

THE PLIGHT OF THE BANKRUPT UNDER THE NIGERIAN LAW

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Abstract

The Nigerian Bankruptcy Act gave a very wide definition of property of the bankrupt that will vest in the estate and be divisible amongst his or her creditors. Flowing from that definition, minimal exemptions have been granted to the bankrupt. If the current value of the exempted assets is anything to go by, the bankrupt and his dependents are practically stripped of all assets. .

This article presents an overview of the Nigerian Bankruptcy Act, and in particular analyzes the assets exempted for the bankrupt under the law. The Article considers whether such exempted assets are sufficient to sustain the bankrupt as well as his/her dependants and to facilitate his fast recovery and reintegration into the society. The learning point when compared with other jurisdictions is the need for a policy consideration to ensure that our bankruptcy law creates the right balance between the needs of the bankrupt, the rights of the creditors and the implications of bankruptcy on the society at large.

1.0 Introduction

In any insolvency system, it is paramount as far as individual bankruptcy is concerned to determine which assets¹ will vest in the bankrupt estate as well as assets that are excluded. Whilst it is natural for the creditors to want limited exclusions so that more of the debtor's assets can be utilized to satisfy their claims, other factors like socio-economic considerations and even basic human rights imperatives may dictate a more liberal system of exclusions.² Indeed, if the right balance is not maintained, the risk is that creditors may be seriously disadvantaged or the debtor may become a burden to the society having been stripped of all assets, thus his³ chances of recovery and reintegration into the society will become very minimal.

As stated in the Cork Report,⁴ the law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society. Society is concerned to relieve and protect the individual insolvent from harassment of his creditors, and to enable him to regain financial stability and to make a fresh start. It accords him this relief in return for:⁵

- Such contribution, not only from the realization of his assets but also from his future earnings, as can reasonably be made by him without reducing him and his family to undue and socially unacceptable poverty and without depriving him of the incentive to succeed in his fresh start;
- The obligation to give an account of the reasons for his failure and if required to submit the conduct of his affairs to impartial investigation; and
- Subjection to such disabilities as may be appropriate in all the circumstances.⁶

¹ Assets and properties are used interchangeably in this article.

² *Boraine et al* "Policy Considerations Regarding Exempt Property: A South African-Canadian Comparison." 2007 *Annual Survey of Insolvency Law* 637.

³ The word "*He or His*" as used in this article refers to both genders.

⁴ "Insolvency Law and Practice" Report of the Review *Cmnd 8558* (1982) par 192. This Report contains the insolvency law proposals for England and Wales and is popularly known as Cork Report.

⁵ *Ibid.*

⁶ *Ibid.*

A well structured insolvency law should therefore appreciate the need to make as many as the assets of the debtor available to the creditors and the ultimate aim of allowing the debtor reasonable assets for survival and fast recovery.

This paper examines the exemption provisions under the Bankruptcy Act of Nigeria⁷ and considers whether the exempted assets are sufficient to sustain the debtor and facilitate his fast recovery in line with current global trends.

⁷ CAP B2 LFN 2004

2.0 Overview of the Nigerian Bankruptcy Act.

The principal law regulating the situation where an individual debtor is unable to pay his debts is the Nigerian Bankruptcy Act of 1979 as amended by the Bankruptcy Decree of 1992.⁸ The Act essentially applies to individual debtors including estate of deceased person who died insolvent as well as firms, partnership and other associations not incorporate under the Companies and Allied Matters Act [CAMA].⁹

Section 1 of the Act stipulates nine acts¹⁰ of bankruptcy one of which must occur to necessitate bankruptcy petition against the debtor. Essentially the Act recognizes compulsory and voluntary bankruptcy filings¹¹. The voluntary filing is by the debtor himself on the ground of inability to pay his debt while the compulsory filings are by the creditors by way of bankruptcy notice for a creditor who has obtained final judgment and upon request from the Registrar or by petition in other cases.¹²

Where an act of bankruptcy is committed, the court may, upon the petition of the debtor or creditor, provided that the conditions are satisfied make a receiving order for the protection of the estate. The word “may” is used to show that the granting of the petition is at the discretion of the court which may be exercised upon proof of certain facts such as debt of the petitioning creditor, service of petition, act of bankruptcy and most importantly, sufficient assets to pay

⁸ Now contained in CAP B2 LFN 2004

⁹ Cap. C20 LFN 2004. See sections 5, 108 and 109 of the Act.

¹⁰ A debtor commits an act of bankruptcy in each of the following cases: (a) (i) a creditor obtains a final judgement against him for any amount and execution not having been stayed, has a bankruptcy notice served on him (ii) does not within 14 days of the notice comply with the requirements of the notice or satisfy the court that he has a counter-claim, etc (b) execution against him has been levied by seizure of his goods, (c) he files in the court a declaration of his inability to pay his debt, (d), he suspends or gives notice to suspend payment of his debts to any of his creditors (e), if under a credit agreement the creditor becomes entitled to file a bankruptcy petition (f), he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally, (g) he makes a fraudulent conveyance, gift or delivery of his property in Nigeria or elsewhere, (h) he makes a conveyance or transfer of his property which will under any Act be void as a fraudulent preference were adjudged bankrupt, (i) with intent to defeat or delay claims of his creditors, he departs out of Nigeria or out of his dwelling.

¹¹ See section 3 of the Act.

¹² Sections 2, 3, 4 and 8.

dividend of at least 15% to unsecured creditors after payment of bankruptcy cost as well as preferential claims.¹³

Upon a receiving order made by the court, the moratorium provisions come into play and no creditor can enforce any remedy or commence any action or other legal proceedings unless with the leave of court. The assets or properties of the debtor upon a receiving order will vest in the Official Receiver and then the Trustee upon appointment.¹⁴ All debts due to the debtor would be paid to the Official Receiver or Trustee and payment to the bankrupt will not discharge the debt unless it was made *bona fide*.¹⁵ Although the assets of the debtor will vest in the Trustee, the debtor still has interest in the said asset. If the adjudication is annulled for instance, the assets may revert to the debtor.¹⁶ Also the debtor has a right to any surplus after payment of his creditors with interest as provided by the Act.¹⁷

The Official Receiver and then the Trustee are required to perform certain duties in terms of administering the assets all geared towards ensuring fair distribution of the debtor's assets according to the priorities allowed in the Act. More importantly is the power of the Trustee to trace assets by means of impeachable transactions.¹⁸

The end of this process is the discharge of the bankrupt which may be made at any time after being adjudged bankrupt where certain conditions are fulfilled or automatically after 5 years.¹⁹

The consequence of a discharge is that the debtor is released from all debts provable in bankruptcy except for any debt which the bankrupt may be chargeable at the suit of the State or from debt or liability incurred by means of fraud.

The discharge in addition gives the debtor a fresh start as all disabilities against him in terms of section 126 will cease.

¹³ Section 7.

¹⁴ Section 55

¹⁵ Section 49.

¹⁶ Section 30 (3)

¹⁷ Section 71.

¹⁸ Section 46

¹⁹ Sections 28-31.

2.1 Properties that will vest in the Estate.

Section 41(1) provides that, all properties that belong or are vested in the bankrupt at the commencement of the bankruptcy or acquired by or devolve on him prior to discharge will vest in the estate and as such divisible amongst his creditors. In addition, the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge will also vest in the trustee or estate. All goods which at the commencement of the bankruptcy are in the possession, order or disposition of the bankrupt, in his trade or business by the consent and permission of the true owner will also vest in the Trustee.

Things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

Section 142 defined property to include money, goods, things in action, transferable interests, and every description of property, whether real or personal and whether situate in Nigeria or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as above defined.

The combined effect of sections 41(1) and 142 is that divisible properties will cover all properties of the debtor at the commencement of the bankruptcy or prior to discharge whether movable or immovable, situate in Nigeria or abroad. It seems also that by the wide definition of section 142, the right of inheritance, if the actual right has accrued will vest in the estate so also is the right of real security except that the secured creditor enjoys preferential treatment under the Act. In addition, third party goods in possession of the debtor with the consent of the owner under circumstances that the debtor is reputed as owner will vest in the estate. The position of cash sales under circumstances where the goods are delivered to the debtor but not paid for is not clearly defined. It seems that by the provision of section 41 (1) (C) such properties will vest in the estate and the seller can claim as a creditor.

2.1.1 Foreign Properties

Sections 41 (1) and 142 provide that foreign assets of the bankrupt will vest in the estate. In terms of section 53 the bankrupt is required to join the trustee in selling the assets abroad for the benefit of his creditors and to sign all necessary authorities, powers, deeds and documents for that purpose. This is however subject to any enactment relating to foreign exchange. Failure of the bankrupt to give the required cooperation may be punished for contempt.

The Bankruptcy Act failed to consider the likelihood of the bankrupt having creditors in the foreign country where the assets are situated in which case it goes beyond selling the assets to satisfy Nigerian creditors. In practice, the trustee will have to contend with creditors abroad who will want to secure those particular assets for their benefits. It is submitted that section 53 will only be productive when there are no creditors abroad where the assets are situated otherwise the Nigeria Trustee will have to apply to be recognized as such in the foreign state with a view to attaching the foreign assets for the interest of the local creditors subject to the laws of the foreign state or may consider concurrent bankruptcy proceedings.

3.0 Exempted assets

The following assets are exempted in favour of the bankrupt:

- Property held in trust by the bankrupt
- The tools (if any) of his trade and the necessary apparel and bedding of himself and his family dependent on and residing with him, to a value, inclusive of tools and apparel and beddings, not exceeding N1,000 in the whole.²⁰

The trustee may however from time to time with the permission of the Committee of Inspection make such allowance as he may think just for the support of the bankrupt and his family or in consideration of his service if he is engaged in winding up of his estate with a proviso that such allowance may be reduced by the Court.²¹

²⁰ Section 41(2)

²¹ Section 60

The Pension Reform Act of 2004 suggests that pensions and life insurance policies maintained in terms of the Act will not vest in the Trustee of the bankrupt. Section 54 of the Act shows that, the salary, income, pension and compensation of the bankrupt will ordinarily not vest in the estate but the court may pursuant to the application of the trustee direct that income of the bankrupt or portion of it to be paid to the trustee. Where the bankrupt is an officer of the Nigerian Army, Navy or Air force or a public officer, the directive that portions of his salary, pension, allowance or compensation be made to the trustee shall be with the consent of the heads of the relevant Armed Forces or the Minister, Commissioner or Department Accounting Officer.

As seen from the Bankruptcy Act, the totality of the assets exempted for the bankrupt and his dependents including tools of trade, apparel and beddings must not be more than the value of N1, 000. The said exempted assets are too minimal that one can rightly say that the bankrupt and his or her dependents are condemned to abject poverty. Not even a telephone handset can survive the total value of N1, 000, thus the bankrupt and his or her dependents have practically nothing to survive on. The section 60 allowance may not provide any meaningful advantage since it is determined by the trustee with the permission of the Committee of Inspection. The said Committee of Inspection whose consent is required represents the creditors who naturally will favour limited exemption for the debtor so that more assets can be available for distribution. It is noted that a bankrupt that is subjected to such level of poverty as seen in the Nigerian Bankruptcy Law will struggle for a very long time to recover especially when there are no modern rescue mechanisms or social support system as applicable in other advanced jurisdictions to assist such debtors in bad financial situations.

In the USA for example which is said to be leading the way in terms of business rescue and debtor rehabilitation, the concept of debtor rehabilitation in the USA is reinforced by the long list of necessary items exempted under the USA law to allow the bankrupt survive reasonably. It's Bankruptcy Reform Act of 1978²² (as amended) popularly known as the Bankruptcy Code provides that estate divisible amongst the creditors consists of all property interests at the time of commencement subject to certain exemptions.

²² Codified in Title 11 of the United States Code commonly referred to as 'Bankruptcy Code' The Act has amended severally, the most significant amendment being the one of 2005 'Bankruptcy Abuse Prevention and Consumer Protection Act 2005'.

With regards to exempt assets, the Federal statute provides list of exemptions and States are allowed to opt out of the Federal exemptions. Consequently, a debtor may choose between Federal list of exemptions and that of the State except the State where the bankruptcy was filed prohibits him from choosing the exemptions on the Federal list.²³ Title 11 has provided the following exemptions with financial limits, homestead exemption, one vehicle, house hold furnishing, wearing apparels, appliances, books, animals, interest in jewelry, debtors aggregate interest in any implements, professional books, tools of trade of the debtor of the dependant, any life insurance contract other than a credit life insurance yet to mature, debtors right to receive social security, unemployment compensation, alimony, support or separate maintenance to the extent reasonably necessary for the support of the debtor and his dependant, funds from award in a law suit, etc.²⁴

It should be noted that pursuant to the BAPCPA, adjustments were made on the value of the exempt assets. In addition, luxury goods were exempted from goods and services reasonably necessary for the support and maintenance of the debtor or the debtor's dependants. Further, household goods have been defined to mean clothing, furniture, appliances, 1 radio, 1 television, 1 VCR, linens, Crockery, kitchenware, educational materials and educational equipment primarily for the use of the minor dependant children, medical equipment and supplies, furniture exclusively for the use of minor children or elderly or disabled dependants, personal effect including toys and hobby equipment of the minor dependant and wedding rings of the debtor and the dependants, 1 personal computer and related equipment.

Interestingly most Nigerian laws including the Bankruptcy Act are modeled after The UK laws and just like Nigeria, the UK Act²⁵ defined property similarly with Nigeria to include money, goods, things in action, land and every description of property wherever situated and also

²³ S 522

²⁴ Ibid

²⁵ Insolvency Act 1986

obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to property.²⁶

The UK has however made significant changes in recent times along the line of debtor's rehabilitation. For instance, in terms of the UK law, property which will otherwise fall within the estate is exempt if it falls within certain categories to safeguard the needs of the bankrupt with respect to living conditions and business.²⁷ The common exemptions are such tools, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him or his employment, business or vocation as well as such clothing, beddings, furniture and household equipment and provisions that are necessary for satisfying the basic domestic needs of the bankrupt and his family.²⁸ The UK has removed the previous financial limits on specific categories of exempt property and now empowered the Trustee to replace the property with a more modest item of that type where in his opinion the original item has a realizable value that exceeds the costs of a reasonable replacement.²⁹ This provision prevents the bankrupt from retaining luxury assets. The Trustee can also apply for an income payment order provided that it will not reduce the income below that which is reasonably necessary for the needs of the bankrupt and his family.³⁰ With regards to homestead exemptions, the UK has made special provisions on occupation of a family home in relation to the trustee's application to sell it to realize the bankrupt's interest in it.³¹

South Africa as a significant economy in Africa is not left out in these reforms and accordingly has made meaningful exemptions for the bankrupt as follows:

²⁶ Section 436

²⁷ Section 283(2), Section 158 of the Insolvency Act 2006

²⁸ Section 158 of the 2006 Act

²⁹ Section 308 of the 1986 Act; See also David Brown "Property and the Insolvency Estate" *JSPL* (2007)11(1) page 92

³⁰ Section 310

³¹ Sections 336

- The right to recover damages for any defamation or personal injury suffered by him at or during sequestration.³²
- The wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors or the Master may determine.³³
- The right to pension³⁴
- Benefits accruing to an employee in terms of the Unemployment Insurance Act.³⁵
- Compensation payable or paid to a workman in terms of the Workmen's Compensation Act does not vest in the workman's trustee.
- Benefits payable or paid to a minor under the Occupational Diseases in Mines and Works Act, and movable or immovable property purchased with such money do not pass to the miner's trustee as a general rule.³⁶
- Life Insurance policies up to certain limits.³⁷
- Trust funds³⁸
- Contingent interests in *fidei commissary* except where the actual right of inheritance should accrue before rehabilitation in which case the right will vest in the trustee.
- Loans under the Land and Agricultural Development Bank³⁹. Specific sections were incorporated to ensure that the Bank remain excluded from the Insolvency Act.
- Wages or salary or profit derived from trade carried on with the consent of the trustee,

³² Ibid; section 23(8) of the Act

³³ Section 82(6)

³⁴ Section 23(7); See also David Brown page 92

³⁵ 63 of 2001

³⁶ Section 131 of the Occupational Diseases in Mines and Works Act 78 of 1973.

³⁷ See Long-Term Insurance Act 52 of 1998

³⁸ See Trust Property Control Act 1988

³⁹ 15 of 2002 (Referred to as LADBA)

The above comparative analysis shows the current trends on “Exemptions” The lesson is that the world is fast changing and bankruptcy laws have since moved from the era of inflicting severe punishments on the bankrupts. Clearly global trends appreciate that there are other ways of making sufficient assets available for the creditor without necessarily denying the debtor and his dependents their basic necessities and means of survival. Again, what constitute basic necessities has now changed based on present day realities. A good insolvency law should therefore be able to respond to these societal changes to remain relevant.

CONCLUSION

The Nigerian Bankruptcy Act is long overdue for a reform. The Act was promulgated during the era where the aim of Insolvency was to punish bankrupts who made default which explains some of the existing provisions in the Act. The 1992 amendment did not make significant changes, thus the archaic nature of this law is such that most of its provisions do not represent modern day realities.

In particular there is need for policy consideration on the exemptions provided under the Bankruptcy Act of Nigeria. The submission is that if the assets excluded as seen under Nigerian law are not sufficient to allow the bankrupt maintain reasonable life balance, his or her recovery will be very slow which will impact negatively on the economy. On the other hand creditors should not be grossly disadvantaged. To create the right balance, it is submitted that basic necessities should be exempted for the debtor. Tools of trade and other basic facilities required to enable the debtor function reasonably are necessary assets that must be exempted and the Trustee should be empowered to make that determination and consider what necessary tools and assets are for the debtor. Like the UK system, our reform must ensure that debtors are not allowed to retain luxurious goods. Consequently it is a good approach to empower the Trustee to replace the property of the debtor with a more modest item of that type where in his opinion the original item has a realizable value that exceeds the costs of a reasonable replacement. Further, the sacrifice on the part of the debtor to reduce his standard of living and give up portions of the income for his creditors should be some of the factors that should weigh in the mind of the court when considering an application to discharge him because a bankrupt who was not willing to

make any sacrifice for the benefit of his creditors may not have learned the basic lessons that are paramount to his rehabilitation.

The pitfall to avoid in our legislative reform is the provision on financial ceiling as now contained in section 41 more so when our laws are not frequently reviewed. Indeed, some jurisdictions have come to recognize the difficulties of fixing financial thresholds, for instances New Zealand that had such financial thresholds now provides in its *Insolvency Act 2006* that in respect of tools of trade and necessary furniture and household effects, the Official Assignee can now fix a maximum value, in his or her discretion. Creditors can still resolve to allow the bankrupt to retain more than the fixed value in those categories.⁴⁰

The challenge therefore for us is to consider all options reflected in the various jurisdictions discussed above and devise what is suitable for us taking into consideration our peculiarities. The way forward I think is to adopt a progression approach which will entail a wholistic review of our insolvency laws.

⁴⁰ Sections 158 and 159 of the Act; See also David Brown page 92.