforward cases where the defendant obviously has no defence to the action. A summary judgment is a judgment on the merit. Save for certain exceptions, it cannot be set aside by the same court that gave it except on appeal. By virtue of Order 20 rule 12 of the *Lagos State High Court (Civil Procedure) Rules*, a summary judgment can only be set aside on
grounds of fraud, non service, and lack of jurisdiction. A defendant who fails to show he has a
defence or lack of proof of service, fraud or lack of jurisdiction, will be held to have no defence
to the extent that the summary judgment given in such situation may not be set aside.

Procedurally, the rules require that a claimant who believes that there is no defence to his
claim shall file along with his application by motion on notice for summary judgment, the
statement of claim containing his reliefs, deposition of witnesses in affidavits together with
exhibits to be relied upon in the application for summary judgment. A defendant who has been
duly served and intends to defend shall, not later than the 42 days period prescribed in the Writ
of Summons, file his statement of defence accompanied by deposition of witnesses as well as
necessary exhibits sought to be relied upon in his defence, including a written brief in response
to the Claimant’s application for summary judgment. Where upon filling defence, it appears to
the Judge that the defendant has a good defence, the debtor may be granted leave to defend.
Where the Judge is not otherwise convinced, judgment may be entered for the claimant. Where
the Judge is convinced that that the defendant has a good defence only as to parts of the claim as
against the whole claim, the Judge may enter judgment for that part of the claim and grant leave
to defend that part to which there is a defence.

In practice, the Plaintiff/Claimant/Applicant (the Creditor) would depose to specific facts
that the application for summary judgment is filed simultaneously with the writ of summons,
along with other processes in compliance with the rules of court. The affidavit must specifically
state that the defendant does not have any defence to the suit and that he (Claimant) has done
everything required of him under the rules of the Court to be entitled to a summary judgement
based on the facts of the case. For example, Order 11 Rule 1 and 5 (2) of the High Court of Ogun
State (Civil Procedure) Rules 2008 states:

“A summary Judgement is a procedure for disposing with dispatch cases which are virtually
uncontested. It also applies to cases where there can be no reasonable doubt that a plaintiff (Claimant) is
entitled to Judgement and where it is inexpedient to allow a defendant to defend for mere purpose of
delay. It is plain and straight forward not for the devious and crafty”.

The essence of summary judgment has been well emphasized and settled in a line of cases by the Supreme Court. In cases brought under Order 10 of the High Court of Lagos State (Civil Procedure) Rules 1994 (which is in pari materia with the provisions and procedure stipulated in Order 11 Rule 1 and 5 (2) of the High Court of Ogun State (Civil Procedure Rules 2008), the supreme Court amplified that the procedure is to prevent a defendant from putting up sham defences to defeat the end of justice causing great loss to the plaintiff in a bid to enforcing their rights. For example, Honourable Justice Karibi-Whyte, J.S.C. in Macauley’s case emphasized that:

The object of the Order 10 procedure is to enable plaintiffs whose claim is unarguable in law and where the facts are un-disputed, and it is inexpedient to allow a defendant to defend for the mere purposes of delay, to enter judgement in respect of the amount claimed… The maxim ‘interest republican ut sit finis litium is the mother of this procedure as in all forms of action which seek to reduce the volume of litigation.

The law and practice of summary judgment procedure/proceedings have been succinctly summarized in the decision of the Court of Appeal in N.B.N Ltd v. Savol W.A. Ltd. The purpose of the summary judgment procedure is for the expeditious disposal of claims which are virtually incontestable. Ordinarily, the defendant ought not to be allowed to stop the plaintiff unless he shows by affidavit evidence that he has a real defence, not a sham defence to the action. The purpose of the summary judgment procedure is not to drive the defendant who shows he has a triable issue from the defending the suit filed by the claimant. The summary judgment procedure aids the plaintiff whose claim is patently unassailable where all the facts relied on by the defendant do not amount to a defence in law.” It is important to emphasize that the summary judgement procedure does not assume that the defendant does not have a defense at all, but that the totality of the defense put forward by the defendant would is not significant enough undermine the veracity or doubt the authenticity of the plaintiff’s claim. Put differently, the proceedings provide summary judgment in favour of the claimant/applicant where the claim is indisputable, or where there is no real defence to the case.
UNDER UNDEFENDED LIST

This procedure applies throughout Nigeria except in Lagos. In most States, this procedure is available in respect of claims to recover ‘a debt or liquidated sum of money’. The plaintiff applies for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand. The application is supported by an affidavit which explicitly states the grounds on which the claim is based. The affidavit must specifically state that, in his (deponent’s) belief there is no defence to the claim. If the court is satisfied with the grounds set out, it then enters the suit for hearing in the “Undefended list”, and accordingly marks the writ as ‘undefended’ and indicates a suitable date for hearing of the suit. The Court cannot delegate the power to place the writ in the undefended list since the function is a judicial one. In *Nwakama v Iko Local Government Council Cross River State*, the marking of the writ “undefended” was done by the Registrar of the Court and the Court of Appeal held this to be invalid.

A copy of the marked writ and the supporting affidavit is served on the defendant who in response may: i) accept the claim if he has no defence; or ii) file a notice in writing containing his intention to defend the action accompanied with an affidavit disclosing a defence on the merit within 5 days of the day fixed for hearing. Where the defendant fails to file within time, he may be allowed to bring an application for extension of time within which to file his notice of intention to defend. Where a writ of summons under the undefended list fails to state or allow a defendant five days to file his notice of intention to defend the action, it will be taken as a technical default, meaning that the writ was improperly served, thus making it voidable. This irregularity goes to the root of the action, and may not be waived by the defendant.

The law ascribes the duty to show cause to the defendant, by disclosing that he has a reasonable defence on the merit for the suit to be transferred to the general cause list. As a general principle, where a defendant shows that he has a defence or reasonable grounds for setting up a defence, the suit will be transferred to the general cause list to allow the defendant to file defense to the suit. It is immaterial whether or not the defence will ultimately succeed, as all the defendant is required to do is depose to facts to support a *prima facie* defence on the merit.
The law does not require a complete defence in showing cause, but a triable issue or question to allow the suit to proceed to trial. The law deems a defendant has raised a triable issue when the affidavit in support of notice of intention to defend raises issues that require claimant’s response or where the defendant’s affidavit casts doubts on the merit (partly or totality) of the claimant’s claim.

The decision as to whether or not a defence under the undefended list procedure raises a triable issue does not depend so much on the discretion of the Court. Rather, it involves the evaluation of the affidavit evidence before the Court to determine whether or not a triable issue has been made out. Where a defence is disclosed, the case is transferred to the general cause list and the Court orders the parties to file their pleadings, or proceed to hearing without further pleadings. By law, once the defendant has filed a notice of intention to defend the suit, the court has a duty to consider it whether or not the defendant or his or her Counsel is in Court.

Where no defence is disclosed by the defendant, judgment is entered for the plaintiff. Judgment given under the undefended list is a judgment on the merit and cannot be set aside by the same court that gave it, save for appeal by the aggrieved defendant. However, the Court reserves power to set aside its own judgment even if the judgment was entered under the undefended list, where: a) it was obtained by fraud; b) there has been no service of the originating process on the defendant; or c) the court has no jurisdiction. A judgment given under the undefended list without jurisdiction can only be appealed by the aggrieved defendant, or an application made by the affected party to the same Court to set it aside.

**GARNISHEE PROCEEDINGS**

A garnishee proceeding is a proceeding that is *sui generis*, and is to be distinguished from other proceedings for enforcement of judgment, such as enforcement by writ of execution. There is a clear difference between execution and garnishee. Execution of a judgment involves the seizure and sale of the property of the judgment debtor following the directive of the Court. Garnishee is attachment of a debt owed to a judgment creditor through a third party (Garnishee), without the need proceed directly against the judgment-debtor. The court has further held in the *Purification case* that the existence of an application seeking for an order of stay of execution of
judgment does not preclude a judgement creditor from seeking to use garnishee proceeding to enforce the judgment. A judgment creditor can institute an action against a person who is indebted to the judgment debtor. Part V of the *Sheriff and Civil Process Act* provides for attachment of debts by garnishee order. Section 83(1) of the SCP Act states:

The court may, upon the exparte application of any person who is entitled to the benefit of a judgement for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment and upon affidavit by the applicant or his legal practitioner that judgment has been recovered and that it is still unsatisfied and to what amount and that any other person is indebted to such debtor and is within the State, order that debts owing from such third person, hereinafter called the garnishee, to such debtor shall be attached to satisfy the judgment or order, together with the costs of the garnishee proceedings and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor or so much thereof as may be sufficient to satisfy the judgment or order together with costs aforesaid.

It is clear from the above provisions that an application for garnishee is to be made by motion *ex parte* for an order nisi for the person owing the judgment debtor, including banks (otherwise known as the Garnishee) to come and show cause why he should not be made to pay the debt to the judgment creditor (otherwise known as the Garnishor). The order is served on the garnishee and the judgment debtor. Service of the order nisi effectively attaches the debt. The orders of the court in a garnishee proceeding can be either an order nisi or an order absolute. According to the Supreme Court in *Union Bank’s case*, Per Akintan, J.S.C:

The first is a garnishee order nisi. Nisi is a Norman-French word and it means “Unless”. It is therefore an order made, at that stage, that the sum covered by the application be paid into court or to the judgment creditor within a stated time unless there is some sufficient reason why the party on
whom the order is directed has given why the payment ordered should not be made. If no sufficient reason appears, the garnishee order is then made absolute and that ends the matter in that party against whom the order absolute is made is liable to pay the amount specified in the order of the judgment creditor. The Court thereafter becomes functus officio as far as that matter is concerned in that the Judge who decided is precluded from again considering the matter even if new evidence or arguments are presented to him.”

The garnishee order nisi must clearly show that the judgment debtor is the garnishee’s creditor; otherwise it will not bind the garnishee. The issuance of an order nisi is a condition precedent to the making of an order absolute in garnishee proceedings. A garnishee order absolute must be predicated upon a subsisting garnishee order nisi. Once the Court makes the garnishee order absolute, the order becomes a final decision of the Court and no longer interlocutory and the Court becomes functus officio as far as the subject matter is concerned.

The service of the order nisi shall be for at least fourteen (14) days before hearing, which shall be fixed by the court Registrar. The order nisi is then served on the garnishee and the judgment debtor. Such order commands the garnishee to appear in court on a stated date to show cause why he should not be made to pay to the judgment creditor the amount he owes the judgment debtor. The garnishee may within eight (8) days of the service of the order pay the amount into the court where the debt is not being disputed. But if the garnishee disputes or alleges a legal defence to the debt, the court may, if satisfied with the defence, discharge garnishee. Unless the court discharges the garnishee, the garnishee order nisi order shall be made absolute and the debt becomes enforceable against the garnishee by writ of fifa. Payment of money by a garnishee under a court order discharges the garnishee.

The onus of proof placed on a garnishee who is disputing judgment debt is discharged if able to establish that the account referred to in the order nisi does not exist in its system or, if it exists it is heavily in debit (negative) and not in credit. The garnishee has a right of set off in respect of liquidated sum in its custody. It may exercise this right in respect of a different transaction in which it is a party or in respect of any as a result of obligation of the judgment
debtor to another party from the garnished sum. Procedurally, mere issuance of an order nisi by the Court does not amount to final order capable of being executed as a final judgment of court. Simply put, a garnishee order is not a final order unless made absolute by the same court.

A judgement debtor is not a party to garnishee proceedings and cannot appeal on a garnishee order nisi. The right to appeal can only be exercised by an aggrieved party, that is, a party to the proceeding by virtue of Section 243 (a) of the 1999 constitution. The garnishee is the aggrieved party for the purpose of appeal and not the judgement debtor. This was the issue in the case of *Nigeria Agip Oil Company Ltd v Peter Ogini*, where the appellant failed to show that he was a party to the proceedings which led to the grant of the garnishee order nisi, by virtue of Section 243(a) of the 1999 constitution, as “a person having an interest in the matter”. The judgment debtor may make an application to the court to set aside a garnishee order nisi where there was a procedural irregularity in the proceedings which renders the order nisi a nullity. However, no appeal can be made on a garnishee order nisi unless and until the order nisi is made absolute by the trial court.

When a garnishee order nisi is made against and served on a garnishee, the onus is no longer on the garnishor to place materials before the Court to enable the court make the garnishee order absolute. The onus is on the garnishee to show cause why the order nisi should not be made absolute. The garnishee has a duty to disclose the true status of the account of the judgment debtor by exhibiting the account statement. Failure to disclose account details of a judgment debtor by a garnishee raises a presumption that the garnishee has something to hide, and the court may presume the existence of certain facts against the garnishee under section 167 (d) of the *Evidence Act*. Under the law, service of the *Order Nisi* on the garnishee makes the debtor’s money in its custody to be automatically attached. For the purpose of garnishee proceedings, the garnishee bank is a mere custodian of the funds attached. The real owners of the funds are either the judgment debtor or the judgment creditor. It needs to be clarified that it is not every debt that is attachable by the due process of garnishee proceedings. Thus, for a debt to be attachable, it must be due or accruing to the judgment debtor. The debt must be certain in amount and the judgment debtor must have a vested and immediate legal right.

The conditions for valid garnishee proceedings were explicitly treated in the case of *C.B.N v. Auto import* as follows:
• The garnishee must be indebted to the judgment creditor within the state and be resident in the state in which the proceedings are brought;

• The proceedings should be filed in any court in which the Judgment debtor could, under the High Court (Civil Procedure) Rules or under the appropriate section or rule governing civil procedure in Magistrate Courts, as the case may be, sue the garnishee in respect of the debt. Thus, the Court may not necessarily have to be the one that gave the judgment. It could be a Magistrate Court, notwithstanding the fact that the debt exceeds the court’s jurisdiction;

• The application for the garnishee order shall be made \textit{ex parte}. The court, if satisfied that the judgment creditor is entitled to attach the debt, shall make a garnishee order nisi;

• The service of the order nisi binds or attaches the debt in the hands of the garnishee.

\begin{itemize}
    \item \textit{Multi-jurisdictional perspectives to garnishee proceedings}
\end{itemize}

Recovering debt from foreigners, corporate or natural, could sometime pose enormous challenges. Some jurisdictions appear much more proactive, to the extent that a defaulter could be held accountable for obligations to non-resident nationals. In France, for example, an alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen. In Canada, the Supreme Court has standardized the basis for asserting jurisdiction over foreign defendants in Canadian courts. The decision given in the case of \textit{Club Resorts Ltd. v. Van Breda} is to the effect that jurisdiction of Canadian court must be established on the basis of the legal situation or the subject matter of the suit.

The position in China is summarized in the \textit{General Principles of Civil Law of China} and the \textit{Civil Procedure Law of China}. Chinese court has jurisdiction where a defendant is domiciled in China. Where the defendant is not domiciled in China, the court may only assume jurisdiction if the contract is signed or performed within Chinese territory or the object of the action is within Chinese territory, or where the defendant has distrainable property within Chinese territory or has its representative or business agent or branch within Chinese territory.
**Approach of the Nigerian Courts**

The Nigerian court exercises jurisdiction as a matter of law. The jurisdiction of Nigerian courts is prescribed by the Constitution and Statutes. The State High Courts have unlimited jurisdiction over civil and commercial matters. Under the Constitution, the Federal High Court has exclusive jurisdiction, but restricted only to causes and matters listed under Section 251 of the Constitution. The Constitution provides that:

Subject to the provisions of Section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. For the purpose of exercising any jurisdiction conferred upon it under this constitution or any law, a High court of a State shall be duly constituted if it consists of at least one Judge of that Court.

The Nigerian courts have continually been wary of exercising jurisdiction over foreigners. The dichotomy created between jurisdictional competences of the Federal High Court versus High Court of a State and varying jurisdictions of the respective High Courts of states have beclouded the ability to properly contextualize issues of jurisdiction for the purpose of debt recovery in Nigeria. For example, the Nigerian courts, including both the Court of Appeal and the Supreme Court have consistently held that the Constitution and laws have not given State High Courts power to exercise extra-territorial jurisdictions. This in effect means that High Court of State ‘A’ cannot exercise any jurisdiction over a cause of action that arose from State ‘B’. However, a foremost conflict of law scholar, Olaniyan differed with the position of the Supreme Court on the issue:
The court reasoned that with the advent of democratic government and constitution, a High Court has been established for each State and as such no state can sit on any action that arose from another state. The court erroneously confused the question of choice of jurisdiction and choice of law. It assumed that a court must always apply its laws to matters before it. This is where the Supreme Court got it wrong. Had it been the panel distinguished choice of jurisdiction from that of law, it would have concluded that a Lagos High Court can apply the law of any other jurisdiction if that is the applicable law to the transaction. The rules of jurisdiction are quite separate and are provided under the various High Court Laws.

The law and practice of debt recovery is relatively settled. A creditor may begin with simple civil procedures of ‘undefended suit, ‘summary judgment’ backed with well calculated garnishee proceedings to attach the funds standing to the credit of the defaulting company before making recourse to insolvency proceedings, which may be hotly contested. And in most cases, actual recovery tends to be insignificant due largely to varying militating or limiting factors such as the nature and structure of the judicial systems, operational constraints like technology, dilatory tactics of the adverse party (debtor and its counsel), social challenges of corruption, archaic filing and archiving procedures and other factors as highlighted below.

- TECHNOLOGICAL AND ADMINISTRATIVE REFORM TO IMPROVE TRANSPARENCY; JUDICIAL ACCOUNTABILITY AND JUDICIAL PERFORMANCE IN INSOLVENCY

The next task is to examine some administrative reforms aimed at improving transparency, transparency, judicial accountability and performance in insolvency cases. Put differently, what measures have been put in place, or could be put place in African courts to ensure efficiency, transparency and probity in the handling of cases bordering on insolvency for the purpose achieving the ultimate objective of maximizing creditor recovery expeditiously.
There is no gainsaying that the role of the Judiciary in the effective administration and determination of insolvency cases cannot be over emphasized. It suffices to say that in all cases of insolvency, the involvement of the judiciary and the role it plays is largely significant. It is therefore important, that in the effective dispensation of justice, the judiciary must be ready to flow with the trend of times which has been engulfed by information technology.

A look at the financial sector and its crucial role in the development of the economy and particularly the drastic and destructive economic effects of an unstable banking system reveals the importance of healthy mechanism and effective judicial role to the economy. For example, the history of banking in Nigeria, being a leading African country depicts a periodic cycle of disruption of the sea evidenced by the many past incidences of failed banks. Examples include the AGBINMAGBE, MBC, MERCANTILE BANK, EAGLE, IVORY, amongst others, and in more recent times, the banks that were rescued by the CBN and the Nigerian Depot Insurance Corporation (NDIC or the corporation) forced into mergers or to having their banking licenses and assets transferred to a bridge bank.

Palpable from frequent bank failures is the need to curtail the tempestuous effect of the collapse, satisfy the creditors of the failed bank and prevent the subsequent nose-diving of the economy, it is on this score that bank insolvency laws and deposit insurance corporations come off the shores and into the blue to aid in restoration, as much as possible, of peace in the ocean and in view of the role of the courts in insolvency determination and the need to enhance the efficiency of our judicial officers.

The judiciary as an important administrator in insolvency must adopt a commercial approach and time bound approach in the effective determination of cases vis-à-vis insolvency and in so doing, it must ensure that judicial officers are above-board and any erring officer should be dealt with appropriately. In order for the Court to effectively dispense justice in a fair, just and timely manner in a digital world, it must embrace information technology (IT). Some of the issues that contribute to delays in the dispensation justice in the court are inadequate system for the filing of court processes, the archaic manual storage and retrieval of files and non-service of court processes, to name a few.

Recognising the urgent need for the Nigerian Judiciary to embrace IT, His Lordship,
Dahiru Musdapher, CJN (as he then was) inaugurated the Judicial Information Technology Policy Formulation and Implementation Committee on 30th January, 2012 declared that:

*To fully satisfy the yearnings of Nigerians for speedy and qualitative justice and justify the confidence of the public in the judiciary, the use of IT can no longer be discretionary. It must become the norm. To reduce case backlog, increase transparency and enhance performance, aggressive, holistic adoption of appropriate information technology is required. As a service-based institution, the Judiciary must begin to make use of innovations such as video conferencing, e-courts, e-filing, integrated communication system, etc., to improve productivity and boost public confidence in the Judiciary.*

The Judicial Institute (NJI) under the leadership of the immediate past Chief Justice of Nigeria, Aloma Mariam Mukhtar, GCON published the National Judicial Policy, which provides in Paragraph 6(e) thereof that “all courts should promote the use Of Information And Communication Technology (ICT).

Judicial effectiveness can be improved through the automation of court management and the adjudication process through computerization of records that minimizes the incidents of vital documents, rampant manipulation and improper interference with highly confidential legal materials. The popular adage goes: *justice delayed is justice denied.*

On a wider scale, the adoption of information technology in the court will allow for easy sharing of information and cross-searching of relevant materials amongst the various courts and the creation of data base for decided cases by all the courts in the country, which can be easily accessed by judicial officers anywhere in the country. The adoption and deployment of IT, which is capital intensive, requires political will, purposeful leadership and the commitment of substantial resources. It also requires training for the justices and upgrading the knowledge and skills of court staff to enable them effectively manage the facilities. The current leadership of the court in Africa should be encouraged to show serious commitment to the transformation of judicial processes and procedures in insolvency cases as well as in other cases.

- **CHALLENGES OF THE AFRICAN COURT IN HANDLING INSOLVENCY**
CASES

To successfully hear and determine a insolvency and financial dispute and protect the investing public, judges must work around a myriad of complex challenges and utilize any and all available tools and policies to creatively and comprehensively deal with the issues that come before them. Amongst the foremost challenges facing African courts in the dispensation of justice in insolvency and other civil and criminal cases are:

- **JUDICIAL TRAINING**

  The way and manner judges are appointed and promoted these days is anything but objective and professional because cherished ideals of integrity, hardwork, competency and good standing appear to have been jettisoned for political patronage, nepotism, cronyism, lopsidedness and ethnicity. What is in dire need is that radical, judicial reform that would cut across the entire judicature at the federal and state levels. Some years ago, newly appointed to the Bench, Marc T Amy, of the Louisiana Third Circuit Court of Appeal, arrived in New York City to attend a judicial training course. Upon settling into a cab, he told the inquisitive cabdriver the purpose of his visit. Laconically, the cabbie retorted: ‘I’d have felt a whole lot better if you’d received your judicial education before donning your judicial robes.’

  The role of the judge remains shrouded in mystery. Despite the days of the sacerdotal Roman *iudex* being long gone, often it seems the general public still believes the elevation of an individual to the Bench sets in train an alchemical process by which a mere mortal is transmuted into a soothsaying, all-seeing oracle. There should be no place secrecy and disillusion about judicial office and officers. Members of the public and those who have had dealings with the judge should have right to a few confidential remarks about the suitability or otherwise of nominees to be appointed as judges.

  While recognizing that the Constitution of most African Nations require that judges be appropriately qualified and a fit and proper person, what those attributes mean in practice is less clear. Why should a person be appointed as a judge without any formal judicial training? The answer to this question traditionally advanced by lawyers in jurisdictions with a common-law legal culture is that since judges are drawn from senior *habitués* of the Bar, they get all the training they need from their years of practice in the courts. It however cannot be contested based on experiences over the years that this view is misleading.
In many African Countries today, only few jurisdictions have adequate judicial education programmes. The need for some uniformity of training before taking up office seems self-evident. The first-time acting judge is different from an experienced or well trained Judge. The average criminal practitioner who probably took up civil matters in a civil court a few times will definitely be a closed book to many commercial issues such as in insolvency.

Judges are in any case in need of re-education of a sort – especially as men of a certain age, who in broad terms share a certain, patriarchal view of the world, continue to predominate on the Bench. The Canadian scholar Kathleen E. Mahoney has noted:

Deeply held cultural attitudes and beliefs about the proper roles for women and men must be examined and challenged when they interfere with the fair and equitable administration of justice … This requires education programs that stimulate a sense of personal discovery and enable judges to identify and eliminate their own biases.’

Judges acknowledge they need more training to handle the technical and scientific evidence involved in complex financial cases like insolvency and to deal with all the obstacles highlighted in this paper. Cases involving hardcore insolvency or financial issues typically are litigated with intensity, and these require the judge to be prepared to resolve vigorously contested factual and technical disputes. Judges note the value of learning how to handle such cases through peer-to-peer education taught by experienced judges.

**B) FAST TRACK PROCEDURES**

Nigeria courts are increasingly introducing fast-track procedures for cases. I had amplified some of the issues and prospects of fast track procedure in one of my presentations. Fast track procedure aimed at mitigating the challenges of delayed trials and, invariably, denial of justice- justice delayed being justice denial. Fast track procedure has been introduced in the various Federal High court and States’ High Court (Civil Procedure) Rules. This has greatly ease
delays and has significantly reduced the time between filing court processes and date of judgment in most court in Africa, especially in Nigeria. Elements of fast track include frontloading of court processes and exhibits aimed at expeditious disposition of cases including insolvency cases. This has greatly enhanced creditors’ recovery suits as the court is best able to decide cases speedily with the benefit of frontloaded court processes. Frontloading aids effective case management, and has also received judicial validation. See Olaniyan v Oyewole (2008) All FWLR (Pt 399), at 503.

Case Tracking System and Court Automated Information System have been introduced in most State judiciaries and the Federal High Court in Nigeria to reduce delays in both civil and criminal trials. These tracking and information systems are still being perfected in the Federal High court of Nigeria where I sit and/or preside. It is anticipated that the process of full automation will be completed in no distance future. The project aims at establishing an electronic network for tracking and managing the flow of cases from filing to disposition by all courts in the various judicial divisions across Nigeria.

Lack of financial resources cannot be ignored in the realization or fruition of the automation of judiciaries in Nigeria and other African countries. The conflicting priorities of considering insolvency cases alongside other equally vital civil and criminal cases are often overwhelming due to high volume of work. African court appear slow, and almost non-receptive to full blown specialization along the line of subjects like insolvency and others. At best, preferences might be given by the Head Judge or Chief Judge, as the case may be, to certain judges reputed to possess special skills and expertise in handling and deciding certain cases based on subjects. This is an unwritten practice in Nigeria and most countries in Africa. However, it needs to be noted that the National Industrial Court is a specialized court dealing with industrial dispute cases while only Federal High Court has jurisdiction to handle insolvency matters in Nigerian by virtue of the provisions of section 251 of the Constitution of the Federal Republic of Nigeria (as amended). With better funding and related logistics, it is anticipated that the process of automation of courts would be speedily accomplished thereby having positive effects on insolvency cases in countries in the Africa region.
• TRANSPARENCY AND EFFECTIVE JUDICIAL MANAGEMENT

Under the doctrine of separation of powers, the judiciary generally does not make law or enforce law, but rather interprets the law and applies it to the facts of each case. This branch of the three arms of government is often tasked with ensuring equal justice under law. In achieving its objective of ensuring that it dispenses justice without fear or favour, and equally to all and sundry, the judiciary is expected to be independent, and government is expected to guarantee its independence. Generally, the independence of the judiciary in Nigeria and indeed the whole of the African sub-region face serious challenges and are generally weak. It is characterized by weak and inadequate constitutional guarantees coupled with lack of commitment by political leaders to promote and protect the principle of separation of power. There is little evidence that the independence of the judiciary is a top priority of the constitutional democratic governments of the sub-region. It is perpetually threatened through unwarranted attacks and circumventing the constitution. Judiciary is often the least funded but most overworked of the organs or arms of government in Africa.

Several countries in Sub-Saharan African are still facing judicial corruption due to complex factors in the areas of appointments, promotions, discipline, remuneration and funding of the judiciary. Poor remuneration invariably leads to poor motivation and commitment of these officials and the resultant likelihood of seeking bribes as financial security. While this is condemnable, insufficient funding is a frequent problem capable of undermining the integrity of the court and judicial process in insolvency and other civil and criminal cases. Funding logistics is required for automation of filing procurest at court registries and other archival units. The courts also need modern, up to date recording devices and gadgets to aid in preservation of records and the quick determination of serious and complex financial disputes like insolvency. Great efforts must be made to ensure that courts are fully and adequately automated to handle the most complex of cases from inception to conclusion.

In most countries in Africa, the inability of the various anti-graft agencies to nip the monster- corruption in the bud has highly brought about challenges in dealing with insolvency and debt recovery cases. There is an urgent need to embark on judicial reform involving a multitude of institutions and players in a bid to improving African legal system to guarantee fair-play, efficiency and the rule of law. The use of alternative dispute resolution methods,
although hardly efficient in sensitive cases like insolvency here the creditors earnestly desires to recover its money, the use of ADR has proved vital in all cases for affording the parties the benefit of conferencing towards amicable, win-win settlement of dispute. ADR mechanisms are gaining ground in countries in Africa, as countries in the region have impressive track record of implementing alternative dispute resolution system as a way of increasing access to justice.

14. CONCLUSION:

On a final note, I wish to recap and note that the basic aim of corporate insolvency law and practice is to protect creditors. A Judge must balance the competing needs and demands of the creditors seeking justice. Ethically, a judge must not be seen to be encouraging a party at the expense or to the determinant of another irrespective of whether or not the case borders on insolvency. Beyond numerous operational and administrative challenges, experience has shown that the appointment of receiver or manager may not solve the problem. Winding-up a defaulting company may also hardly ever lead to full and total recovery of debts. The justice of the case may demand deploying alternative procedure to debt recovery as highlighted above. Equitable jurisdiction of the court might also be deployed to promote what in other jurisdiction is referred to as “rescues” to allow for the development and survival of companies, especially in African jurisdictions, due to pressing socio-economic realities and challenges.

Even in cases where the court is poised to do justice to the parties, one way or the other, operational, ethical and administrative issues might pose formidable threat. Courts in Africa are inhibited by a lot of factors. Unfortunately, improving transparency, transparency, judicial accountability and performance in insolvency cases or other measures to be put in place in African courts to ensure efficiency, transparency and probity in the handling of cases bordering on insolvency for the purpose achieving the ultimate objective of maximizing creditor recovery expeditiously are rarely for the judicial arm of government. In most cases, the executive determines the success or failure of African judiciaries in the way and manner funding and operational logistics are deployed or withheld, among others. An impression also needs to be corrected. In insolvency cases, the Judge is for both the creditor and the debtor, and must ensure and uphold the tripod of justice- justice to the Debtor, Creditor and larger society by deploying the various alternatives and options analyzed above in this paper.
I thank you all for your attention.

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Honourable M.J. Idris

Federal High Court, Nigeria.