

CHASING THE GUARANTOR: USING BANKRUPTCY PROCEEDINGS AGAINST DIRECTORS WHO SIGNED PERSONAL GUARANTEES

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A. INTRODUCTION

When a corporate borrower defaults and its accounts are empty, the directors who personally guaranteed the facility are often the creditor's best prospect of recovery. Many corporate debt files contain a document that changes the complexion of the recovery exercise - **a personal guarantee executed by the company's directors or promoters**.

The company may be insolvent or judgment-proof, but the individuals behind it often are not. The critical question therefore is not simply whether personal liability can be established, but how it can be translated into effective, enforceable recovery.

In our view, the Bankruptcy Act[1] ("**the Act**"), offers one of the most effective and least used answers. It cannot be used against the company itself[2], but it can be used against the directors who guaranteed its debts, before the Federal High Court, which has exclusive jurisdiction[3].

This article explains how the Bankruptcy Act can be used to enforce those guarantees, where petitions tend to go wrong, and what lenders should put in place before default.

B. WHY THE GUARANTOR CAN BE PURSUED DIRECTLY

A guarantee is a separate contract between the guarantor and the creditor. In **CHAMI v. UBA PLC**[4], the Supreme Court held that it "*can be enforced against the guarantor directly or independently without the necessity of joining the principal debtor in the proceedings to enforce same*".

Once the borrower defaults, the creditor need not exhaust its remedies against the borrower first and, unless the guarantee says otherwise, need not make a prior demand on the borrower or notify the guarantor. Nor can the guarantor escape by letter. In **FBN PLC v. SONGONUGA**[5] ,the Court held that "*A guarantor cannot determine his liability under a guarantee agreement by a mere writing of a letter without more*"

Two qualifications apply. First, liability goes no further than the wording of the guarantee and secondly under an on-demand guarantee the cause of action accrues only when a demand is made and not met.

[1] Cap. B2, Laws of the Federation of Nigeria 2004 as amended by the Bankruptcy (Amendment) Act No. 109 of 1992
[2] section 108
[3] section 251(1)(j) of the 1999 Constitution
[4] **(2010) LPELR-841(SC) at P. 33, Paras. B-D**
[5] **(2005) LPELR-7495(CA) at Pp. 57-58, Paras. D-D,**

C. WHAT BANKRUPTCY GIVES A CREDITOR THAT EXECUTION DOES NOT

A judgment is worth only what can be found and attached and execution achieves little against property moved into a spouse's name, a holding company or an account abroad. Bankruptcy is designed for that problem.

First, it protects assets early. Once a petition is presented, the court may, where necessary, appoint an interim receiver, stay other proceedings against the debtor and appoint a special manager.[6] In Access Bank Plc's petition against Dr. A.B.C. Orjiako[7], the court granted ex parte orders restraining dealings with his funds in Nigerian banks and according to disclosures by the companies concerned, with his shares in companies in which he had invested. Where there is probable cause to believe that a debtor has absconded or is about to, the court may also order his arrest and the seizure of his books, money and goods once a bankruptcy notice has been issued and served.[8]

Second, it compels disclosure. After a receiving order, the debtor must submit to the Official Receiver a sworn statement of affairs covering his assets at home and abroad, including property held under an alias, by his wife or children, or by anyone in trust for him.[9] He is then examined on oath in open court, where creditors who have proved may question him and no lawyer may appear for him.[10] The court can summon anyone suspected of holding his property or owing him money[11], and a bank that learns that a depositor is an undischarged bankrupt must not pay out without the instructions of the Official Receiver and trustee.[12] Preferences given by an insolvent debtor in the three months before the petition are void against the trustee[13], and part of the bankrupt's income can be ordered paid to the trustee for his creditors.[14]

For many directors, though, the personal consequences matter most. An undischarged bankrupt cannot stand for President, Governor, the National Assembly or a State House of Assembly.[15] Once adjudged bankrupt, he is also disqualified from local councils, from the boards of statutory bodies and companies, from acting as a justice of the peace or trustee, and from practising a regulated profession other than as an employee[16]. Offices he holds become vacant[17], and obtaining credit of N100 or more without disclosing his status is an offence.[18]

There is no quick way out. Discharge is automatic only after five years[19] ;an earlier discharge must be applied for and may be refused, suspended or made conditional.[20] Discharge never releases fraud debts or co-guarantors[21], and the disqualifications lift early only on annulment or on a discharge certified as caused by misfortune rather than misconduct.[22] All of this gives a well-founded petition real weight in

[6] sections 11 to 13.
[7] (FHC/L/BK/08/2023)
[8] section 25
[9] Section 16
[10] Section 17
[11] Section 27
[12] Section 50(2)
[13] Section 46
[14] Section 54
[15] Sections 66(1)(e) and 107(1)(e) of the Constitution, among others
[16] Section 126(1)
[17] Section 127
[18] Section 131(a)
[19] Section 31
[20] Section 28
[21] Section 29
[22] Section 126(2)

settlement talks, although the court will not let a petition be used to force payment of a genuinely disputed sum.

D. THE PROCEDURE AT A GLANCE

S/N	Stage	What happens	Key authority
1.	**Demand**	Serve a written demand on the borrower and each guarantor, as the guarantee requires.	Terms of the guarantee
2.	**Judgment**	Sue the guarantors personally, with or without the company, using summary procedures where possible.	**CHAMI v. UBA PLC**; rules of court
3.	**Bankruptcy notice**	Issued by the Registrar on request. The debtor has 14 days from service to pay, secure or compound for the debt.	Sections 1(a) and 2
4.	**Petition**	Present it within three months of the act of bankruptcy, verified by affidavit.	Sections 4 and 7
5.	**Interim protection**	Interim receiver, stay of other proceedings, special manager and preservative orders; arrest if flight is feared.	Sections 11 to 13 and 25
6.	**Receiving order**	The Official Receiver takes over the debtor's property. Creditors need leave to sue him, though secured creditors may still realise their security.	Sections 7(2), 10 and 72
7.	**Examination and adjudication**	Statement of affairs, creditors' meeting and public examination, then a composition or adjudication and distribution.	Sections 15 to 21 and 64

Sue the guarantors, not just the company: a judgment against the company alone is useless for bankruptcy purposes. First Bank's 2020 petition against two directors of an engineering company, for example, rested on a 2017 Federal High Court judgment for about N289.9 million obtained on the undefended list against the company and both guarantor-directors. Any final judgment or order will do, since the Act treats anyone entitled to enforce one as a judgment creditor.[23] On its wording, that includes State High Court judgments and registered foreign judgments, such as the English judgment behind the Access Bank petition.

Watch the clock: The debtor avoids an act of bankruptcy only by complying with the notice within 14 days of service, or by showing a counterclaim, set-off or cross-demand at least equal to the judgment debt that he could not have raised at trial, and execution must not have been stayed.[24] The petition must

[23] Section 1(a)

then be presented within three months.[25] The debt must be liquidated and not less than N2,000, and the debtor must be ordinarily resident in Nigeria or have lived or done business here within the past year.[26]

Mind your security: A lender holding a mortgage over the guarantor's own property must either offer to give it up for the benefit of all creditors or value it and petition only for the balance.[27] Security over the company's assets does not count, because a "secured creditor" under the Act is one with security over the debtor's own property.[28]

E. PETITIONING WITHOUT A JUDGMENT

The 1992 amendment added acts of bankruptcy that need no judgment,[29] such as suspending payment of debts, fraudulent conveyances and leaving Nigeria to defeat creditors. The most interesting for lenders is paragraph (e) which says "**a debtor commits an act of bankruptcy if, under a credit agreement, the creditor becomes entitled to petition**". Read literally, the provision permits a lender and borrower to agree in advance on the circumstances in which a petition may be presented. To our knowledge, however, the provision has not been tested at appellate level, and whether a guarantee falls within the statutory meaning of a "credit agreement" remains arguable.

The risk of going without a judgment is real. If the debt is disputed, the court may stay the petition while liability is tried.[30] In 2021, the Federal High Court in Lagos (Oweibo J) dismissed, with costs, Staco Insurance Plc's petition against its former managing director over about N576 million in alleged unauthorised loans and payments, because there was no judgment and the court was not satisfied that a debt existed. Where the debt is genuinely disputed, sue first.

F. WHERE PETITIONS FAIL

Beyond missed deadlines and disputed debts, a petition may be stayed or dismissed if an appeal is pending,[31] if the debtor proves he can pay, or if the estate will not yield a 15 per cent dividend to unsecured creditors.[32] A variation of the facility, or a release of security, without the guarantor's consent may discharge him altogether. Once presented, a petition cannot be withdrawn without leave,[33] so settlement terms should provide for it, and a creditor cannot keep the benefit of an execution not completed before the receiving order.[34]

G. A CHECKLIST FOR LENDERS

- Take guarantees in writing, signed in the guarantor's personal capacity, with principal-debtor and continuing-guarantee wording.

[25] Section 4(1)(c)
[26] section 4(1)
[27] Section 4(2)
[28] Section 142
[29] Section 1(d) to (i)
[30] Section 7(5)
[31] Section 7(4)
[32] Section 7(3)
[33] Section 7(7)
[34] Section 43

- Include a waiver of any right to make the lender pursue the borrower or the security first, and advance consent to variations and restructurings.
- Make liability payable on demand, with the lender's certificate of the amount due conclusive save for manifest error.
- Consider defining when the lender may present a bankruptcy petition, with section 1(e) in mind.
- Keep a current, signed statement of the guarantor's assets and addresses, with a duty to notify any move abroad.
- On default, serve demands promptly, sue the guarantors personally, diary every deadline, trace assets before petitioning, and coordinate with any receivership, winding-up or AMCON process.

H. A WORD TO GUARANTORS

If you have guaranteed a facility that is in difficulty, act before judgment. A variation made without your written consent may have discharged you, so check, and engage the lender early. If a bankruptcy notice is served, any counterclaim, set-off or application for a stay of execution must be pursued within the 14 days. After a receiving order, a court-approved composition or scheme backed by a majority in number and two-thirds in value of the proving creditors is still possible and far better than adjudication,[35] and a pending appeal suspends the constitutional disqualification.[36]

I. CONCLUSION

The Act is nearly half a century old, and a bill introduced in the House of Representatives in 2025 would replace it with a Business Insolvency and Restructuring Act ("**BIRA**"). Until then it remains the law, and for a lender holding a personal guarantee from a solvent director it is a tool worth using. Much of the groundwork is done, or missed, when the guarantee is first taken.

[35] Section 18
[36] Sections 66(2) and 107(2) of the Constitution