

**AN EXAMINATION OF THE CONSEQUENCE OF INABILITY  
TO PAY DEBT ON CORPORATE EXISTENCE UNDER  
SECTION 572 OF COMPANIES AND ALLIED MATTERS  
ACT, 2020**

**Richard Ujah Oyiwona\***  
**Zion Machem Lashom\*\***

**Abstract**

*There is no concise meaning as to what can be held to be inability of a company to pay its debt. Though, there is provision under the Companies and Allied Matters Act 2020 on how it could be said that a company is inability to pay its debt. Ordinarily, if a company has no money to pay its debt or settle its debt, it is obvious that the company is insolvent. There could be however the situations when a company has money but has willfully refused to pay its debt. The Companies and Allied Matters Act 2020 has not made provision in respect to such scenario. The methodology adopted in the article is doctrinal. The Companies and Allied Matters Act 2020 as it relates to the article was examined together with other relevant laws on the subject. Since the issue of a company inability to pay its debt means that the company is insolvent, it is recommended that the provisions of the Companies and Allied Natters Act should be amended to bring insolvency matters in line with the current global best practices, It is concluded that there should be a single law on insolvency in Nigeria, dealing with all issues relating to a company inability to pay its debt.*

**Keywords:** Debt, CAMA 2020, Insolvency, Liquidation, Winding up

---

\* LLB, BL, LLM, PhD, Lecturer, Faculty of Law, Admiralty University of Nigeria.  
Email: [oyiwona-law@adun.edu.ng](mailto:oyiwona-law@adun.edu.ng)

\*\* Lecturer Faculty of Law, Admiralty University of Nigeria. Email: [lashom-law@adun.edu.ng](mailto:lashom-law@adun.edu.ng)

## 1.0 Introduction

Liquidation is a process of ending the existence of a company when it is established that the company is unable to pay its debt and render other obligations to its shareholders, creditors and other stakeholders, winding up is used interchangeably and part of liquidation process of a company which is unable to pay its debt. It is a procedure of allocating the assets of the company upon the conclusion of the winding up proceedings and ending the existence of a company. It is also a process of dissolving a company by collecting its assets, paying up its liabilities out of the assets of the company or from contribution by its members. If any excess is left, it is distributed amongst the members in accordance with their rights. A company ceases to exist when it is dissolved. The processes leading up to its demise is termed winding up or liquidation. In the end of the winding up processes, the company will have no assets or liabilities and will therefore be regarded as a non-existing company, as the corporate personality of the company could have been brought to and,<sup>1</sup> In Nigeria, the court having jurisdiction for the winding up of a company is the Federal High Court of Nigeria by virtue of section 251 (e),<sup>2</sup> This article examined the provisions of Nigeria extant laws on the subject, a comparative analysis on the concept in other jurisdiction such as the United Kingdom, India, and South African.

## 2.0 Conceptual Framework

Company is a corporation or, less commonly, an Association, partnership, or union that carries on a commercial or industrial enterprise,<sup>3</sup> it is also defined as a legal entity formed by a group of individual to engage in and operate a business enterprise in a

---

. Richard U Oyiwona, LLB, BL LLM, PhD, Lecturer, Faculty of Law, Admiralty University of Nigeria, Ibusa. Delta State. The author can be reached via [Oyiwona-law@adun.edu.ng](mailto:Oyiwona-law@adun.edu.ng)

. Zion Machedem Lashom. Lecturer Faculty of Law, Admiralty University of Nigeria. [Email-lashom-law@adun.edu.ng](mailto:Email-lashom-law@adun.edu.ng)

<sup>1</sup> Pennington, Company Law (5<sup>th</sup> edn) 839.

<sup>2</sup> Constitution of the Federal Republic of Nigeria (*as amended*) and s 578 of CAMA 2020.

<sup>3</sup> Black Law Dictionary, (9<sup>th</sup> edn) 318,

commercial or industrial capacity,<sup>4</sup> Under section 2 of Companies and Allied Matters Act (CAMA),<sup>5</sup> it is stated that any two or more persons may form and incorporate a company by complying with the requirement of the Act,<sup>6</sup> in respect of registration of the company.

Liquidation refers to the act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain,<sup>7</sup> The Cambridge Dictionary<sup>8</sup> defines liquidation as a situation in which a company stops operating and sells all its assets in order to pay its debts.

On the other hand, where a company no longer has funds to function or its members no longer wish it to function, then there needs to be a process for bringing the existence of the legal entity to an end. This is achieved by winding up, or liquidation (the two terms can be used interchangeably). The process of winding up or liquidation is to ensure that, before the company ceases to exist, all its outstanding obligations are met and any surplus assets (if there are any) are distributed to members according to their agreed entitlement,<sup>9</sup>

Inability to pay debt on the other hand is declared by section 571 of CAMA,<sup>10</sup> to mean that a company is deemed to be unable to pay its debts when it is shown that a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

---

<sup>4</sup> <https://www.investopedia.com>> accessed 9<sup>th</sup> Nov, 2023.

<sup>5</sup> Companies and Allied Matters Act 2020.

<sup>6</sup> CAMA [n5].

<sup>7</sup> [Investopedia.com](https://www.investopedia.com) [n4] @ 1015.

<sup>8</sup> <https://dictionary.cambridge.org>> accessed 9<sup>th</sup> November, 2023.

<sup>9</sup> Davies, Sarah & Worthington, *Principles of Modern Company Law* (9<sup>th</sup> edn, Sweet and Maxwell, London 2012) 1271-1302.

<sup>10</sup> CAMA [n5].

Insolvency is defined as the condition of being unable to pay debt as they fall due or in the unusual course of business,<sup>11</sup> Corporate insolvency involves several processes ranging across actions for recovery of debts, appointment of a receiver, petition for winding up and appointment of a liquidator, arrangement and compromise. Corporate insolvency law embodies a variety of objectives, some of which include the following: facilitating of companies in difficulty, suspending the pursuit of rights and remedies by individuals' creditors, the vesting on the directors of their management powers, providing for the avoidance of transfers and transactions which unfairly prejudice the general creditors, as well as procuring an orderly distribution of estate.<sup>12</sup>

## 2.1 Liquidation

Liquidation refers to a process of winding up of a company. Since a company is created through a legal process, it follows that its existence can only be ended through a legal process. It must go through the legal process of winding up its affairs, it cannot disappear or evaporate. The term winding up or liquidation is used to describe the process whereby the life of a company is ended and its property is administered by an official called the Liquidator for the benefit of the creditors and members of the company,<sup>13</sup>

The business of winding up involves gathering the assets of the company, disposing of such assets, meeting the liabilities of the company and sharing the balances between the shareholders to the proportion of their shares, the assets, pays its debts and distributes any surplus among the members,<sup>14</sup>

The act of winding up of a company or the appointment of liquidator does not by itself result in the death of a corporate body thereby,

---

<sup>11</sup> *Investopedia.com* [n4] @ 867.

<sup>12</sup> R Goode, *Principles of Corporate Insolvency Law* (4<sup>th</sup> edn, Sweet and Maxwell: 2011); 90.

<sup>13</sup> J.O. Abugu, '*Principles of Corporate Law in Nigeria*' (MIJ Professional Publishers Limited Lagos) 747.

<sup>14</sup> *Ibid* [n13].

removing its legal personality. Any actions or proceedings against the winding up of a company are still maintainable with the leave of court. The case of *Provisional Liquidator of Tapp Ind. v Tapp Industries*,<sup>15</sup> is relevant to this point.

## 2.2. Insolvency

Insolvency is described as a situation where a legal or natural person is unable to pay debt,<sup>16</sup> The Companies and Allied Matters Act,<sup>17</sup> defines an insolvent person as follows:

Any person in Nigeria who respect of any judgment, decree, or court order against him, is unable to satisfy execution or other process issued there in favour of a creditor and the execution or other person remains unsatisfied for not less than six weeks.

This definition requires an order of a court to establish that a person is insolvent, whereas, in practical situations, corporate insolvency means the inability of a debtor to meet its commercial commitment to its creditors. The article views this definition as restrictive and does not take into consideration other processes that come into play before the order of a court.

Insolvency, just like other Nigerian law is based on common law, precedent, and local status like CAMA,<sup>18</sup> and to some extent the Asset Managing Corporation of Nigeria Act,<sup>19</sup> Under CAMA,<sup>20</sup> inability to pay debt has been described to mean that a company is unable to its debt.

### 2.2.1. Modes for Winding-Up of a Company

---

<sup>15</sup> [1995] 5 NWLR (Pt. 393)9.

<sup>16</sup> Bankruptcy & Insolvency Act 2016

<sup>17</sup> CAMA [n5].

<sup>18</sup> CAMA [n5].

<sup>19</sup> *Ibid* [n5].

<sup>20</sup> *Ibid* [n5].

There are modes by which a company may be wound up. Under section 564 (1) of CAMA,<sup>21</sup> it is provided that winding-up of a company may be effected:

- a. by the Court; or
- b. by voluntary winding-up; or
- c. subject to the supervision of the court.

Section 573 (1) of CAMA,<sup>22</sup> enumerate the categories of persons who may present an application that an application to the court for the winding up of a company s

A contributory shall not be entitled to present a petition for winding up of the company unless the number of members is reduced below two; or the shares in respect of which he is contributory or some of originally allotted to him or have been held by him, and are in his name, for at least six months during the 18 months before commencement of the winding up, or have devolved on him through death of a former holder,<sup>23</sup>. A contributory is defined in sections 566 of the CAMA,<sup>24</sup> to include every person liable to contribute to the assets of a company in the event of its being wound up and all proceedings prior to the final determination of the persons who are to be deemed contributories; the expression includes any person alleged to be a contributory. In other words, it refers to holder of fully paid up shares with a tangible interest in the winding up which is usually demonstrated by showing that the company has surplus of assets over liabilities though he is entitled to present a petition notwithstanding that though he is entitled to present asset available on the winding-up for contributories. A contributory in initiating the proceedings must state he has no other remedy apart from winding up of the company. In summary, there must be cogent reasons for seeking that the company be wound up. In the case of *Minso Wadzani Gadzama v. The Rims Merchant Bank Ltd*,<sup>25</sup> the appellant was a shareholder in the

---

<sup>21</sup> *Ibid* [n5].

<sup>22</sup> *Ibid* [n5].

<sup>23</sup> CAMA [n5].

<sup>24</sup> *Ibid* [n5].

<sup>25</sup> [1997] 4 NWLR (Pt 498), 234

respondent bank until he holds a share to the bank, being dissatisfied about how the respondent was been managed, the appellant later filed a petition for the winding up of the company and the revocation of the banking license of the respondent.

The respondent consequently filed an application seeking an order to restrain the appellant from taking a step in the petition and also restrain the appellant from advertising the petition pending the determination of the status of the appellant as a shareholder of the bank. The Court of Appeal held, when a shareholder of a bank company sells his shares in the company, he has no more rights under section 114 of the CAMA,<sup>26</sup> to attend general meetings of the company or to vote in such a meeting, he ceases to be a shareholder of the company and is replaced in the company by the purchaser/purchasers of the shares. It also held that the appellant, being no longer a shareholder of neither the respondent nor a creditor, does not qualify as a contributory or any person under section 401 (1) CAMA,<sup>27</sup> who may present a petition for winding up. He has no right to bring a petition for winding up under section 410 (1) for any of the grounds stated in section 408. Therefore, he neither has the *locus standi* nor the capacity to intervene or interfere in the affairs of the bank.

### **2.2.2. Winding up by the Court for Inability to Pay Debt**

The conditions under which a company may be wound up by the court for inability to pay debt is provided for in section 571 (d) of CAMA,<sup>28</sup>

A compulsory liquidation has an element of insolvency on the part of the company. Therefore, where members' voluntary winding up proceeds according to its tenure with a realisation that the company is insolvent and cannot fully pay its debts, the members may pass a special resolution pursuant to section 571 (a) of the CAMA,<sup>29</sup> and thereby convert the process into a compulsory winding up by the court As regards (d) a company is deemed to be unable to pay its debts if:

---

<sup>26</sup> CAMA LFN 2004 now s.564 (1) CAMA 2020

<sup>27</sup> *Ibid* now CAMA 2020

<sup>28</sup> CAMA [n5].

<sup>29</sup> *Ibid* [n5].

- a. A creditor to whom the company owes that N2000 has served on it a written demand for payment and the company for 3 weeks failed to comply; or
- b. A judgment creditor of the company has levied execution and it has remained unsatisfied;
- c. The court after taking the company's contingent or prospective liability into account is satisfied that the company is unable to pay its debt.

The circumstances when a company can be held unable to pay its debts are not susceptible to a concise meaning.<sup>30</sup> Ordinarily if a company has no money to settle its debt, it is obvious that company is insolvent. However, there could be situations when a company has money but has willfully refused to pay its debt. In such situation, will it be right to say that the company is unable to pay its debt, and as such insolvent? Again, a company could have sufficient assets but not sufficient liquidity to provide an adequate amount of cash to meet present or even contingent liabilities amount of as they fall due. It therefore, becomes difficult to decipher at what point a company is said to be unable to pay its debts.

A cursory look at the interpretation section of the CAMA,<sup>31</sup> reveals that instead of defining what constitutes inability to pay debts, a referral is made to the meaning assigned to it by section 572 of the CAMA,<sup>32</sup>. Accordingly, following the provisions of the said section 572 of the CAMA, a company shall be deemed to be unable to pay its debts under three (3) circumstances. They are:

(a) statutory demand

By the provisions of the CAMA,<sup>33</sup> a creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding N200,000 then due, has served on the company, by leaving it at its

---

<sup>30</sup> C. E. Halliday, *The Aftermath of Company's Inability to Pay Its Debts in Nigeria* (2018) (1) (7) *Port Harcourt Law Journal* 178-186

<sup>31</sup> CAMA [n5].

<sup>32</sup> *Ibid* [n5].

<sup>33</sup> *Ibid* [n5].

registered office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. The implications of the above are that a company is said to be unable to pay its debt if is indebted to a creditor as seen in the case of *Unifam Ind. Ltd v Oceanic Bank Intl (Nig) Ltd*,<sup>34</sup> corroborating the above, it is stated that in a similar provision in the United Kingdom legislation,<sup>35</sup> that the use of the words “is indebted,” “... then due” and “so due” have the consequence that a debt can only furnish the basis for a statutory demand served under the United Kingdom if the debt is presently due at the date when the creditor seek to utilise it for this purpose,<sup>36</sup>. It is stated therefore, that a company cannot pay its debt as they fall due, out of cash or readily realizable assets in its hands, and it will be immaterial that it could pay then over a lengthy period by a steady realization of all its assets,<sup>37</sup>

Again, where a debt is disputed bonafide, an order of winding up will not be made. In such case, the creditor must seek his remedy in an action to establish the debt... and where there is such a genuine dispute as to the indebtedness of a company, that issue must first be resolved before winding up petition is continued as a company can only be wound up ordinarily where it is, for example insolvent”. Hence, a petitioner in a winding up proceeding must establish not only that there is a debt owed but that the company is not disputing the debt in good faith,<sup>38</sup> Therefore, where the company disputes the debt, it is important to ascertain whether the dispute is bonafide or substantial. It is also noted that the ground for dispute can be raised at any time either before or after the winding up petition. So, where a petition is based on a debt that is disputed on substantial grounds, the petition will fail, the Supreme Court in *Ado Ibrahim & Co. Ltd v B. C.C. Ltd*,<sup>39</sup> held:

---

<sup>34</sup> [2005] 3 NWLR (Pt. 911) 88-89

<sup>35</sup> Insolvency Act 1986 (UK)

<sup>36</sup> *Re Bryant Investment Co. Ltd* [1974] 1 NLR 826

<sup>37</sup> *Ibid* [n37].

<sup>38</sup> [n36].

<sup>39</sup> [2007]15 NWLR (Pt. 1058) SC 538 at 572-574, Para G-A

... And a court will not decline to entertain a petition from a creditor from winding up a company that is unable to pay its debt because there is dispute as to how much the company owes the creditor.

The above appears scholarly and plausible. However, going further, the Supreme Court stated:

... However, where the debt in issue is colossal such that the assets of the company, if left untouched, will not in the nearest future, having regards to galloping inflation, be sufficient to pay off the debt, when they are realized, justice demands that the court exercises restraint in acceding to a winding up prayer and wait for the determination of the suit relating to the disputed debt.

### **3.0. Comparative Analysis of Liquidation of a Company in Nigeria and selected Jurisdiction**

#### **1) United Kingdom (UK)**

The liquidation process is regulated by the Insolvency Act of the UK,<sup>40</sup> It deals with a situation where a company would be wound up for inability to pay its debt. The Insolvency Act of UK<sup>41</sup> envisaged two types of winding up, that is: voluntarily winding up which is divided into members voluntarily winding up and creditors voluntarily winding up. The second way of winding up of company in the UK is winding up by the court.

As their names imply, an essential difference between compulsory winding up by court and voluntary winding up is that the former does not necessarily involve action taken by any organ of the company itself, whereas voluntary winding up does. The essential difference between members and creditors winding up is that the former is possible only if

---

<sup>40</sup>Insolvency Act of UK 2016.

<sup>41</sup> *Ibid* [N40].

the company is solvent, in which event the company's members appoint the liquidator, whereas, if it not, its creditor have the whip hand in deciding who the liquidator shall be. In all the three cases, the winding up process is not exclusively directed towards realizing the assets and distributing the net proceeds to the creditors and, if any is left, to the members, according to their respective priorities, it also enables an examination of the conduct of the company's management to be undertaken. This may result in civil and criminal proceedings being taken against those who have engaged in any malpractices thus revealed and, in the adjustment, or avoidance of various transactions,<sup>42</sup>

a) **Grounds for Winding Up in the UK (By the Court)**

Under section 122 of the Insolvency Act,<sup>43</sup> a company may be wound up by the court on one or more of eight specified grounds. Of these grounds, the most important is ground (f), that the company is unable to pay its debt, and the next important is ground (g), that the company is of the opinion that it is just and equitable that the company should be wound up. The company can do this by a special resolution authorizing that the company be wound up. Winding up by the court is the most expensive type of winding up and the one in which their conduct is likely to be investigated most thoroughly. Section 124 of the Insolvency Act,<sup>44</sup> have provision for a wide range of people who may petition the court for the winding up of the company, the list includes the company directors, its members, its creditors (including prospective and contingent creditors) and various parties with official public status.

The Insolvency Act,<sup>45</sup> affords creditors owed more than \$750 pounds to simply establishing ground (f) that the company is unable to pay its debts by serving a statutory demand. Because of the presumption of insolvency inherent in this, courts are astute to prevent creditors relying on the subsection if the debt itself is disputed. In *Stonegate Securities*

---

<sup>42</sup> Davies [n9].

<sup>43</sup> *Ibid* [n9].

<sup>44</sup> *Ibid* [n9].

<sup>45</sup> UK Insolvency Act [n40] s. 123.

*Ltd v Gregory*,<sup>46</sup> it was stated that a creditor whose debt is bonafide disputed cannot petition at all for winding up.

b) **Voluntarily Winding Up**

In contrast to the winding up by the court, voluntarily winding up in Uk always start with a resolution of a company. In unlikely event of the articles fixing a period for the duration of a company or specifying an event on the occurrence of which it is to be dissolved, all that is required is an ordinary resolution in general meeting,<sup>47</sup> Otherwise what is required is a special resolution that the company would wound up voluntarily,<sup>48</sup> In either case, the resolution is subject to the requirement that a copy of it has to be sent to the Registrar within fifteen days,<sup>49</sup> and the company must give notice of the resolution by advertisement in the gazette within fourteen days of his passing,<sup>50</sup>

It is worthy of mention here that, unlike Nigeria, in the United Kingdom, the Court is empowered to make administrative orders appointing a person referred to as an administrator to see the survival of the company whole or part of its undertaken approval of voluntary arrangement and/or for a mere advantageous realization of company assets in case of winding up.

2) **India**

The liquidation process in India is governed by the Insolvency and Bankruptcy Code,<sup>51</sup> and it applies to insolvency and liquidation of corporate debtors. Section 4 of the Insolvency and Bankruptcy Code,<sup>52</sup> provides:

This part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the amount of the default is not less than one

---

<sup>46</sup> [1980] CH

<sup>47</sup> UK Insolvency Act [n40] s. 84(1&a)

<sup>48</sup> *Ibid* [n40] s. 84(1&b)

<sup>49</sup> *Ibid* [n40] s. 84(3)

<sup>50</sup> *Ibid* [n40]s. 85(1).

<sup>51</sup> India 2016

<sup>52</sup> *Ibid* [n51].

lakh rupees or such other amount not exceeding one crore rupees, as the Central Government may, by notification specify.

Section 6 of the Code,<sup>53</sup> provides:

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate a corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

3.2.1. The process of Liquidation in India is provided under Chapter III of the Act,<sup>54</sup>. Section 33 (1) of the Act,<sup>55</sup> Provides:

- (1) Where the Adjudicating Authority-
  - (a) before the expiry of the insolvency process period of the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or
  - (b) rejects the resolution plan under section 31 for noncompliance with the requirements specified therein, It shall-
    - (i) pass an order requiring the corporate debtor in the manner as laid down in this Chapter.
    - (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
    - (iii) require such order to be sent to the authority with which the corporate debtor is registered.

3.2.2. Section 33 (3) of the Insolvency Code,<sup>56</sup> says that:

---

<sup>53</sup> *Ibid* [n51].

<sup>54</sup> *Ibid* [n51].

<sup>55</sup> *Ibid* [n51].

<sup>56</sup> India [n51].

Where the resolution is professional, at any time during the corporate insolvency resolution process but before confirmation of the resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in clause (i), (ii), (iii) of subsection (1).

3.2.3. Apart from proceedings pending before the Supreme Court or the High Court prior to the liquidation process, subject to section 52 of the Code,<sup>57</sup> when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor,<sup>58</sup>

### 3) **South African**

Under the Winding up proceeding in South African, the provisions of Chapter 14 of the Companies Act 1973,<sup>59</sup> applies to companies being wound up on the grounds of insolvency.

The general effective date on which the Companies Act No 71 of 2008 came into force was May 2011. Consequently, as from that date, the Companies Act 61 of 1973 was repealed, except in so far as the transitional provisions contained in schedule 5 of the new Act provide for the continued application of certain provisions of the old Act. Of particular significance are the provisions of Schedule 5 of the Companies Act 2008,<sup>60</sup> in relation to the winding-up of companies and the important distinction in this regard between solvent companies and insolvent companies.

Item 9 (1)-(2) of Schedule 5 provides, in effect, that despite the repeal of the Companies Act 1973,<sup>61</sup> certain specified provisions of Chapter 14

---

<sup>57</sup> *Ibid* [n51].

<sup>58</sup> *Ibid* [n51] s 33(5)

<sup>59</sup> Companies Act 1973 South Africa (Repealed)

<sup>60</sup> Companies Act 2008 (SA)

<sup>61</sup> *Ibid* [n60].

of that Act,<sup>62</sup> which deals with the winding-up of companies, both solvent and insolvent continue to apply, except in relation to solvent companies. Expressed more plainly, chapter 14 of the Companies Act 1973,<sup>63</sup> Continues to apply in relation to the winding up of insolvent companies.

However, the distinction drawn in Schedule 5 of the Companies Act 2008,<sup>64</sup> in terms of which the winding-up of solvent companies is governed by that Act whilst the winding up of insolvent companies continues to be regulated by the Companies Act 1973,<sup>65</sup> raises the question as to what is meant, in this context, by solvent and insolvent. In *Firststrand Bank Ltd v Lodhi 5 Properties Investment*,<sup>66</sup> it was held that:

Where item 9 (2) of Schedule 5 to the Companies Act 2008 refers to solvent companies having to be wound up in terms of the provisions of that Act, it uses the word solvent in contradistinction, not just to companies that are factually insolvent (that is to say, those companies whose liabilities exceed their assets) but also to those that are commercially insolvent, in other words, those companies that are unable to pay their debts as they fall due.

This will come as a considerable relief to an unpaid creditor of a company who wishes to bring an application for it to be wound up, for he will not be required to prove that it is factually insolvent which may be an impossible task in application proceedings, for he will usually lack the evidence necessary to prove factual insolvency, and will be able to succeed by proving commercial insolvency and to rely on such commercial insolvency to trigger the deemed inability to pay the debt in question as provided for in section 345 (1) of the Companies Act 1973.<sup>67</sup>

---

<sup>62</sup> *Ibid* [n60].

<sup>63</sup> *Ibid* [n60].

<sup>64</sup> *Ibid* [n60].

<sup>65</sup> *Ibid* [n60].

<sup>66</sup> 2013 (3) SA 212

<sup>67</sup> Companies Act 1973 (SA).

by laying before the court either a statutory demand for payment as envisaged in section 345 (1) (a) or a *nulla bona* return envisaged in section 345(1)(b).

#### **4.0. Recommendations**

- a. There should be a single body of law on insolvency to provide the practice direction for its practitioners. At present, the absence of a single and unified law on insolvency practice in Nigeria, present the whole regulatory framework on insolvency like choose and pick the laws to be applied when there is a situation at hand.
  - b. Provisions of CAMA should be amended to bring Insolvency matters in line with current global best practices. The provision of the extant CAMA on the issue of insolvency practice in Nigeria should be amended to reflect the current reality on ground as it is obtainable in other jurisdictions. For instance, pegging the limit of the amount of debt which the company should owe a creditor before the company can be proceeded against at the sum of N200,000.00 is not in conformity with the present economic reality in Nigeria.
  - c. Insolvency Practitioners should undergo continuous training programmes to update their knowledge on the emerging area of insolvency law and practice in Nigeria. Continuous training and retraining by insolvency practitioners are very key in order to broaden the knowledge from time to time.
  - d. There should be an Insolvency tribunal to attend specifically to Insolvency matters just like we have in Britain. This will enable the insolvency matters to be dispensed with as quickly as possible.
  - e. The regulatory framework for insolvency practice should be improved upon by equipping the relevant agencies for effective monitoring, supervision and if need be invoking the relevant sanction.
-

#### 5.0. **Conclusion**

In conclusion, it will be wrong to say that Nigeria does not have any law on insolvency. The truth is that there are selected provisions of insolvency related issues in the statute books, especially in the Companies and Allied Matters Act, AMCON Act and a couple of other legislations. However, these provisions are not adequate as there is a very long gap between the provision and practice of insolvency in Nigeria. To state that reform is needed in the insolvency practice in Nigeria is to state the obvious. What better words can best describe the totality of the law on insolvency than those contained in the preamble of the Insolvency Act 1986 of the United Kingdom?

An Act to consolidate the enactments relating to company Insolvency and winding up (including the winding up of companies that are not insolvent, and of unregistered companies); enactments relating to the insolvency and bankruptcy of individuals; and other enactments bearing on those two subject matters, including the functions and qualification of insolvency practitioners, the public administration of insolvency, the penalization and redress of malpractice and wrongdoing, and the avoidance of certain transactions at an undervalue Nigeria should take a cue from this and come up with a comprehensive law on insolvency and its related matters.