

EFFICACY OF GARNISHEE PROCEEDINGS AGAINST CLOSED BANKS/NIGERIA DEPOSIT INSURANCE CORPORATION (NDIC)^Ω

INTRODUCTION

1. The prosecution of cases in Nigeria is an arduous task. This stems from the fact that litigation suffers a lot of protracted delays in Nigeria to the extent that a matter can take up to fifteen (15) years before it is finally decided¹. As a corollary to this, a successful litigant may still encounter some challenges in the enforcement of the judgment because the party who lost the case may take some steps capable of frustrating or truncating the realization of the fruits of the judgment. In other words, the fact that a party has gotten a judgment in his favour simply means that such a party has won the battle but yet to win the war.
2. The foregoing underscores the importance of enforcement of judgment. According to Afe Babalola, "*Enforcement is the last stage of judicial process after the legal right, claim, or interest has been converted into a judgment or order which remains to be enforced. Therefore, a party who has successfully obtained a final order or signed judgment against another has only won the first round in the fight*"²

NATURE AND PROCEDURE IN GARNISHEE PROCEEDINGS

3. A garnishing proceeding, being a judgment enforcement mechanism is a judicial process where a judgment creditor armed with a judgment of a court may recover such debt owed by a judgment debtor from a third party, who in turn has an

^Ω A paper on the efficacy of garnishee proceedings against closed banks/Nigeria Deposit Insurance Corporation (NDIC) delivered at the Annual Sensitization Seminar for External Solicitors to the Nigeria Deposit Insurance Corporation (NDIC or Corporation) organized by NDIC at Colonnades Hotel, No.54 Alfred Rewane Way, Ikoyi Lagos on 5th August 2015; Dr. Nnamdi Dimgba, Partner, Olaniwun Ajayi LP ably assisted by Olufemi Olaoye (Associate, Olaniwun Ajayi LP); Adeniyi Aderogba (Associate, Olaniwun Ajayi LP); Cindy Ojogbo (Associate, Olaniwun Ajayi LP); and Joseph Onele (Olaniwun Ajayi LP).

¹ . For instance, the case of *Ariori v. Elemo* (1983) 1 SC 13 took about 23 years while *Union Bank Nigeria Plc v. Ayodare and Sons (Nig.) Limited* [2007]13 NWLR (Pt. 1052) 567 was instituted at the State High Court in 1989 but was not finally disposed of by the Supreme Court until 2007 – a period of 18 years. The trial court gave judgment in *Adisa v Oyinwola* [2000] 10 NWLR (Pt.674) 116 in 1985 while the appeal was not determined by the Supreme Court until year 2000 – the appeal lasted for 15 years from the Court of Appeal to the Supreme Court.

² Afe Babalola: *Enforcement of Judgments, First Edition, (Intec Printers Limited, Ibadan, 2003)* 1

obligation to the judgment debtor.³ By this process, the court has power to order a third party to pay direct to the judgment creditor the debt due from him to the judgment debtor or as much of it as may be sufficient to satisfy the amount of the judgment and the costs of the garnishee proceedings. Put succinctly, the general rule is that all debts due or accruing from any person to the judgment debtor, whether they are legal or equitable, may be attached. However, this general rule is not absolute as it admits of certain exceptions. To be capable of attachment, there must be in existence at the date the attachment becomes operative, something which the law recognizes as a debt, and not merely something which may or not become a debt⁴.

4. The synopsis of the foregoing is that a debt can only be attached if it is due or accruing to the judgment debtor and the test for determining this, is whether any sum certain is due and payable by the garnishee to the judgment debtor. The third person indebted to the judgment debtor is called the garnishee while the judgment creditor is also referred to as the garnishor.
5. In Nigeria, the procedure for garnishee proceedings is regulated by the Sheriffs and Civil Process Act, 1945 LFN, Cap S6, 2011 and the Judgments (Enforcement) Rules made pursuant to section 94 of the Sheriff and Civil Process Act.⁵
6. The process is instituted in court through an ex-parte motion⁶ by the judgment creditor applying to the court for an order attaching the judgment sum, the order nisi is then served on the garnishee and the judgment debtor.

³ See *U.B.N. Plc v Boney Marcus Ind. Ltd* [2005] 13 NWLR (Pt. 943) 654, 660

⁴ Thus, where the existence of a debt depends upon the performance of a condition, there is no attachable debt until the condition has been duly performed. Even an existing right under which something is accruing which will probably become a debt at some future date is not sufficient, notwithstanding that the amount to become due is capable of being calculated with precision. As soon as the debt has arisen, it can be attached. So long as there is a debt in existence, it is not necessary that it should be immediately payable. Thus, where an existing debt is payable in installments, the garnishee order may be made to become operative as and when each installment becomes due.

⁵ It should be noted that all states, if not all, have adopted the Sheriffs and Civil Process Act and the Judgments (Enforcement) Rules. Consequently, the Sheriffs and Civil Process Act and Judgments (Enforcement) Rules are contained in Laws of the different States of the Federation.

⁶ The ex-parte motion shall be supported by an affidavit stating that judgment has been obtained and that judgment is still unsatisfied. The affidavit is also required to state the

7. The service of the order nisi on the garnishee binds the debt in his custody⁷. In effect, any payment of the debt to the judgment debtor or its alienation without the leave of court shall be null and void⁸. The garnishee may, within 8 days of the service of the order nisi on it, pay into court the amount alleged to be due from him to the judgment debtor or if that amount is more than sufficient to satisfy the judgment debt and the costs, a sum that satisfies that debt and costs⁹. Once the payment is made, the proceedings against the garnishee shall be stayed.¹⁰
8. However, where a garnishee disputes his liability to pay the debt, he does not have to make any payment into court, but to appear in court on the return date and dispute his liability and the court may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined or may refer the matter to a referee.¹¹ Also, a garnishee may contend that the debt sought to be attached belongs to some third person or that a third person has a lien or charge on it. In this case, the court may order such third person to appear and state the nature and particulars of his claim upon such debt¹² but if the third person does not appear, the court on proof of service of the order nisi may proceed to make an order as if such third person has appeared. Where the third person appears and after hearing his allegation and those of any other person who the court may order to appear, the court may order execution to issue to levy the amount due from the garnishee, or any issue or question to be tried and determined, and may bar the claim of such third person or may make such other order, upon such terms with respect to any lien or charge or otherwise as the court shall think just.
9. Where the garnishee does not, within the time prescribed, pay into court the judgment sum being claimed and does not dispute the debt or where he does not

extent of the amount so unsatisfied and that a third party who is within the jurisdiction of the court is indebted to the judgment debtor.

⁷ Section 85 of the Sheriffs and Civil Process Act

⁸ Section 92 of the Sheriffs and Civil Process Act

⁹ Order VIII, rule 5 (1) of the Judgments (Enforcement) Rules

¹⁰ Order VIII, rule 5 (2) of the Judgments (Enforcement) Rules

¹¹ Section 87 of the Sheriffs and Civil Process Act.

¹² Section 88 of the Sheriffs and Civil Process Act

appear as ordered, the court, on proof of service, may order that the order nisi be made absolute.¹³

10. It is important to state that garnishee proceedings may be commenced either at the High Court or Magistrate Court¹⁴ notwithstanding that the debt owing or accruing from the judgment debtor is for an amount exceeding the jurisdiction of that court.¹⁵
11. It is to be noted that garnishee proceedings are distinct and separate from the original action which culminated in the judgment sought to be enforced by the garnishee proceedings. This principle was given judicial imprimatur by the Court of Appeal in **Denton-West v. Muoma**¹⁶, where the Court held as follows:
*“There is no doubt that garnishee proceedings are separate proceedings between the judgment creditor and the person or body who has custody of the assets of the judgment debtor, even though it flows from the judgment that pronounced the debt owing.”*¹⁷
12. It is pertinent to note that a garnishee proceeding is different from other enforcement proceedings like writ of execution. As rightly stated by Owoade, JCA in **N.A.O.C Ltd. v. Ogini**¹⁸, *“A garnishee proceeding is a proceeding that is sui generis, in a class of its own and it is to be distinguished from other proceedings for enforcement of judgment, such as that by writ of execution”*. Thus, execution of a judgment entails the seizure and sale of chattels of the judgment debtor under the warrant of a court. This is different from attachment

¹³ See the case of *In re: Diamond Bank Ltd.* [2002] 17 NWLR (Pt. 795) 120 at 134, para. G. See also the case of *Fidelity Bank Plc v Okwuowulu* [2013] 6 NWLR (Pt. 1349) 197 at 213-214, paras. H-D.

¹⁴ Order 6 of the Magistrates' Courts (Regulatory Enforcement Procedure) Rules, 2009 is more elaborate than the Sheriffs and Civil Process Act. However, due to constraint of space, we shall not be able to discuss same.

¹⁵ Order VIII, rule 1 of the Judgments (Enforcement) Rules.

¹⁶ [2008] 6 NWLR (Pt. 1083) 418 at 442, para. D

¹⁷ See also the case of *Denton-West v Muoma* [2008] 6 NWLR (Pt.1083) 418 at 442, para. D where the Court of Appeal held that *“there is no doubt that garnishee proceedings are separate proceedings between the judgment creditor and the person or body who has custody of the assets of the judgment debtor, even though it flows from the judgment that pronounced the debt owing”*.

¹⁸ [2011] 2 NWLR (Pt.1230) 131 at 147, paras. B-C

of debt owed to a judgment debtor by a third party who is indebted to the judgment debtor directly.¹⁹

13. In brief, therefore, it clear that the essence of garnishee proceedings is enforcement of money judgment which money is in the custody of a third party but in favour of the judgment debtor.

A CLOSE BANK AND ROLE OF NDIC AS PROVISIONAL LIQUIDATOR

14. Section 23 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act²⁰ (FBA), defines a failed bank is a bank or other financial institution whose licence has been revoked or which has been declared closed or placed under receivership.²¹ It is pertinent to note that once the licence of a bank has been revoked by the CBN, the NDIC becomes automatically cloaked with the status of a provisional liquidator of the closed bank²².
15. The pivotal role of banks in the economic structure of nations and the systemic risk posed by bank failures necessitates the need to closely regulate the insolvency of banks to mitigate the fallout on the economy and the public generally. The mischief is to stem the ripple effects, potentially sinking everything riding on its waves, and ultimately the economy of the country. The special regime thus exists, primarily, in the interest of the public. To maintain confidence in the banking system and to maintain stability of the financial system, special bank insolvency regimes are designed to promote the efficient, expeditious, and orderly liquidation of failed banks.²³
16. Accordingly, Nigeria, (like other jurisdictions) has adopted approaches to contain negative externalities of bank insolvency and to maintain financial stability and confidence in the financial system.²⁴ As far back as the nineteenth century, banks in the United States of America (the US) have been subjected to a special

¹⁹ See *Purification Techniques (Nig.) Ltd. v. A.G Lagos state* [2004] 9 NWLR (pt. 879) 655 at 678-679, paras. H-A

²⁰ Cap F2, LFN 2004

²¹ The term 'Closed Bank' is used in this presentation to depict a bank whose licence has been revoked.

²² See section 40 of the NDIC Act.

²³ FDIC, 'Managing the Crisis: The FDIC and RTC Experience', Vol. 1

²⁴ Robert R. Bliss and George Kaufman, 'A Comparison of U.W. corporate and bank insolvency resolution', 2Q/2008, *Economic Perspectives*, 44, 47.

regime of bank insolvency outside the jurisdiction of the bankruptcy courts.²⁵ Consequently, bank insolvency in the US is purely administrative. The Federal Bankruptcy Code, the general insolvency regime, expressly excludes banks from its scope.²⁶

17. Much like the US, Nigeria has developed a special regime to cater for bank insolvencies. A careful examination of the Nigerian Deposit Insurance Act 2006 (**NDIC Act**)²⁷ reveals that the Nigerian bank liquidation regime falls among those governed by general insolvency laws supplemented by special rules and regulations. The NDIC Act makes clear in Section 40 (6) that the provisions of the Companies and Allied Matters Act, 1990 shall remain applicable in so far as they relate to insured institutions and to winding-up by the Federal High Court except in situations of conflict, in which case, the provisions of the NDIC Act shall prevail. In essence, while CAMA functions as the general regime, the NDIC Act and the Banks and Other Financial Institutions Act²⁸ (**BOFIA**) apply as special rules relating to banks.
18. Noteworthy is the fact that the NDIC Act contains express exclusion of certain provisions of CAMA²⁹ and the exclusion of the application of the Companies Winding-Up Rules.³⁰ The process of bank liquidation commences with the revocation of the banking license by the Central bank of Nigeria (**CBN**) on one or more of the following grounds³¹:
 - 18.1 ceases to carry on in Nigeria the type of banking business for which the license was issued;
 - 18.2 goes into liquidation or is wound up;³²

25 Peter Swire, 'Banking Insolvency Law now That it Matters Again', *Duke Law Journal*, 1992. Vol. 42, Number 3.

26 Section 109, Chapter 11.

27 We note that there is a bill before the National Assembly for the amendment of the Act but as of today, the NDIC Act 2007 remains the relevant law.

28 Cap B3 LFN 2004.

29 For example, Section 40 (4) excludes the application of Section 427 (1) & (2) of CAMA which makes companies winding up procedures subject to the supervision by the creditors.

30 Section 40 (5) NDIC Act.

31 Section 12 BOFIA.

32 In relation to this ground, it is important to point out that as no law prohibits creditors of a banking institution from petitioning for the winding-up of a company, the said winding up would be initiated entirely under CAMA. However, by virtue of this Section 12 of BOFIA, the CBN retains the right to revoke the licence of a bank in respect of which such winding-up

- 18.3 fails to fulfill or comply with any condition subject to which the license was granted;
- 18.4 has insufficient assets to meet its liabilities; and
- 18.5 fails to comply with any obligation imposed upon it by the CBN.
19. Revocation of a bank's licence may also occur under section 39 of BOFIA in the situation where a bank taken over by NDIC³³ cannot be rehabilitated and revocation is recommended to CBN. Interestingly, by virtue of Section 40 (3) NDIC Act, revocation of a bank's licence is construed as included to the grounds upon which a winding-up petition can be brought before the court.
20. The liquidation of a closed bank involves three stages: pre-closing³⁴, closing and post-closing³⁵ processes. However, the primary concern of this presentation is closing.
21. Once a decision to close a bank has been taken, necessary approvals for the closure obtained and documentary instruments prepared, NDIC will take appropriate steps to ensure the closure of the bank concerned. At this stage, there are three main activities that are of great legal importance, namely: the filing of a petition for winding up, appointment of liquidator and the closing exercise.³⁶
22. After the revocation of a bank's license, a winding up petition must be filed before the Federal High Court for a winding up order.³⁷ At a time, there was a doubt as to whether NDIC had the power to file a petition in view of provisions

petition has been brought and accordingly activating the role of NDIC under the bank insolvency regime; It is however doubtful if the courts will sanction an application to wind up the affairs of a bank initiated by creditors of the bank. In Germany for instance, only the regulator can file an application to wind up the affairs of a bank. According to Wood, the reasoning behind this is to avoid vexatious petition by an indignant creditor as such action if publicized may seriously damage the bank. See Phillip R Wood, The Law and Practice of International Finance Series Vol. 1: Principles of International Insolvency (Sweet and Maxwell, 2nd Ed. 2009) 741

³³ *Section 36 BOFIA provides for the taking over of control and management of a failing bank by NDIC.*

³⁴ *It describes the range of activities and decisions that take place prior to the closure of a bank for the purpose of liquidation.*

³⁵ *This involves the realization and distribution of the assets of a company to those entitled to same.*

³⁶ *See Legal Issues in Bank Liquidation by Mr. A.B. Nyako published in the NDIC Quarterly Volume 16, September/December 2006, No ¾ page 41*

³⁷ *See Section 40 of BOFIA*

of CAMA³⁸ which prohibits a corporate body from acting as liquidator. However, with the clear provisions of section 40 of BOFIA, it is beyond doubt that NDIC is empowered to file a petition for winding up of a bank whose license has been revoked.³⁹

23. The closing exercise signifies the physical takeover of control of the affairs of a bank whose license had been revoked, securing its premises, assets and records, the preparation of the statement of affairs and drawing up of a closing report which contains the details of the position of the assets and liabilities of the closed bank as at the closing date.
24. The powers and procedure guiding the NDIC in carrying out its functions as liquidator are delineated in the NDIC Act⁴⁰ and supplemented by non-conflicting powers of a liquidator specified under CAMA.⁴¹ NDIC has a duty to give notice, by advertisement, to all depositors with the failed bank to forward their claims to the Corporation. The Corporation then undertakes to realize the assets of the bank in liquidation, pay off insured depositors and wind-up the affairs of the banking institution.
25. As deposit insurer, Section 20 (1) of the NDIC Act authorizes the Corporation to pay up to ₦200,000.00 to depositors in an insured bank that fails, subject to the power of the Corporation to vary, upwards, the maximum amount. Such payments shall be made within 90 days by cash or by making available to each depositor a transferred deposit in a new bank in the same area, or in another insured bank in an amount equal to the insured deposit of such depositor. In making such payments, NDIC may require proof of claim from all depositors with the failed bank and if not satisfied as to the validity of a claim, require that the court determine the validity of the claim.⁴²

³⁸ See section 509 (1) (c) of Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2004 (CAMA)

³⁹ See section 40 (6) of the NDIC Act which provides that the provision of this Act shall apply without prejudice to the provisions of Companies and Allied Matters Act, 1990 in so far as they relate to the insured institutions and to winding up by the Federal High Court and where any provisions of the Companies and Allied Matters Act, 1990 are inconsistent with the provisions of this Act, the provision of this Act shall prevail.

⁴⁰ Section 41 (2) NDIC Act.

⁴¹ Section 425 CAMA.

⁴² Section 21 (b) (i) and (ii) NDIC Act.

26. Upon the payment of an insured deposit via cash or transfer, the Corporation and the bank stand discharged from any liability⁴³ and by Section 21 (2) of the NDIC Act the Corporation is subrogated to all rights of the depositor against the failed insured bank to the extent of such payment, including the right of the Corporation to receive the same dividends from the proceeds of the assets of the bank and recoveries on account of shareholder's liabilities as would have been payable to the depositor for any uninsured portion of his deposit.
27. It is against this background that this paper discusses parties to garnishee proceedings, relationship between garnishee proceedings and stay of execution, garnishee proceedings against a closed bank, garnishee proceedings against NDIC, garnishee proceedings against bridge bank and defences available to NDIC in garnishee proceedings. Central to this discourse is the efficacy of garnishee proceedings against closed banks/NDIC.

PARTIES TO GARNISHEE PROCEEDINGS

28. The pertinent question here is who are the proper parties to garnishee proceedings? This question has generated a lot of controversies among legal scholars and jurists. While one school of thought believes that a garnishee proceeding is *stricto sensu* between the judgment creditor and the garnishee⁴⁴ and does not involve a judgment debtor, the other school of thought holds the firm belief that it is a tripartite relationship. Arguments canvassed in support of the first school of thought are to the effect that the judgment debtor is merely a nominal party whose money in the custody of the garnishee is being recovered by the judgment creditor in satisfaction of the judgment debt he is owing to the judgment creditor and it is only the garnishee that is expected to react if the law was not properly followed or observed. This argument is further fortified by the reasoning that the judgment debtor is not required to appear before the Court to show cause why the order nisi should not be made absolute but that it is the

⁴³ Section 22 (3) NDIC Act.

⁴⁴ A garnishee is a third party who is indebted to the judgment debtor or having custody of his money and who at the instance of the judgment creditor is being called to pay the judgment debt from his indebtedness to the judgment debtor or from the credit of the judgment debtor in his account with the third party. See *STB Ltd. v. Contract Resources (Nig.) Ltd. (2001) 6 NWLR (pt. 708) 115.*

garnishee that is required to inform the Court if there is any third party's interest in the judgment debtor's money in his custody.⁴⁵

29. On the other hand, arguments canvassed by proponents of the second school of thought is to the effect that although a judgment debtor is not a necessary party in a garnishee proceeding before the Court, the Court should not close its eyes to processes filed in court, after all, the law includes the judgment debtor as one of the parties to be served the order nisi.⁴⁶

30. Having highlighted the fulcrum of the position of each school of thought on the legal status of a judgment debtor in a garnishee proceeding, it becomes pertinent to distinguish nisi proceedings from the absolute proceedings.

31. At the nisi proceedings, only the judgment creditor and the garnishee are the proper parties to the proceeding. The judgment debtor is not a party to it. As Salami, JCA stated in **P.P.M.C Ltd v. Delphi Petroleum Inc**⁴⁷:

*"The reason for inability of the appellants to appeal against a garnishee order is for the simple fact that it is a product of proceedings between the judgment creditor and the person in possession of the assets of the judgment debtor. In the instant case, Guaranty Trust Bank is the garnishee or a person holding the assets of the judgment debtor, the appellants herein, while the respondent is the judgment creditor. A garnishee proceedings although incidental to the judgment pronouncing the debt owing, **the appellants being judgment debtor are not necessary party to the said proceedings.**"*

32. Orji-Abadua JCA put the principle beyond mere rhetoric in **U. B. A. v. Ekanem**⁴⁸, where his lordship stated thus:

"A close scrutiny of the aforestated provisions reveals that a judgment debtor is merely a nominal party whose money in the custody of the garnishee is being recovered by the judgment creditor. He is not the one requested to appear before the court to show cause why the order nisi should not be made absolute. It is only the garnishee, and, only the garnishee is expected to inform the court if there is third party's interest in the said judgment debtor's money in its custody.

⁴⁵ See also *PPMC Ltd. vs. Delpy Petroleum Inc. (2005) 8 NWLR Pt.928 page 458*

⁴⁶ *Cross River State Forestry Commission & Anor V. Anwan & Ors (2012) LPELR-9479(CA), (Supra) at 484, paras. C-G*

⁴⁷ *[2010] 6 NWLR (Pt. 1190) 207 at 222, para. B-D*

⁴⁸

So, in all ramifications, it is only the garnishee that is expected to react if the law was not properly followed or observed.”

33. At the absolute proceedings, where on the return date the garnishee does not attend, or does not dispute the debt claimed to be due from him to the judgment debtor, the court may subject to certain restrictions, make the garnishee order absolute under which the garnishee is ordered to pay to the judgment creditor the amount of debt due from him to the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the cost of the proceedings and cost of garnishee. This later proceeding is tripartite between the judgment debtor, judgment creditor and the Garnishee. This is because on the return date all parties must have been served and given an opportunity to dispute liability or pray that the order nisi be discharged for one cause or the other⁴⁹.

GARNISHEE PROCEEDINGS AND STAY OF EXECUTION

34. Judicial authorities are divided on whether an application for stay of proceedings precludes the judgment creditor from seeking to use garnishee proceedings to enforce the judgment. In **Denton-West v. Muoma**⁵⁰, the Court of Appeal held that “*garnishee proceedings are legitimate exercise of his right to employ auxiliary methods to enforce the judgment obtained in his favour and they are competent notwithstanding the pendency of a motion for stay of execution*”. Similarly, in **Purification Techniques (Nig.) Ltd v. A.G Lagos state**⁵¹, it was held that the existence of an application for stay of proceedings of a judgment does not preclude a judgment creditor from seeking the use of garnishee proceedings to enforce the judgment.
35. However, the same Court of Appeal gave a contrary decision in the case of **WAEC & Ors. v. Mrs. Nkoyo Edet Nkang**⁵², where Akaahs, JCA (as he then was) held as follows:

“However I am still at a loss as to the reasonableness of a court ignoring to deal with a pending application for stay of execution of

⁴⁹ See *Fidelity bank Plc v. Okwuowulu & Anor* (2012) LEPLR-8494 (CA)

⁵⁰ [2008] 6 NWLR (Pt. 1083)

⁵¹ [2004] 9 NWLR (pt. 879) 655

⁵² [2011] LPELR- 5098 (CA)

the judgment and proceed to grant the ex parte garnishee application”.

36. It would appear that a better and pragmatic view regarding this issue is that an application for stay of proceedings should preclude a judgment creditor from enforcing the judgment by garnishee proceedings. This view is premised on the fact that the **WAEC’s case**, which is the latest decision of the Court of Appeal on the issue, appears to be reasonable since the import of stay of execution is to prevent the enforcement of the judgment when the judgment debtor is still challenging the judgment on appeal.

GARNISHEE PROCEEDINGS AGAINST CLOSED BANK

37. Judgment debts are debts arising out of damages or judgments delivered by a court against the judgment debtor. Upon obtaining such judgment, the person in whose favour the judgment was given, the judgment creditor is entitled to receive the judgment debt from the judgment debtor and this can be enforced by undertaking any of the available enforcement procedures provided under the law, including garnishee proceedings.
38. It becomes likely, that in the event that the judgment debtor has money lodged or deposited in a bank, the judgment creditor would seek, invariably, to commence garnishee proceedings against the bank in a bid to obtain the money of the judgment debtor in the custody of the bank. However, the process becomes somewhat unclear when the bank sought to be garnisheed is one undergoing winding-up or has been taken over by a liquidator.
39. With regard to attempts to commence garnishee proceedings against the closed bank, it is important to note that Section 417 of CAMA provides that once a *“winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose”*.⁵³ The words “proceeded with” in the foregoing provision may be construed to mean “continued”. In effect, it would mean that the making of a winding up order or the appointment of a provisional liquidator, NDIC in this case, operates as a

⁵³ See also *FMBN v. NDIC (1999) 2 NWLR (Pt. 591) 333*.

stay of any proceedings already instituted, as well as a bar to any proceedings sought to be instituted or maintained by any person against the company in liquidation except the leave of court is properly sought and obtained as well as the conditions imposed by the court are satisfied.⁵⁴

40. Thus, garnishee proceedings against the closed bank commenced before the making of a winding up order will be stayed automatically, and the liquidator need not apply for a stay, except the enforcement officer had entered into possession prior to the making of the winding up order.⁵⁵ This position is buttressed by Section 414 of CAMA which provides that when a company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of winding up shall be void.
41. With respect to banks, by virtue of the NDIC Act, it can be argued that upon the revocation of the bank's license and the statutory appointment of the NDIC as provisional liquidator, all incidental effects of the winding up process become operational. It is beyond dispute that upon the NDIC's application for winding-up, the winding-up proceedings will be said to have commenced and judgment creditors will be prohibited from commencing enforcement proceedings against the bank.
42. This position has been confirmed by the court in **NDIC v Ifedigwu**⁵⁶ where the Court of Appeal gave effect to the provision of Section 414 of CAMA by holding that with the lower court's order for the winding up of Cooperative and Commerce Bank of Nigeria Plc and the appointment of the appellant as the liquidator, it was impossible to attach the wound-up company's property.⁵⁷

⁵⁴ See *Utuk v. The Official Liquidator (Utuks Construction and Marketing Company Ltd.) (2008) LPELR-4323 (CA)* where the Court of Appeal held that the wordings of Section 417 CAMA are so clear, unambiguous and plain and must be given their plain and ordinary meaning. The Court thereafter held that no action can or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose.

⁵⁵ *Bailey, E. & Groves, H., Corporate Insolvency Law and Practice, 2007. Lexis Nexis Butterworths, London. 110-111.*

⁵⁶ [2003] 1 NWLR (Pt. 800) 58, 81.

⁵⁷ See also the case of *NDIC (Liquidator of Highland Bank) & Anor v. David Barau & 2 Ors (unreported)* cited in a Paper titled "Garnishee Proceedings Against Banks in Liquidation and the Liquidator", presented by Belema A. Taribo on Saturday 20 June 2015 at the Annual Seminar For Judicial Officers on Challenges to Deposit Insurance Law and Practice

GARNISHEE PROCEEDINGS AGAINST NDIC

43. Upon the revocation of the license of the bank, as earlier noted, the NDIC becomes the provisional liquidator as if appointed by the court.⁵⁸ As regards commencing enforcement proceedings against NDIC, as liquidator of a failed bank,⁵⁹ it must be borne in mind; firstly, that the liquidator is not liable for the debt of the closed bank as the NDIC is a legal entity⁶⁰ distinct from the liquidated banks.
44. Meanwhile, in bringing a garnishee proceeding against NDIC, the judgment creditor must bear in mind the provision of section 84 of the Sheriffs and Civil Process Act⁶¹ (“SCPA”). Section 84 of the SCPA provides that where money liable to be attached by garnishee proceedings is in the custody or under the control of a public officer in his official capacity or in ‘custodia legis’, the order nisi shall not be made unless the consent of the Attorney-General of the Federation (“AGF”) or Attorney-General of a State (“AGS”) is first obtained.
45. Notably, there has been a debate on the constitutionality or otherwise of the provision of section 84 of the SCPA. While a school of thought believes that the provision of section 84 of the SCPA is a violation of the provision of section 287(3)⁶² of the 1999 Constitution of the Federal Republic of Nigeria (“1999 CFRN”), the other school of thought holds the contrary belief.
46. The school of thought which holds the belief that section 84 of the SCPA is unconstitutional argues that to subject the decision of a court of law to the whims and caprices of a political appointee like the Attorney-General would amount to promoting the 'moral code of tyrants'⁶³. The case of **Purification**

⁵⁸ See generally the provisions of Sections 422, 423, 424 and 425 of CAMA.

⁵⁹ It should be noted that the revocation of a bank's licence does not mark the demise of the juristic personality or the legal entity of the bank

⁶⁰ See section 1(2) of the NDIC Act 2006

⁶¹ Cap S6, LFN 2004

⁶² Section 287(3) of the 1999 CFRN also provides that “The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively.”

⁶³ See *Yibakuo David Amakiri: Consent for Execution of Money Judgments against the Government: Does the Law Expect the Debtor's Servant to Give his Master Away?* Available online at <<http://www.nigerianlawtoday.com/2014/03/consent-for-execution-of-money.html>>

Techniques (Nig.) Ltd. v. Attorney General of Lagos State⁶⁴ lends credence to this school of thought. In that case, a Nigerian registered company had obtained judgment against the Lagos State Government. The company sought and obtained a Garnishee order nisi against several banks as part of its efforts to enforce the judgment. The Lagos State Government sought to resist the Garnishee order on the grounds that monies held by a State Government/judgment debtor in a bank is in the custody or under the control of a public officer and therefore subject to the provisions of Section 84 of the SCPA. The Court of Appeal (Lagos Division) rejected the argument on grounds that such monies in the hands of a banker are not in the custody or under the control of the judgment debtor customer. Such monies remain the property in the custody and control of the banker and payable to the judgment debtor.

47. However, the other school of thought argues that the provision of section 84 of the SCPA is not in any way inconsistent with the provisions of the 1999 CFRN. The Court of Appeal (Abuja Division) in the case of **Christopher Onjewu v Kogi State Ministry of Commerce & Industry**⁶⁵ deliberated exhaustively on the question of the validity of Section 84 of the SCPA vis-à-vis the 1999 CFRN. The Court decided inter-alia that there was nothing unconstitutional in the requirement that the consent of an Attorney-General is required before a litigant in a case involving the state, can reap the fruit of victory. This decision was followed by the Court of Appeal in Government of **Akwa-Ibom State v. Powercom Nig. Ltd**⁶⁶. Recently, the Court of Appeal (Lagos Division) affirmed the validity of Section 84 of the SCPA in **CBN v. Hydro Air Pty Ltd**⁶⁷.
48. At this juncture, it is pertinent to draw a distinction between a situation whereby the money sought to be attached by garnishee proceedings belongs to the NDIC and a situation whereby the money sought to be attached is an asset of the closed bank or a customer (depositor) of the closed bank. With respect to the first case, the consent of the AGF has to be sought and obtained before the garnishee proceedings can be instituted by virtue of section 84 of the SCPA.

⁶⁴ *(Supra)*

⁶⁵ [2003] 10 NWLR (Pt. 827) 41

⁶⁶ (2004) 6 NWLR (pt. 868) 202

⁶⁷ (2014) LPELR-22587 (CA)

Otherwise, the action will not be competent. On the other hand, where the money sought to be attached by garnishee proceedings belongs to a closed bank or a customer of a closed bank, garnishee proceedings cannot be instituted at all because of the provision of section 414 of CAMA. Where the action is instituted, it will be void. In effect, while the money standing to the credit of the NDIC in a commercial bank or the CBN can be attached in satisfaction of a judgment debt upon obtaining the prior consent of the AGF, the money standing to the credit of a closed bank or to a depositor of a closed bank, but under the management of the NDIC is prohibited from being attached by virtue of Section 414 of CAMA.

GARNISHEE PROCEEDINGS AGAINST A BRIDGE BANK

49. Another angle is to consider the possibility of instituting garnishee proceedings against a bridge bank. Under the Nigerian bank insolvency regime, the law provides for the transfer of the business of the banking institution to a bridge⁶⁸ bank to administer the deposits and liabilities of the failed bank. The primary objective of a bridge bank, being in itself a temporary bank, is to facilitate the sale of the business to one or more purchasers.
50. Section 39 (1) of the NDIC Act empowers the NDIC to organize and incorporate bridge banks in consultation with the CBN to assume such deposits and liabilities of the failing bank. The bridge bank shall purchase the assets of the failing bank and perform other functions as stipulated by the Corporation. The operation of the bridge bank shall either terminate after 2 years from the date it was issued a banking license by the CBN or at the end of any extension period granted by the Corporation.
51. It is important to note that the process of transferring the assets and liabilities of the failing bank to a bridge bank is by Purchase and Assumption Agreement (P&A). The assuming bank purchases the assets and assumes the liabilities of the failing bank as defined under the P&A. The Corporation then continues with

⁶⁸ *It is pertinent to note that a bridge bank is distinct and separate from a closed bank as decided in the unreported case of Babatunde Ososanya v Mainstreet Bank Limited- Suit No. NICN/LA/66/2012. See also the unreported judgment of the National Industrial Court in Bamidele Oyekanmi v Mainstreet Bank Limited- Suit No. LA/65/2012*

winding up the affairs of the failed bank and its liquidation by realizing the assets of the failed bank that were not acquired by the assuming bank for payment of liabilities of the failed bank that were not assumed by the assuming bank.

52. The question then becomes can the judgment creditor commence garnishee proceedings against the bridge bank in the stead of the failed bank? It is pertinent to note that the bridge bank and the failed bank are two distinct entities⁶⁹ and as such it does not automatically follow that upon transfer of the assets and liabilities of the failed bank to the bridge bank, the judgment creditor can commence garnishee proceedings to recover funds belonging to the judgment debtor with the failed bank cum bridge bank.
53. It would appear that to resolve the question, recourse must be made to the P&A effecting the transfer of the assets and liabilities to the bridge bank. The P&A would, *inter alia*, contain the particular assets and liabilities to be transferred and the terms regulating the transfer. If it is the case that deposits form part of the assets transferred to the bridge bank, then the judgment creditor may be well within rights to seek to recover the funds of the judgment debtor which would now be in the custody of the bridge bank.

DEFENCES AVAILABLE TO NDIC IN GARNISHEE PROCEEDINGS

54. There are certain defences that may avail the NDIC in any garnishee proceedings involving a closed bank or the NDIC. These include:

54.1 *Disputing the liability of garnishee*

The NDIC as the garnishee may appear in court and dispute its liability in respect of the money sought to be attached by garnishee proceedings. The position of the law is that where a garnishee disputes his liability to pay the debt, he does not have to make any payment into court, but to appear in court on the return date and dispute his liability and the court may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in any

⁶⁹ See the case of *Babatunde Ososanya v Mainstreet Bank Limited (supra)*

proceedings may be tried or determined or may refer the matter to a referee⁷⁰.

54.2 *Money belonging to a third party*

The NDIC may also contend that the debt sought to be attached belongs to some third person or that a third person has a lien or charge on it. In this case, the court may order such third person to appear and state the nature and particulars of his claim upon such debt⁷¹. However, if the third party does not appear, the court on proof of service of the order nisi may proceed to make an order as if such third person has appeared. Where the third party appears and after hearing his allegation and those of any other person who the court may order to appear, the court may order execution to issue to levy the amount due from the garnishee, or any issue or question to be tried and determined, and may bar the claim of such third person or may make such other order, upon such terms with respect to any lien or charge or otherwise as the court shall think just⁷².

54.3 *Failure to obtain the consent of the AGF*

Where the money sought to be attached by the garnishee proceedings is in the custody of the NDIC (that is, the judgment was obtained against NDIC), the judgment debtor must obtain the consent of the AGF before instituting the garnishee proceedings. This is in line with the provision of section 84 of the SCPA. Failure to obtain the consent renders the proceedings incompetent⁷³. This defence will however, not avail the NDIC when it is performing its statutory duty as a liquidator of a closed bank.

54.4 However, judgment creditor on the basis of Section 20 of the NDIC Act may only be entitled to a share in the sum of ₦200,000.00, being the insured sum by NDIC after having due regard to order of priority and ranking. Section 20 NDIC Act provides for immediate payment of the

⁷⁰ See section 87 of the SCPA

⁷¹ See section 88 of the SCPA

⁷² See sections 89 and 90 of the SCPA

⁷³ See *CBN v. Hydro Air Pty Ltd (2014) LPELR-22587 (CA)*

sum of ₦200,000.00 upon failure of a bank, whilst section 41(3)⁷⁴ of the NDIC Act provides that the Corporation liquidation expenses enjoy priority over all other liabilities including over legal mortgage or crystallized debenture.

CONCLUSION

55. This paper has succeeded in x-raying garnishee proceedings as it relates to closed banks and NDIC. The cogent, compelling and irresistible inference deducible from the foregoing is that garnishee proceedings is not an efficacious way of enforcing money judgment against closed banks and NDIC. This is stemmed from the fact that NDIC as the statutory liquidator of closed banks is only obliged to pay a maximum of ₦200,000.00 to any person who has an account with any closed bank. Furthermore, the requirement of AGF's consent before attaching the money in custody of the NDIC also makes garnishee proceedings less efficacious against the NDIC as the AGF may not give his consent at the long run.
56. Also, the combined effect of the provisions of Sections 414 and 417 of CAMA poses a legal challenge to the commencement of garnishee proceedings against a closed bank once a provisional liquidator has been appointed to manage its affairs. This is because the garnishee proceedings will be void given the provision of section 414 of CAMA.
57. It is, therefore, advisable for a judgment creditor to use other means of enforcing the judgment, such as the writ of *fifa*.⁷⁵

Thank you for listening.

⁷⁴ The section provides in case of liquidation that the corporation shall pay itself first liquidation expenses and then pay depositors and other creditors net amount available for distribution. The provision is however in direct conflict with Ss.54 and 56 of BOFIA which give priority to local deposits over all other claims. By S56 BOFIA, it is submitted that BOFIA prevails.

⁷⁵ This is a judgment enforcement mechanism wherein the judgment creditor seeks to recover the amount ordered to be paid by the seizure and sale of the judgment debtor's properties and chattels. From the proceeds of sale, the judgment debt is satisfied. The order is usually directed to the sheriff requiring him to seize and sell enough of the judgment debtor's goods to satisfy the judgment debt.