AN EXAMINATION OF THE LEGAL IMPLICATION OF INDIVIDUAL AND CORPORATE INSOLVENCY IN UGANDA: AN ANALYSIS OF THE LAW AND PRACTICE IN UGANDA.

BY

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DECLARATION

"I declare that this thesis is the work of **BABIRYE JUDITH** alone, except where due acknowledgement is made in the text. It does not include materials for which any other University degree or diploma has been awarded. I therefore bear the absolute responsibility for the content, errors, defect and any omissions therein".

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APPROVAL BY SUPERVISOR

"I certify that I have supervised and read this study and that in my opinion , it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as dissertation in partial fulfillment for the award of the Degree of Bachelor of Laws of Kampala International University".

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Date: 24/09/2018

DEDICATION

I dedicate this piece of work firstly to my sponsors and the entire Maria's Care community I will remain indebted to you because you have really made my life meaningful.

Secondly I dedicate the same to my parents the late Bossa Emmanuel and late Nankwanga Lukia who always encouraged and believed that I could make it in life, my siblings Gertrude, Jane, George and Jovan and the entire family at large whose love, extreme tolerance, support and encouragement has brought me this far. Lastly to all orphans who are struggling to become someone in life under tough and challenging situations. I encourage you to be strong and believe that with your hard work and faith you will make it in life as I have.

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LIST OF ABBREVIATIONS

&	-	And
(U)	-	Uganda.
ALLER	-	All England Law Reports
Anor	-	Another
EA	-	East Africa Law Reports
Etc.	-	And Many Others
HCB	-	High Court Bulletin
KALR	-	Kampala Law Reports
Ltd	-	Limited.
MDI	-	Microfinance Deposit Taking Institute.
No.	-	Number
NSSF	-	National Social Security Fund
Reg	-	Regulation
S	-	Section
S.I	-	Statutory Instrument
S/he	-	she or he
UCB	-	Uganda Commercial Bank.
UCB	-	Uganda Commercial Bank.
ULR	-	Uganda Law Reports
URA	-	Uganda Revenue Authority
URSB	-	Uganda Registration Services Bureau
V	-	Versus.

ABSTRACT

The study is sought to an examination of the legal implication of individual and corporate insolvency in Uganda an analysis of the law and practice in Uganda. With the main purpose to examine the effects of insolvency and its cross cutting issues in the other legislations; and the specific objectives to (a) To identify the effects of insolvency on Companies, (b) To identify the effect of insolvency on individuals, (c) To identify legislations and their provisions relating to insolvency and what effects do they have on either an individual or on the company declared bankrupt or insolvent, (d) To examine the consequences of both Bankruptcy and winding up of individuals and companies respectively, To examine the procedures necessary for bankruptcy proceedings.

The financial challenges today face both individuals and companies and when a person cannot pay his debts as and when they fall due, this is what is referred to as insolvency. Insolvency Law provides mechanisms for both the reorganization of a debtor and the distribution of his/her assets for collective satisfaction of the creditors' claims. The legal regime in Uganda is enriched with a lot of guidance on how Insolvency proceedings can be instituted from the beginning to the end.

This research discusses the Law regulating Insolvency practice in Uganda, the implications/Consequences of insolvency, and some relevant principles necessary for instituting Insolvency proceedings. It goes in detail to discuss the two major divisions of insolvency known as bankruptcy and winding up for both Individuals and companies respectively. The major areas of weakness and improvements needed for this branch of Law are fully discussed to give the reader deeper knowledge in this branch of the law both for practice and research.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the study

This chapter provides the background to the study, statement of the problem, objectives of the study, research question, Scope of study, Significance of the study, Research Methodology, Qualitative data collection, Literature review and Chapterization.

Insolvency means one's inability to pay his/her debts or the lack of means to pay debts[1]. According to ***Downes and Jordan***[2] define insolvency as the state of being unable to pay the money owed, by a person or company, on time. There are two forms of insolvency, that is to say, cash-flow insolvency and balance-sheet insolvency.

Cash-flow insolvency is when an individual or a company has enough assets to pay what is owed to the creditors, but does not have the appropriate form of payment. For example, a person may own a chunk of land, but not have enough money to pay a debt when it falls due. It stated that this type of insolvency can be resolved by negotiation including but not limited to the fact that the creditor may wait until the land is sold and the debtor agrees to pay a surcharge[3].

On the other hand, balance-sheet insolvency, also referred to as technical insolvency, is when a person or company does not have enough assets to pay

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[1]Black's Law Dictionary Abridged 8th Ed at page 812 .
[2]Downes, John, and Jordan Elliot Goodman (2003). Dictionary of Finance and Investment Terms. Hauppauge, NY: Bawens Educational Series, 2003. Print.

[3] Joseph Swanson and Peter Marshall (2008), HoulihanLokey and Lyndon Norley, Kirkland & Ellis International LLP.A Practitioner's Guide to Corporate Restructuring. City & Financial Publishing, 1st edition ISBN 978-1-905121-31-1.

all of their debts. In this case the person or company might file for bankruptcy. However, once a loss is accepted by all parties, negotiation is often able to resolve the situation without bankruptcy. A company that is balance-sheet insolvent may not be allowed by law to pay its next bills unless the outcome of the activity being paid for directly benefits the creditors of such company.

A company which is insolvent may be put into liquidation (wound up). The directors and shareholders can instigate the liquidation process without court involvement by a shareholder resolution and the appointment of a licensed Insolvency Practitioner as liquidator. However, the liquidation will not be effective legally without the concerning of a meeting of creditors who have the opportunity to appoint a liquidator of their own choice. This process is known as creditors' voluntary liquidation (CVL), the liquidator in this case responsible to the creditors of the company insolvent companies are more wound up by order of the court[4].

Alternatively, a creditor can petition the court for bankruptcy order which, if granted, declares the affected person bankrupt. The liquidator releases the assets of the company and distributes funds released to creditors according to their priorities, after the deduction of costs met during the liquidation process. In the case of a sole proprietorship business, the insolvency options include individual voluntary arrangements (IVA) and bankruptcy[5].

According to ***Black's Law Dictionary***, bankrupt of company is the state or condition of company bankrupt, amenability to the bankrupts laws, the condition of company has committed an act of bankruptcy, and is liable to be proceeded against by his voluntary application, to take the benefit of the bankrupt laws. The term is used in a loose sense as synonymous with insolvency. Insolvency is nightmare to all companies in the world but thoughts

[4]Re Kistson& Co Ltd (1946) I ALL ER 435.

[5]Hompson, DAVID "A Critique of deepening insolvency 'anew Bankruptcy tort theory" Stanford Journey of Law Business & Finance 12(2):536. RETRIEVED 201002-05 the year of 2005.

unfortunate when its proved that company its unable to pay its debts then it has few options thus finding itself winding up where by winding up involves many things it's a process but the ***Insolvency Act 2011*** and the regulations made there under have laid all the procedures to be followed so that every creditor shall be ably compensated.

In all business sectors, both individuals and companies operate in a constantly changing environment, with changing technology, changing competitors, changing customer demand. Many times, failure to manage change results in underperformance and increasing financial pressure. Adverse currency movements, credit constraints, the possibility of strategic errors any or all of these can plunge a company into serious financial distress.

In one of the ways safeguard such occurrences; the Government of Uganda through the Legislative Organ enacted the Uganda ***Insolvency Act of 2011*** which was assented to on 8th August 2011 together with the Insolvency Regulations which provides in detail issues relating to insolvency in Uganda. This Act amended the Bankruptcy Act which was provided for matters relating to Bankruptcy before 2011. It further consolidates all laws relating to insolvency. The requirements of the Insolvency Act are implemented by the "Official Receiver", who is also the regulator of insolvency practitioners. The "Official Receiver" is presently the Registrar General.

An Insolvency Practitioner is defined to mean a person who acts as: "a receiver, a provisional administrator, an administrator, a provisional liquidator, a liquidator, a proposed supervisor of a voluntary arrangement or a trustee in bankruptcy"[6].

[6]Section 203 of the Insolvency Act, of 2011.

1.2 Statement of the problem

In Uganda today Individuals and companies face grave financial challenges to the extent that their efforts to discharge their debts achieve no success due to their economic downturn. This in the end makes them unable to pay their debts and the only way out is either by themselves or their creditors petitioning for Bankruptcy or Liquidation of the said companies which comes with great legal implications as highlighted in a number of legislations to which this research highlights.

In Uganda for example, when Wava Broadcasting Services (WBS) became insolvent and was later on put under receivership by Uganda Revenue Authority (URA), there was widespread outrage among their former employees and creditors for nonpayment of monies owed to their creditors. Non-payment of workers and other service providers by Wava Broadcasting Services forced Uganda Revenue Authority to take over the said company and since the April 2016 to date, its business transactions remained a myth in the eyes of Ugandans who had interests in watching its programs[7].

As a result of above, WBS can no longer be held eligible for filing income tax returns in Uganda though the status of the company's former employees and suppliers is not clear. For example, it is not certain whether URA obtained their monies which were due and what happened to the properties owned by WBS.

In order to understand the above implications, this study finds it important to examine the effects of insolvency and its cross cutting issues in other legislations in Uganda.

[7]www.monitor.co.ug accessed on the 05th day of july 2018. Also see Monitor News Paper publication of 11th April 2016 at the front page.

1.3 Research question

During the study, the questions will be used to guide.

a. What is the effect of insolvency on companies?

b. What is the effect of insolvency on individuals?

c. What are the other legislations and their provisions which have a bearing on insolvency?

d. What are the consequences of bankruptcy or of winding up on an individual or company respectively?

e. What are the relevant procedures one may require to go through when petitioning for bankruptcy?

1.4 Objectives of the study

1.4.1 General objective

To examine the effects of insolvency and its cross cutting issues in the other legislations

1.4.2 Specific objectives

a. To identify the effects of insolvency on Companies.
b. To identify the effect of insolvency on individuals.
c. To identify legislations and their provisions relating to insolvency and what effects do they have on either an individual or on the company declared bankrupt or insolvent.
d. To examine the consequences of both Bankruptcy and winding up of individuals and companies respectively.
e. To examine the procedures necessary for bankruptcy proceedings

1.5 Scope of study

1.5.1 Geographical scope

This study will be conducted in Uganda.

1.5.2 Field scope

This study will base on effects of bankruptcy and liquidation and the procedures necessary under the Insolvency Act in Uganda.

1.6 Significance of the study

This study has two key roles that it will play;

The research generated during will be an important source of literature for future researchers studying similar subject. It will therefore create a basis for comparison during results analyses and the gaps left by this study will give birth to future studies. It will present the diverse effects of bankruptcy and how other legislation across different areas in the contemporary business environment relates to the concept of Insolvency.

The research will show how insolvency proceedings are commenced from the beginning to the end and therefore relevant for any practitioner.

The findings will show the gaps that are in the law regulating insolvency practice in Uganda.

1.7 Research Methodology

This study will be descriptive in nature as it will be based on desk research. This study will involve review of documents on insolvency in Uganda which involves review of relevant research reports, statutes, cases journal articles and literature, thus analyzing whether the key causes are directly linked to the other legislations. The study will involve a comprehensive analysis of exiting literature on the subject. The documents will be reviewed to get a clear understanding of rate of insolvency/bankruptcy in Uganda.

1.8 Literature Review

According to the **Kiryabwire J** as he then was, analyzed that the enactment of the insolvency act 2011 was a practice of the commercial court to be very conservative with allowing liquidations or bankruptcy petition to succeed. He further enumerates that the commercial court gave preferences to the use of Court Annexed Process (CAP), such as Mediation, Arbitration and other forms of ADR over litigation in insolvency and secured transaction proceedings[8].

The impact of regulation on solvency is a complex matter. This is not only due to the fact that a variety of market players and jurisdictions are involved but it is also because the inhibiting effect of regulation is often difficult to see and to quantify[9].

Solvency and liquidity are both terms that refer to an enterprise's state of financial health, but with some notable differences. Solvency refers to an enterprises capacity to meet its long-term financial commitments. Liquidity refers to an enterprise's ability to pay short-term obligations; the term also refers to its capability to sell assets quickly to raise cash[10].

According to **D.J BAKIBINGA**[11] in his book, the law on winding up or liquidation of accompany is an extension of the law of bankruptcy. However special rules which are laid down in the Companies Act[12], govern the winding up of companies. Apart from the end of the company being brought about by the registrar striking it off the Registrar of Companies Registry consequent upon its becoming defunct, or its being reorganized or amalgamated, the usual way of terminating the life of the company is through winding up. Winding up

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[8]A paper presented at the Uganda law society continuing legal education training in understanding insolvency law and practice held at Golf Course Hotel – Kampala Uganda on the 31st day of January 2012 entitled CORPORATE RESCUE VIS-A- VIS LIQUIDATION by Mr. Faisal Mukasa of F. Mukasa & Co. Advocates.

[9]Ibid.

[10]Ibid.

[11]Company law in Uganda by D.J Bakibinga Published in2013.

[12] Companies Act of 2012.

may take three forms (1) by the High court (2) voluntarily by either the members or creditors of the company (3) subject to court supervision[13].

The principal focus of modern insolvency legislation and business debt restructuring practices no longer rest on the liquidation and elimination of insolvent entities but on the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. This is known as business turnaround or business recovery[14].

Martin Frey A in his book[15] discussed that bankruptcy helps the creditors recover their losses. To him the threat of imprisonment or exile stimulated some debt payment. Under **Roman law**, debtors were obligated to pay their debts and if the debtor's estates were sold by their creditors, the debtors received no discharge from any unpaid balance. That prior to the late 1700s failure to pay debts was viewed as an immoral act and debtor often faced imprisonment.

This book discusses that the bankruptcy process influences many people's lives. In addition to the debtors and creditors, the bankruptcy process annually affects the employment of thousands of people, involves billions of dollars in assets, and, to a greater extent concerns the public interest. The bankruptcy process can be characterized at the stage upon which a large cast of characters play out their roles. The bankruptcy process naturally focuses on the debtor.

According to **Julian Franks and Gyongyi Loranth in their journal**[16] it is explained how the allocation of control rights in bankruptcy influences outcomes. Using Hungarian data **Julian** and **Loranth** finds that the large majority of bankrupt firms in samples are maintained as going concerns

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[13]Section 57 of the Insolvency Act 2011.

[14]Supra [8].

[15]Introduction to bankruptcy law at www.amazon.com accessed on the 1st Arpril 2018 at 12:30 pm.

[16]The review of finance.A study costs and the Allocation of control.

despite the fact that these firms generate large operating losses and how recovery rates for pre-bankruptcy creditors are handled. The trace of bias to the allocation of control rights between secured and unsecured creditors and the compensation scheme of the agent managing the bankruptcy process. Findings shed light on very important bankruptcy design question; how particular provisions of the size of the pie available to pre-bankruptcy creditors.

1.9 Chapterisation.

This research is made up of five chapters. Chapter one highlights the Background to the study, Statement of the problem, Objectives of the study, Research question, Scope of study, Significance of the study, Research Methodology, and Literature review. Chapter two discusses the laws and other relevant principles governing Insolvency, Chapter three focuses on individual insolvency, its consequences and cross-cutting issues in the other legislations, Chapter four discusses liquidation/winding up of *companies, its consequences and the cross cutting issues in other legislations* and lastly Chapter five provides for Findings, recommendations and conclusion.

CHAPTER TWO

THE LAWS AND THE RELEVANT PRINCIPLES GOVERNING INSOLVENCY

2.1. Introduction

The present laws governing Insolvency in Uganda are widely regulated and adequately equipped with strengths and benefits to which anyone who wishes to institute in Insolvency proceedings can utilize. They provide a quick response to the challenges of modern business both personal and corporate. It is pertinent to note that the principals of in Insolvency law are contained in the in Insolvency Act, and the regulations made there under. These two are almost a replica of the English law that was adopted from Britain by virtue of s.15 of the 1902 order in council and they give enough steps relating to how both in Insolvency and bankruptcy proceedings are conducted.

Both the Insolvency Act and the Insolvency Regulations are said to have replaced the Bankruptcy Act[17] which had never been changed since Uganda acquired her independence and therefore the current laws came in to fit the commercial circumstances prevailing in Uganda which the old legislations could never do. More so, with the trend of modern business and trade, our insolvency law has been rendered obsolete.

It should be noted that the purpose of in Insolvency law is to provide a fair and easy process of getting individuals and companies in financial hurdles settle their financial obligations without necessarily winding them up. This way, they will be enabled to continue participating and contributing to economic development.

Fortunately, the current law provides an easy procedure, and easy mechanisms for administering Insolvency firms and bankrupt's estates which limit expenditures which could arise as a result of protracted litigation and may be

[17] Chapter 67 (Repealed).

exacerbate their financial problems and ultimately, leading to the wounding up of those companies which may have negative consequences on the economy such as unemployment; the government will lose revenue thereby causing the slowdown of the entire economy. This chapter therefore provides a detailed discussion of how Insolvency and Bankruptcy is regulated in Uganda.

2.2. The Insolvency Act of 2011 and the Insolvency Regulations Of 2013

These are the cardinal laws as far as Insolvency regulation in Uganda is concerned. They provide for matters such as receivership, administration, liquidation, arrangements, bankruptcy, and regulation of Insolvency practitioners, cross boarder Insolvency among others and which concepts have a great bearing on either Liquidation or bankruptcy proceedings.

The ***Insolvency Act of Uganda*** like the rest of East Africa is a replica of the Insolvency law of England and Wales. The Inso lvency Law Bill 2009 was passed into law in 2011. In Uganda, the law and practice relating to Insolvency has since changed substantially with the enactment of a single Insolvency code, which governs both bankruptcy and corporate Insolvency.

According to **S. 263 of the Act**, which is the transition provision, any case relating to receivership, liquidation or bankruptcy which was pending before any court prior coming into force of this Act that case continued to be heard by that court until completion. This provision gave courts a lee way to try all suits which had already been instituted before the coming into force of the Act.

2.3. Regulation of Jurisdiction of Insolvency Matters

Jurisdiction is the authority given by law to a court to try cases and rule on legal matters within a particular geographic area and or over certain types of legal cases. The High Court has jurisdiction over all matters concerning companies under the Act and has jurisdiction in relation to cross boarder insolvencies[18].

The Chief Magistrate Court has jurisdiction over all Insolvency matters against individuals the subject matter of which does not exceed 50 million shillings[19].

2.4. Regulation of insolvency practitioners in Uganda.

Unlike in the past, where the law in Uganda did not regulate or license liquidators, receivers and manager who can generally be referred to as Insolvency Practitioners and did not clearly state who can act as a Receiver or Manager or even Liquidator but only provided provisions which disqualified body corporate/bankrupt from acting as Receivers or Managers[20], the current Insolvency Act clearly provides for the regulation and licensing of Insolvency Practice in Uganda.

An Insolvency practitioner by law is defined[21] to mean a person who is an official receiver who is qualified to act as an Insolvency practitioner within the meaning of ***S. 203 of the Act***.

Section 203 provides for Insolvency practitioner to include; a Receiver, Provisional liquidator, an administrator, a liquidator, a proposed supervisor of a voluntary arrangement, supervisor of a voluntary arrangement and a trustee in bankruptcy.

Section 204 (1) (a) provides the qualifications to act as Insolvency practitioners to include lawyers, accountants, charted secretary who are registered member of relevant professional body or member of any other professional body as may be prescribed by the Minister.

[18]Section 254 of the Insolvency Act of 2011.
[19]Section 254 of the Insolvency Act of 2011.
[20] Section 349 and 350 of the Companies Act.
[21]Section 2 of the Insolvency Act of 2011 laws of Uganda.

Furthermore, under ***S. 204 (1)(b) of the Act***, the Practitioner is required to have in place a professional indemnity or security for the due performance of their duties under the Act[22]. Insolvency Practitioners are now required to submit reports of their assignment to the Official Receiver and the failure to comply may result in the issuance of a prohibition order by Court. Insolvency Practitioners are required to be of high moral standing with no previous criminal Convictions or pending disciplinary investigations.

The Laws have an age restriction for Insolvency practitioner as 25 years and above. It also makes it an offence to act as an Insolvency practitioner without qualifications. This in my view is inconsistent with and in contravention of **Articles 257 (1) and Articles 34 (c)** of the 1995 constitution of the Republic of Uganda which provides for the majority age to be 18 years and above and if any concerned citizen petitions the constitutional court, it may not remain a valid section.

2.5. Commencement of Insolvency proceedings

In Uganda, the law has made it easier to commence Insolvency proceedings by making inability to pay a debt demanded by an issued statutory demand as the only premise on which bankruptcy proceedings may be commenced[23].

Section 3 (1)[24] a debtor is presumed to be unable to pay the debtors debt if.

a) The debt has failed to comply with a statutory demand.
b) The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole is in petition.
c) All or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.

[22] Insolvency Act 2011.
[23] Section 4 and5 of the Insolvency Act of 2011 laws of Uganda.
[24] Insolvency Act of 2011.

In accordance with the case of ***Re Teddy Seezi Cheye***[25] it was emphasized that in a bankruptcy petition, two essential elements must be proved and these include; Proof of the petitioner's debt; and Performance of an act of bankruptcy; now inability to pay debts.

Bankruptcy therefore can only be commenced when the debtor is unable to pay his/her debts so it is in liquidation. ***S. 3 of the Act*** begins with "**unless the contrary is proved**" meaning that this is subject to proof. The debtor can prove that he is able to pay his/her debts and therefore not Insolvency. This therefore implies that a debtor can successfully challenge any petition for bankruptcy which has been brought against him/her by proving that he is able to pay his debts.

In the case of ***SNP Panbus V Juronyshipyard Ltd***[26] court held that in a case where a solvent company does not admit the debt and is prepared to offer security to defend the claim, the court should not as a matter of principle in the exercise of jurisdiction allow a claimant to file a winding up petition against the solvent company with all the potentially disastrous consequences that may result from the filing of the petition. The creditors have to prove that the company is unable to pay its debts and it can do so by adducing evidence of actual inability to pay its debts or evidence of a declined inability to pay its debts. The court further noted that it is necessary for the creditor to have a "due" debt which the debtor has neglected to pay or to secure or compound to the reasonable satisfaction of the creditor after it has been served with a statutory notice to pay. This means that the debt therefore should not be disputed debt.

Section 3 (3) of the Act, provides that ***sub section (1)*** does not prevent proof or inability to pay debt by other means such as proving contingent or prospective debts as against the debtor. Contingent or prospective debts are

[25] [1996] 4 KALR 116.
[26](2009)2 SLR 949.

not presently due for payment but may be in the future. A prospective debt is one which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events[27].

Insolvent trading occurs when an insolvent individual or the directors of an insolvent company continue to trade or conduct business. This may amount to fraud to the extent that credit is obtained where there is no reasonable prospect of paying the debts. Under Section 199 of the Companies Act, a director who allows a company to trade while insolvent is liable to be disqualified from acting as a director for a period of three years.

Section 3 (4) provides that while determining whether debtor is unable to pay the debtors debts, contingent prospective debts may be taken into account. However the law allows a petition to be brought basing on a contingent or prospective debt only with the leave of the court and the court may give such leave without conditions, only if it is satisfied that prima facie case of inability to pay debts has been made[28].

2.6. Statutory Demand as a legal requirement for Instituting Insolvency proceedings.

Section 4 (1)[29] provides that a demand by a creditor in respect of a debt made in accordance with this section shall be a demand notice and shall constitute a statutory demand. It is a demand notice issued to the debtors to pay his debt within a specified period of time. It is called a statutory demand because it provided for by statute. In the case of **General Parts (U) Ltd V NPART**[30] this was a second appeal emanating from a suit in the High Court in which Uganda Commercial Bank sued General Parts (U) Ltd, in the suit, UCB inter alia sought

[27] Uganda Insolvency Law Hand Book of 2018 by Nelson Nerima.
[28] Section 3(5) of the Act.
[29] Insolvency Act 2011.
[30] SCCA 5/99.

a declaratory Judgment that it had properly appointed a receiver court held that the demand must be unequivocal and must state the consequences.

2.6.1. Circumstances in which a Statutory Demand can be given, Form and Content of a Statutory Demand.

A statutory demand is made in respect of a debt that is not less than the prescribed amount and in the case of a debt owed by;

i) An individual is a judgment debtor, or
ii) A company is an ascertained debt, but need not to be a judgment debt[31]. The prescribed amount is provided for under the second schedule to the Act but briefly it is to the effect that in case of an individual it is 1,000,000/= and in case of a company it is 2,000,000/=.

The statutory demand has to be in the prescribed form which Form and Content of a statutory demand are stated in Regulation 4 of the Insolvency Regulations of 2013.

Reg. 4 (1) provides that a statutory demand made by the creditor is in **form 1** in schedule 1 of the Regulations. The law requires that a statutory demand should specify[32]

(a) The amount of the debt owed and in case of a debt arising out of a judgment or order of a court, the details of the judgment or order.
(b) How the debtor may comply with the statutory demand.
(c) Where the debt is secured, the nature of the security.
(d) Whether and how the debtor may compound the debt or give a charge on property to secure the debt.

[31]Section 4(2) (a) of the Act.
[32] Regulation 4 (2) of the In Insolvency Regulations.

(e) That, if the debtor does not comply with the demand within the specified time in ***section 4 (2) (e) of the Act***, Insolvency proceedings, may be commenced against the debtor and.

(f) The right of the debtor to apply to the court to set aside the statutory demand.

Section 4 (c) is to the effect that, except where the debt is a judgment debt, a statutory demand must be verified by a statutory declaration attached to the demand and Section 4 (d), provides for it being served on the debtor.[33]

The demand requires the debtor to pay the debt or compound with the creditor or give a charge over property to secure payment of the debt, to the reasonable satisfaction of the creditor within 20 working days after the date of service or longer period as the court may order[34]. In the case of **SNP Panbus v Jurong Shipgard Ltd**[35] The court held that to prove inability to pay debts, it is necessary for the creditor to have a due debt which the debtor has neglected to pay or to secure or compound to the reasonable satisfaction of the creditor after the debtor has been served with a statutory demand.

2.6.2. Service of a statutory demand;

The statutory demand should be served personally on the debtor[36] and according to **Reg. 5 (2)**[37] where the debtor cannot be found, the demand may be served at the registered office or place of business of the debtor, by sending it to the address of the debtor, by serving the legal representatives, the debtor if known or in any other way determined by the court.

In the case of ***Gatete Geoffrey & Anor V William Kyobe***[38]; court held that service on one of the defendants does not constitute service on the other

[33] This service must be done as provided for under Order 5 of the Civil Procedure Rules S.I 71-1.
[34] Section4 (c) of the In Insolvency Act of 2011.
[35] (2009)2 SLR 949.
[36] Section 4(d) of the Act & Reg. 5(i) of the Regulations.
[37] Insolvency Regulation of 2011.
[38] Civil Appeal No. 7 of 2005.

defendants even if they are sued both jointly and/ or severally. The same is provided for under **Order 5 rule 9**[39] that service should be made on the defendants personally and was emphasized in the case of **R.W.K Nadiope (Debtor)**[40], in this case a demand notice was sent on the state run post address of the debtor. The court held that a post office box number is not a sufficient address for the purposes of a bankruptcy notice which is now referred to as a Statutory demand since it is not an address at which creditor can be found, nor is it an address on which he can be paid or the debt can be compounded. This seem to vary with the position in It is important to note that proof of service statutory demand has to be by an affidavit of service stating the time and manner of service.[41] as was stated in the case of **Epaineti Mubiru v Uganda Credit and saving Bank**[42] that demand is mandatory and the mortgagee/debtor must retain proof of service.

2.7. Application of Equity And common Law in Insolvency.

Despite the fact there is a statute together with its instrument regulating Insolvency practice in Uganda, the rules of equity and common law continues to apply in Uganda. The Insolvency Act under **S.264** Provides that the rules of equity and common law are applicable to corporate Insolvency and bankruptcy of individuals and receivership except where they are inconsistent with this Insolvency Act. This means that the Insolvency Act takes precedence over the principles of equity and common law where there is a contradiction between the two.

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[39] Civil Procedure Rules S.I. 71-1 Laws of Uganda.
[40](1959) EA 251.
[41] Regulation 5 (3) of the Insolvency Regulations & Order 5 rule 16 of the Civil Procedure Rules.
[42](1978)HCB 109.

2.8. The administrative machinery of corporate Insolvency

2.8.1 The Ministry of Justice and Constitutional Affairs.

The present day the overall responsibility for the administration of corporate Insolvency law in Uganda rests with Ministry Justice and Constitutional Affair.

It's this Ministry that through which the judiciary is subject and amongst its responsibility is that of appointment of the person who takes over the office of the official receiver based at the Uganda Registration services Bureau.

2.8.2 The Courts.

Section 2 of the Insolvency Act defines a Court to mean the High Court or a court presided over by a Chief Magistrate. The Insolvency Act provides for jurisdiction on all matters concerning companies to be vested with the High Court of Uganda[43]. It further gives the High Court power to make the necessary orders for cross boarder insolvency proceedings. This means that it is only the High Court that can hear petitions/matters relating to liquidation of companies. What is important to note is that the same law gives courts presided over by the Chief Magistrates powers over all insolvency matters against individuals the subject matter of which does not exceed 500,000 shillings[44]. This means that the Judiciary arm of government has a central role to play from the time insolvency proceedings are instituted to the time when they are concluded. A case in point is evidenced in **Allied Bank International Ltd v Sadru Kara and Abdul Kara**[45], where it was stated that the receiver can sue on behalf of and in the name of the company but if the receiver who being in control of the company is at the same time a wrong doer and refuses to sue, a shareholder can bring a derivative action for fraud. The above case together

[43] Section 254(1) of the Insolvency Act 2011.
[44] Section 254(3) of the Insolvency Act 2011.
[45] High Court Commercial Division Civil Suit No.191 of 2002, upheld in Court of Appeal Civil Appeal No.62 of 2002.

with many others provides a hint on the roles of courts in insolvency proceedings in Uganda.

2.8.3 The Office of the Official Receiver.

An Official Receiver is appointed by the Minister of Justice to perform the functions of Official Receiver under the Insolvency Act[46].

The Registrar General of Uganda Registration Services Bureau has been appointed as the Official Receiver[47].

The Official Receiver has the following general powers and duties under section 199 of the Insolvency Act:

investigate the directors, shareholders, contributories and all present and past officers of an insolvent company or of a company which is being wound up or liquidated, for the purpose of establishing any fraud or impropriety;

Investigate the promotion, formation, failure and conduct of Business of an insolvent company;

Prosecute any person for offences committed under the Insolvency Act;

Investigate and prosecute insolvency practitioners;

Act during a vacancy in the office of an insolvency practitioner; and

Take all necessary steps and actions he or she considers fit to fulfill the provisions of the Insolvency Act.

The specific roles of the Official Receiver in insolvency proceedings and processes under the Insolvency Act are the following:

[46] Section 198 of the Insolvency Act. Under Section 255(b), the acts of the Official Receiver are valid not withstanding any defect in the appointment.
[47] Appointed under General Notice No. 650 of 2015.

Section 20(3) and 27(1)(a) — upon the making of a bankruptcy order, the Official Receiver is appointed as the interim receiver of the estate of a bankrupt for the purpose of preservation of the estate

Section 22(4) — the Official Receiver takes part in the examination of the debtor in bankruptcy proceedings Section 37(3) — where as the result of the vacation of office by a trustee, there is no person acting as trustee the Official Receiver acts as trustee until a successor is appointed. The court may appoint the Official Receiver to substantively replace the trustee.

Section 42(2) — while considering a bankrupt's application for discharge, the court takes into consideration the Official Receiver's report on the bankruptcy and the conduct of the bankrupt during the bankruptcy proceedings

Section 49(5) — the trustee in bankruptcy must make a report to the Official Receiver stating that the trustee has realized all the bankrupt's estate or so much of it as can be realized without needlessly protracting the trusteeship

Section 51 — the Official Receiver may apply to court for supervision of the trustee in bankruptcy

Section 59(2) — a copy of the resolution for voluntary liquidation of a company must he sent to the Official Receiver

Section 65 — where winding up is commenced under any other law and the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in any declaration made under that other law, the liquidator must immediately notify the Registrar of Companies and the Official Receiver

Section 67(7) when the date of final dissolution of a company is deferred, a copy of the order must be sent to the official Receiver

Section 82(1) - a company liquidator must give the Official Receiver a copy of the notice of his or her appointment

Section 84(3) — where the court stays the liquidation proceedings a copy of the order must be delivered to the Official receiver

In conclusion therefore, any person who would wish to institute, practice or even make a study on insolvency as a branch of law has gotten an obligation to read, understand and apply the laws together with the principles as they are discussed herein above in this chapter to avoid being embarrassed in courts of law for having not properly applied any of such laws or principles.

CHAPTER THREE

INDIVIDUAL INSOLVENCY, ITS CONSEQUENCES AND CROSSCUTING ISSUES IN THE OTHER LEGISLATIONS

3.1. Introduction

Insolvency practice has grown to include a few full-blown bankruptcy proceedings. The law governing bankruptcy have been the least utilized in the Ugandan courts of Law as parties desire to go for litigation of civil suits than filing for bankruptcy against individuals. As a result, there is at least a whole generation of lawyers, businessmen, financial consultants among others who cannot appreciate or understand the workings and functions of insolvency. This has also brought about a development of less jurisprudence on bankruptcy as compared to liquidation. While we do applaud the renewed interest in this area of the law, the numbers of cases still coming up are not enough to capture the required level on understanding and appreciation among all the stakeholders of this law. This however can be blamed on the legal implications that come with one being declared bankrupt.

3.2. Meaning and presentation of the different forms of Individual Insolvency

3.2.1. Meaning and presentation of a debtors petition for bankruptcy

A bankrupt is defined under **S. 2 of the Insolvency Act** as an individual in respect of whom a bankruptcy on has been made. **Section 20 (1) of the Insolvency Act** provides that a debtor may petition court for bankruptcy alleging that s/he is unable to pay his/her debts, and the court subject to submission of a statement of affairs and public examination of a debtor may make a bankruptcy order in respect of that debtor. The bankruptcy order declares the debtor bankrupt and appoints the official receiver as an interim receiver of the estate for the preservation the estate of the bankrupt.

When a debtor issues a debtor's petition then it is the debtor, who has commenced the bankruptcy. This is also known as voluntary bankruptcy and the petition should be accompanied a statement of affairs which is a list of persons assets and liabilities[48]. Once the petition and the statement of are accepted by the receiver, the debtor will automatically become bankrupt which position was established in the case of **Re *Jackson Exp. Jackson***[49], that it is not only the presentation of a debtors petition which makes a debtor bankrupt but the court's acceptance of the petition and that a bankrupt who has something to hide may be tempted to omit the incriminating information or even in decline to submit any statement of affairs at all.

3.2.2. Meaning and presentation of a creditors petition for bankruptcy.

Section 20 (3) of the Act provides that, a creditor may petition for bankruptcy of the debtor upon the debtors failure to satisfy the statutory demand.

Regulation 9 (1) provides that where the debtor fails to satisfy a statutory demand and the debtor has not applied to court to extend the time within which to comply with the demand, creditor may petition the court to make a bankruptcy order in respect of the debtor.

Regulation 9 (2), the petition is in form 3, in schedule of the regulations and it should be supported by an affidavit and sworn by the petitioner or one of the petitioners[50] the petitioner together with the affidavit should be fled after paying the necessary fees which according to the insolvency (fees), Regulations of 2012, item 2; on the filing of any petition 20,000/=; item 5, on the filing of an affidavit in support of any petition or application – 15,000/=.

[48] Section 21 of the Insolvency Act 2011.

[49] (1989)ALLER 145.

[50] Regulation 10 of the Insolvency Regulations 2013.

The petitioner then serves the petition to the debtor by an officer of the court or a person authorized by the court[51] and it is affected by delivering a copy of the petition sealed by the court to the debtor[52].

The process server should swear an affidavit of service which should be filed and the petitioning creditor will then within 7 working days after filing the petition give public notice of the petition which notice is in form 4 in schedule 1 of the insolvency regulations.

The debtor should then after receiving service of the petition, `reply to the petition or make cross petition within 14 days[53].

Every creditor who wishes to be heard on the petition should within 5 days after the publication give notice to the petitioning creditor or debtor of his/her intention to appear and be heard on the petition[54] but If the creditor does not give notice under this regulation, he may appear and be heard only with leave court[55].

The petitioner then prepares for court a list of the creditors and their advance if any who/ have given notice to appear and be heard, specifying their names, and addresses[56] and it should be given to the court before the hearing. The petitions should indicate whether the intention of the creditor is to support the petition or to oppose[57].

When time expires for filing a reply to the petition or cross petition, the court may set down the petition for hearing[58]. The petitioner will then take out

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[51] Regulation 11(2) (supra).
[52] Regulation 11(3) (supra).
[53] Regulation 14(3) of the Insolvency Regulations, 2013.
[54] Form 5 schedule one of the Insolvency Regulations.
[55] Regulation 15 of the Insolvency Regulations 2013.
[56] Form 6 in the first schedule.
[57] Regulation 16 of the Insolvency Regulations 2013.
[58] Regulation 17 of the Insolvency Regulations 2013.

hearing and he or she serves them to every creditor who has given notice of intention to appear to be heard and on the official receiver[59].

According to Regulation 18, when two or more bankruptcy petitions are presented against the same debtor, the court may order the consolidation of the proceedings on such terms as it thinks fit[60]. Where the petitioner does not appear at the hearing of the petition, the court may dismiss the petition for want of prosecution, and no subsequent petition against the same debtor shall be presented by the petitioner in respect of the same debt, without leave of court. However the court may on such terms as it thinks fit substitute the petitioner with any other creditor who[61] has given notice of his/her intention to appear at the hearing and is present in court on the date on which the petition is fixed for hearing or is in the same position in relation to the debtor as would have enabled the creditor on that date to present a bankruptcy petition in respect of a debt owed to him or her by the debtor and is desirous of prosecuting the petition.

At first hearing, court will require the debtor to file his/her statement of affairs with the court and within 7 working days serve a copy of a statement on the official receiver after filing it with the court.

The petitioner(s) will then give at least 14 working days' notice of the public examination the debtor to the trustee or special manager and to every creditor of the debtor who has given notice of his/her intention to appear and be heard the petition.

The bankruptcy Order will then be made if the court is satisfied that the debtor is unable to pay his or her debts or has failed to satisfy a statutory demand issued against him/her[62].

[59]Regulation 15 and 17(1) of the Insolvency Regulations 2013.
[60]Regulation 19 of the Insolvency Regulations 2013.
[61]Regulation 20 of the Insolvency Regulations, 2013.
[62] Regulation 24 of the Insolvency Regulations, 2013.

The petitioner should then proceed to serve the bankruptcy order on the official receiver who should send other copy to the bankrupt and thereby required to give a public notice within 14 days declaring the person named in the order bankrupt and should there after proceed to call the first creditors meeting wherein they will appoint a trustee of the estate of the bankrupt.

The official receiver should then make report to the court of the proceedings of the first creditor's meeting which shall include the person appointed trustee; and the creditors or representatives who attended meeting specifying their names and addresses[63].

Section 26 of the Act requires the trustee within 5 working days after his or her appointment to give notice of his/her full names, physical address, day time telephone number and electronic address and the date of commencement of bankruptcy.

3.3. Options Available to a Person In Respect Of Which a Bankruptcy Petition is brought.

A person who faces threats of bankruptcy is not completely hopeless. This is because the law provides for alternative options which s/he can utilize to minimize the gross effects of a bankruptcy order. They include;

Section 119 of the Insolvency Act allows a debtor who intends to make arrangement with his creditors to apply for an interim protective order and according to regulation 63, this application is by summons in chambers and after its filed in court, it must be served on; the trustee, where the debtor is an un discharged by the proposed supervisor, the debtor where the applicant is a trustee[64].

Regulation 64 of the Insolvency Regulations provides that at any time after filing the application the court may set down the application for hearing. The

[63] Regulation 27 of the Insolvency Regulations, 2013.
[64] Regulation 64(2) of the Insolvency Regulations, 2013.

applicant shall take a hearing notice which he or she must serve on; the trustee where the debtor is an un discharged bankrupt, the proposed supervisor and the debtor, where the applicant is a trustee.

Regulation 64 (3), a person who is served with a copy of the application or hearing notice may appear or be represented at the hearing and the court may make an interim order if satisfied that[65];

The debtor intends to make an arrangement with his creditors and where the debtor is an un discharged bankrupt or she has given notice of the intention to make an arrangement with his creditors to the trustee of his or her estate.

A named insolvency practitioner is willing to act as supervisor of the proposed arrangement as a trustee or otherwise for the purpose of supervising its implementation.

The debtor is an un discharged bankrupt or is able to petition for his or her own bankruptcy if,

A previous application has not been made by the debtor for an interim order in the last twelve months.
Making the order is appropriate for the purpose of facilitating the consideration and implementation of the debtors proposed arrangement[66].

The implication of this is that where an application for an interim order is pending, the court may stay any action, execution or other legal process against the property or person of the debtor but it ceases to have effect at the end of fourteen working days after the making of the order which makes it almost irrelevant[67].

[65] Section 120(2) of the Insolvency Act of 2011.
[66] Section 120 of the Insolvency Act 2011.
[67] Section 121 of the Insolvency Act 2011.

Upon the court making an interim order, the debtor must submit to the proposed supervisor[68]; a document setting out the terms of the arrangement which the debtor is proposing; and Statement of his or her affairs containing particulars of the debtors, creditors, debts and assets.

Section 123 (1) of the Act, gives power to the proposed supervisor to give court a report stating whether in his/her opinion, a creditors meeting should consider the individuals proposed arrangement. And if s/he fails to submit the said report, the court may direct that the proposed supervisor be replaced by another named consenting insolvency practitioner or direct that, the interim order continues or if it has ceased to have effect, be renewed, for a further period as the court may specify in direction[69].

Section 123 (3) of the Insolvency Act gives court powers to, on application by the proposed supervisor, extend the period for which the interim order has effect to give him a more time to prepare the report and after considering the report, court may[70];

> *Order the proposed supervisor to call a creditor's meeting to consider the proposed arrangement and for that purpose, extend the period for which the order has effect,*
>
> *Discharge the interim order if satisfied that the individual has failed to comply with his or her obligations under section 122 or for any reason it would be inappropriate for creditors meeting to consider the debtors proposed arrangement.*

Where the court makes an order to replace the proposed supervisor, the proposed supervisor shall call a creditors meeting not later than 14 working days after making that order and shall give a public notice in Gazette and a

[68] Section 122 [Ibid].
[69] Regulation 68 of the Insolvency Regulations of 2013.
[70] Section 123 (4) of the Insolvency Act.

newspaper of wide circulation of the meeting addressed to each creditor of the debtor stating the date, time and venue for the meeting and at the meeting, s/he shall the chairperson of the meeting and must give a report of it to court[71].

At the meeting the creditors may resolve to; approve the proposed arrangement or to do so with modifications with the consent of the debtor[72]. But where this will affects the rights of a secured creditor to enforce his or her security, the creditors may only approve it with the consent of the secured creditor concerned[73].

3.4 Arrangement order and its effect

Where the meeting declines to approve a proposed arrangement, court may discharge, vary or extend the interim order, and the debtor shall be given only one more opportunity to present a second proposed for arrangement[74]. However, where the meeting approves a proposed arrangement with or without modifications, the court may make an arrangement order[75] wherein immediately after the supervisor shall send to each known creditor a written notice showing that an arrangement has taken effect and give a public notice that an arrangement has taken effect[76].

Section 119 (2) of the Act, once the order is given, no application for bankruptcy can be brought and if there has been one , it cannot proceed but this relief can only happen for the period of 14 days.

A receiver of any property of the debtor cannot be appointed, no other steps can be taken to enforce a charge over any of the individual's property, no other

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[71] Section 124(2) of the Insolvency Act 2011.
[72] Section124(5) [Ibid].
[73] Section124(6) [Ibid].
[74] Section 125(2) of the Insolvency Act 2011.
[75] Section125 (3) [ibid].
[76] Section 126 of the Insolvency Act 2011.

proceedings, and execution of other legal processes can be commenced against the debtor.

3.5. Advantage of an arrangement order as opposed to a petition for bankruptcy.

The creditors stand to benefit by an arrangement in as much as the debtors estate can be usually wound up more quickly and less expensively than by official proceedings/ petition for bankruptcy. The debtor does not have to go through the embarrassing consequences of bankruptcy which among others include.[77]The creditors also do not have to wait in line for the preferential creditors. i.e. the statutory creditors to be paid in case of arrangement for example URA, NSSF, among others. Arrangements also, facilitate the rescue of businesses of the debtor which do not have close down if there is a viable way of rescuing them from the cripple of debts. The individual is given a fresh start and can continue carrying on his/her businesses.

3.6. Consequences of Bankruptcy

3.6.1. To the person of the debtor.

A person who has been adjudged bankrupts certain restriction that s/he is subjected to as seen below;

According to ***Section 45 (1) of the Act***, where a debtor is adjudged bankrupt, he/she shall be disqualified from, being appointed or acting as a judge of court in Uganda, being elected to or holding or exercising the office of the president, MP, Minister, Member of Local government, Council, Board, Authority other government body and if s/he has a public office it immediately becomes vacant.[78]

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[77] Section 45 of the Insolvency Act of 2011.

[78] Section 45(2) of the Insolvency Act of 2011.

Section 27[79] also discusses the effect of the bankruptcy order. It provides that upon making of a bankruptcy order the bankrupt's estate vests in the official receiver and then in the trustee, without any conveyance, assignment or transfer and that except with the trustee's written consent or with the leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate. This section literally eases the process of bankruptcy proceedings by quickly allowing the Official receiver to take over control of the bankrupt's Estate but it still in the same way gives protection to the Estate of the bankrupt by putting a stop on any further proceedings which in away gives relief to the bankrupt.

3.6.2 Offences likely to be committed by a debtor/who is adjudged bankrupt.

Section 53 (1) of the Insolvency Act provides that a bankrupt or a debtor in respect of whom a bankruptcy order is made shall not;

a) .Leave or attempt to leave Uganda without the permission of court
b) Conceal or remove property with the intention of preventing or delaying the assumption of custody or control by the trustee.
c) Destroy conceal or remove documents with the intent of defrauding or concealing the state of his or her affairs.
d) Obstruct the trustee in his or her duties (absconding).

Section 53 (2) provides that a person who commits the offence of absconding on conviction is liable to imprisonment not exceeding six months or to community service.

Section 54 (1) provides that a bankrupt should not obtain credit or engage in business without disclosing bankruptcy and any person who contravenes

[79] Insolvency Act 2011.

section 54 (1) commits on offence and is liable on conviction to a fine not exceeding 480,000/= or imprisonment not exceeding 12 months or both[80].

Section 55 (1) provides that where a bankrupt has been engaged in any business within 2 years before petition he commits an offence if he or she has not kept accounting records, that give true and fair new of the business financial possession and explains its transactions.

Section 259; of the Insolvency Act provides for the general penalty which is a fine of exceeding to 480,000/= or imprisonment not exceeding 2 years and shall in addition pay defaults fine.

R V Ratital Armarshi Lakhani[81]; the accused was convicted on the counts of failing to keep any books of account or respect of his business and failing to Re proper books of account in respect of his shops at Mbale and Gulu.

3.6.3. The property of the bankrupt.

Not only is the person of the bankrupt affected but even his property. ***Section 31 (1) of the Insolvency Act*** all property which is considered to comprise the bankrupt estate and ***section 31 (2)*** provides of that which does not comprise the same. A bankruptcy order results in the property which is owned by the debtor at the date of bankruptcy vesting in the official receiver or a registered trustee. In the case of **Re K B Docker** [82] it was held that from the time of the commencement of the bankruptcy all the property of the bankrupt in theory belongs to the trustee of the estate. Every payment of money, every transfer of property made by the bankrupt is an alienation of property that belongs, not to him, but to his trustee.

[80]Section 54 (2) of the Insolvency Act of 2011.

[81] (1956) E.A 150.

[82] (1938) 10 ABC 198, 245.

3.6.4. Creditors

Section 11 of the Act in Subsection 1, a secured creditor shall as soon as practicable after public notice has been given of the bankruptcy, deliver to the trustee written notice of any debt secured by a charge over any asset including particulars of the asset subject to the charge and the amount secured. The law gives the secured creditors options, that is, realize any asset subject to a charge, where he or she is entitled to do so (free to sell their security y and recover their money), Claim as secured creditors.

The laws further allows them to surrender the charge for the general benefit of creditors and claim as an unsecured creditor for his or her whole debt[83] and if one chooses to realize the security, the secured creditor is allowed to claim his balances as an unsecured creditor after deducting the net amount realized if the amount is not enough.[84]

On the other hand if he remains with a surplus after selling if there is any other party with a charge on that property he is supposed to pay the other party. If there is still a surplus, he must a count the trustee[85] Section 11 (6) provides that if a person claims to be a secured creditor;

The trustee or liquidator is supposed to meet claim in full and redeem the charge.

The liquidator or trustee is allowed to sell the asset and pay the secured creditor whichever is lower, if realizes less than the debt, he pays the creditor money he obtains, if he realizes more, he, pays the creditor the amount only that is claimed.

The liquidator or trustee can reject, the claim as whole or in part and when a claim is rejected in whole or in part the creditor may make a revised claim as a secured creditor with 10 working days of receiving

[83]Section 11 (2) of the Insolvency Act.
[84] Section 11 (3) (a) of the Insolvency Act.
[85] Section 11 (3) (b) [Ibid].

notice of the rejection[86] and the liquidator or trustee may if she subsequently considers that a claim was wrongly rejected in whole or in part revoke or amend such decision.

3.6.5. The transactions made by the Insolvent individual

The Act empowers the trustee to recover some property disposed of by the bankrupt through insider dealings which are voidable on application of a liquidator, receiver, trustee, and member or contributory as the case may be[87]. The dealing must relate to some asset of the insolvent. The insiders listed include spouses, siblings, children of the insolvent or any person with a class social proximity to the insolvent partners, shareholders, etc. all transactions of this nature will be rendered voidable and therefore will be cancelled[88]. For example, the purchase of land by the debtor in the name of his wife and a gift of a motor car have been held to be settlements. In **Re Pahoff**[89], the court held that a mortgage of property by the bankrupt to her two sons constituted a settlement and was void against her trustee. The effect of such settlement is that they are void against the trustee.

In Arbuthnot leasing International Ltd V Havel Leasing finance[90], Lord Scott, held that the court must be satisfied that the transaction was entered into for the purpose of putting the assets beyond the reach of those who are making or may at some time make a claim of the bankrupt or the company. However, nothing in **s. 15-18 of the insolvency Act** affects the title of a person who has in good faith and for valuable consideration purchased the subject property from the persons entitled to the benefit of the settlement, covenant or contract. A creditor is deemed not to be a purchaser, payee or

[86] Section 11 (5) (c) (i) [Ibid].
[87] See Sections 15-19 of the Insolvency Act commonly referred to as the avoidance provisions under the Act.
[88] Section18 of the Insolvency Act of 2011.
[89] (1961)20 ABC 17.
[90] (1990) BCC 696 .

encumberancer in good faith if the transaction which benefited him/her took place in such circumstances as to lead to the inference that the creditor knew or had reason to suspect that the debtor was unable to pay his debts as they fell due from his own money that the effect of the transaction would be to give him a preference priority.

3.7. Cross Cutting Issues of Bankruptcy as in Other Legislations

3.7.1 The 1995 constitution of the Republic of Uganda.

Article 80 (2) (d) of the constitution Uganda provides that a person is disqualified from being a Member of Parliament when s/he has been adjudged bankrupt or otherwise, declared bankrupt and has not been discharged. This means that the supreme law of Uganda considers a person declared bankrupt to be unable to serve the citizens of Uganda and that such a person is unfit for the office of Member of Parliament of the Republic of Uganda. It is on this basis that an individual is advised to fight and pay his or her debts as and when they follow due.

The same applies to the higher of Office of the President of the Republic of Uganda wherein under ***Article 102 (c)***, a person is not qualified for election as president unless that person is qualified to be a member of parliament all the above provisions of the constitution shows how a person who is declared bankrupt disabled from serving their country.

3.7.2 The Advocates Act of 2010

Section 11(a) of the Advocates Act provides that an un discharged bankrupt will not practice law in the courts of Uganda. This provision affects the profession of an individual who has been declared Bankrupt but it also in some provides protection to the Noble legal profession from being diluted and marginalized by society which could have already participated in the process of declaring some person bankrupt during the public examination which is one of the processes that subjects the bankrupts to embarrassment and torture in the eyes of the Public.

3.7.3 Companies Act of 2012

Section 200 of the Companies Act of 2012 prohibits an un discharged bankrupt from acting as a director of or taking part in the management of any company except with leave of the court. This implies that companies are protected from such individuals who are considered unable to manage their own affairs from getting involved in the day to day running of any company whose affairs are directly linked to the interest of the general public.

3.7.4 Contracts Act of 2010

Section 135 of the Contracts Act 2010 provides for termination of agency and one of the grounds is where a principal is adjudicated an insolvent under the law. Under the law of agency, it's an established legal principle of law that the actions of an agent are actions of the principle. It's also important to note that an agent acts on behalf of his/her principle mostly when dealing with third parties. This section gives protection to the third parties or even the principle who would be directly affected by the actions of the agents who are already bankrupt as they will be unable to indemnify them when they act beyond the authority given to them.

3.7.5 Partnership Act of 2010.

Section 35 of the Partnership Act 2010 provides for dissolution of partnership by bankruptcy that is, subject to any agreement between or among the partners, a partnership may, at the option of the other partners, be dissolved by the death or bankruptcy of any partner. This section saves the other partners from being affected by the consequences of bankruptcy which could end up affecting the partnership business.

3.7.6 The National Social Security Fund Act Cap 222

Under the Provision for the Board of directors and their appointment and section 3(3) (b) provides for revocation of the directors' appointment by the minister if he/she is insolvent or bankrupt. This section seem to have been enacted under this act for the purpose of protecting this particular organizations affairs from being run by financially incapacitated persons who are victims of bankruptcy with its gross effects. Its important to note that this particular organizations deals with the savings of different citizens and to allow a bankrupt to run it would mean subjecting it to financial scandals which can lead it into both administrative and financial problems.

3.7.7 The Registration of the Titles Act Cap 230

Section 197 provides that upon bankruptcy of the proprietor of any land, lease or mortgage, or upon any bankrupt before obtaining his or her discharge becoming proprietor of any land, lease or mortgage, the official receiver or trustee shall be entitled to be registered as proprietor in respect of that land, lease or mortgage. This implies that the bankrupt cannot dispose of any the land to which they are the registered owners and in a way this section protects any of the creditors who would be interested in the property of the bankrupt.

By the official receiver being registered as the proprietor, the interests of the creditors are protected.

In conclusion therefore, a person who is faced with a situation of being unable to pay his /her debts stands higher risks of being slapped with bankruptcy petitions and even though s/he may apply for an interim protective order as s/he plans to make arrangement with his /her creditors, the entire process of either a petition or him making arrangement with his creditors is full of grave and negative consequences which do not only affect the person of the bankrupt but also his property and any prior transactions entered into by the bankrupt which stand to be rendered void. It's important to note that these grave consequences of bankruptcy are scattered all over the various legislations as listed under this chapter.

CHAPTER FOUR

LIQUIDATION/WINDING UP OF COMPANIES, ITS CONSEQUENCES AND THE CROSS CUTTING ISSUES IN OTHER LEGISLATIONS

4.1. Introduction.

Liquidation is the procedure by which a company or other type of corporation is brought to an end, in other words, the company or such other type of corporation ceases to exist as a corporate entity[91]. The process of liquidation involves the appointment of a liquidator who is tasked with closing down or selling off the corporation's business, realizing all of its assets, paying off its creditors and if there is residue value, distributing it amongst those who are entitled to it under the corporation's Constitution/Memorandum and Articles of Association[92]. Liquidation is also sometimes referred to as winding-up or dissolution, although dissolution technically refers to the last stage of liquidation.

Winding up is the process by which a company is dissolved and ceases to be a going concern. In a winding up the company's business is closed down. Its assets are sold off, the creditors are paid, and the balance is distributed to the members and at the end of the whole process, the company ceases to exist[93].

4.2. Modes of Liquidation

***Section 57* of the Act** provides for the modes of liquidation to include; by court, by voluntary liquidation or liquidation subject to the supervision of court. For one to know which mode to use at a particular point in time, it goes

[91]LS Sealy and RJA Holy, Commercial Law Text, Cases and Materials, 3rd Edition (2003) LexisNexis UK, 1171.
[92] Ibid.
[93]Downes, John and Jordan Elliot. Goodman (2003). Dictionary of Finance and Investment Terms. Hauppauge, NY: Barron's Educational Series, 2003. Print.

back to the facts of a particular case and as to whether these modes are well understood/utilized, is a matter that requires scrutiny but not much discussed in this research. The above modes are herein discussed as seen below.

4.2.1. Voluntary Liquidation of a Company

This is provided for both under the Insolvency Act and the Companies Act. ***Section 58 (1) of the Insolvency Act*** provides that a company may be liquidated voluntarily if the company resolves by a special resolution that it cannot by reason of its liabilities continue its business and that it is advisable to liquidate. This particular mode was evidenced in a petition to the High Court of Uganda Civil Division for winding up of **Uchumi Supermarkets Uganda Ltd**[94], wherein the above company petitioned court for liquidation on the ground that it was insolvent and its operations where no longer commercially viable and upon full inquiry by the court, it was found out that indeed the company was no longer a going concern and could no longer pay its debts. The petition was accordingly allowed and the Official receiver was appointed as the Liquidator. It's important to note that he liquidation takes effect at the time the resolution is passed and it can further be discussed as seen below

4.2.1.1. By the Directors

Section 271 of the Companies Act provides that directors of a company can commence liquidation where they have made a full inquiry into the affairs of the company and have formed the opinion that the company is able to pay its debts in full within a period not exceeding 12 months from the commencement of the liquidation.

The company should be solvent for this mode to be invoked; hence the declaration of solvency and where a company passes a resolution for the voluntary winding up, the provisions of the Insolvency Act, relating to liquidation thereby applies with the necessary modifications.

[94] High Court Civil Division Companies Cause No. 30 of 2015.

4.2.1.2. By the Members of the Company.

This is a liquidation that is initiated by the Company's shareholders. ***Section 62 (1) of the Insolvency Act*** *is to the effect that* the company shareholders by special resolution or the directors or any authorized person may appoint one or more liquidators for the purpose of liquidating the company[95].

Section 62 (2) on the appointment of a liquidator all the powers of the directors cease except where the company in a general meeting or the liquidator sanctions the continuance of those powers. The liquidator is required to give a public notice of his appointment within fourteen day after his appointment in the Gazette and failure to do so attracts a penalty of a fine not exceeding five currency points every day for which the default continues.

In the case of **Re Imperial Investment Finance Ltd**[96], the members of the said company applied the High Court of Uganda Commercial Division to voluntarily wind up the operations of the applicant company. The court held that once the members have gone through the formal procedure of passing a special resolution to wind up the company and a liquidator is appointed, together with making an adequate advert in the local newspaper, the court can go ahead to grant their application.

4.2.1.3. By the Creditors.

Section 69 (1) provides that the company shall cause a meeting of the creditors of the company to be summoned on the same day as the meeting for the resolution for liquidation is to be proposed or on the following day and send to the creditors notices for the meeting together with the notices for the meeting for proposing the resolution for liquidation[97].

[95] Also refer to Part IX of the Companies Act of 2012 Laws of Uganda.
[96] (2007) ULR571.
[97] Also refer to Section 58 and 93 of the Insolvency Act of 2011 for the mechanisms through which a Company may be liquidated voluntarily by its Creditors.

The notice for the meeting of the creditors should be published in Gazette and in the official language in a newspaper with wide circulation in Uganda[98].

4.2.2. Procedure of the creditors meeting for voluntary liquidation.

Section 69 (3) provides that the directors should appoint one of them to preside at the meeting and present a statement of the company's affairs and a list of the creditors and the estimated amount of their claims to the meeting of the creditors.

Section 70 (1) the creditors and the company at their respective meetings may nominate a person to be liquidator and if they nominate different persons, the person nominated by the creditors shall be the liquidator and if the creditors do not nominate any person, the person nominated by the company shall be the liquidator. It is important to note the person appointed must still abide by the requirement of giving public notice of his appointment before going on with the ascertainment of claims as are alleged by the different creditors in their respective capacities either as secured or unsecured creditors.

It's important to note that the creditors must also go ahead at their meeting to appoint a committee of inspection which must not be more than five in number who can also be removed by the creditors through a resolution passed by them to that effect but court has power to reappoint any of them. The committee of inspection has power to fix the remuneration to be paid to the liquidator.

4.2.3. Procedure for Voluntary Winding up of the Company

Directors of the company investigate the affairs of the company and then form an opinion that the company can pay its debts within a period of one year[99] and they will then make a statement of the company's assets and liabilities[100].

[98] Section 69 (2) of the Act.
[99]Section 271(1) of the Companies Act of 2012 laws of Uganda.
[100]Section271 (2) of the Companies Act of 2012 Laws of Uganda.

Directors call a board meeting to make a status declaration of solvency[101] wherein under ***Article 78***[102] the directors of a company are given powers to meet for the disperse of company business and even regulate their meetings as they think fit. The Quorum of such meeting of the directors is two (2) if not fixed[103].

The declaration is filed together with the statement of assets and liabilities within a period of 30 days with the registrar of companies.[104] The Notice is issued to call an extra ordinary general meeting[105] for the purpose of winding up the company and the quorum is 3members present[106]. A special resolution is passed to the effect that the company be wound up[107] and the same is registered within 7 days by the registrar of companies[108]*and they will go ahead to advertise the* notice of the resolution to wind up in Uganda Gazette and a newspaper with wide circulation[109].

After that, they will go on to appoint a liquidator through the directors meeting and make a board resolution appointing the liquidator who will be required within 14 days after appointment to publish in the Gazette a notice of his appointment and deliver the same to the registrar for registration[110]and where the liquidation continues for more than one year, the liquidator must summon a general meeting[111]

Notice of final meeting is then given in the Gazette and in a newspaper of wide circulation specifying the time and place of the meeting and must be published

[101]Section 271 (1) of the Companies Act of 2012 Laws of Uganda.
[102] Table A of the Companies Act of 2012 Laws of Uganda.
[103]Ibid.
[104]Section 271 (a) & (b) of the companies Act.
[105]Section 140 of the companies Act relating to calling of company meetings applies accordingly.
[106]See Article 53 and Article 57 of Table A to the Companies Act of 2012.
[107] Section 268 of the Companies Act of 2012.
[108]Section269 (2) of the Companies Act of 2012.
[109]Section 269 (1) of the Companies Act of 2012.
[110]See regulation 98 of the Insolvency Regulations.
[111]Section 66 of the Insolvency Act provides for one of the duties of the liquidator to be among others call a general meeting at the end of each year.

at least 30 days before the meeting[112]. This meeting determines the final dissolution of the company.

The liquidator will then prepare an account of the liquidation showing how the liquidation was conducted[113] before calling the final meeting which is the general meeting of the company to present the account of his acts and dealings.[114]

Afterwards, s/he sends a copy of the account to the registrar and makes a return of the meeting and its date to registrar within 14 days after the meeting.[115]

And lastly at the expiration of 3 months from the date of registration of the return, the company is taken to be dissolved[116].

4.2.4. Compulsory Liquidation.

This is the winding up of a company which is initiated by the making of an application by a person who is entitled to do so. In the case of **Trans Africa Assurance Co. Ltd V Cimbria (EA) Ltd[117],** the appellant who had failed to honor a performance bond in favor of the respondent successfully petitioned the High Court to wind up the appellant on the ground that it was insolvent and the court gave an order that the company be compulsorily wound up.

Section 92 and Regulation 85 (1) provides for the persons who may petition court for a compulsory liquidation of a company, that is, the company, a director of the company, a contributory or official receiver. A contributory is a person who is liable to contribute to the assets of a company in the event of a winding up.

[112]Section67 (2) of the Insolvency Act of 2011.
[113]Section 67(1) (a) of the Insolvency Act of 2011.
[114] Section 67 (1) (b) of the Insolvency Act of 2011.
[115]Section 67(3) (a) & (b) of the Insolvency Act of 2011.
[116]Section 67 (6) of the Insolvency Act of 2011.
[117] [1997-2001] UCLR139.

The grounds for petition are that the Company has been served with a statutory demand and is unable to comply with the demand. Or that the company is unable to pay its debts in the meaning of Section 3 of the Insolvency Act, or that the Company has agreed to make a settlement with its creditors or entered into administration[118] and the forum is the High Court of Uganda[119].

However, a petition based on a substantial dispute as to whether the debt is due or owing will not be entertained by court. ***In the case of Re Tanganyika Produce Agency***[120]it was held that a disputed debt cannot be the subject matter of a creditors petition for winding up and if the debt is bonafide in dispute, it is an abuse of the process of the court to try to enforce it by a petition to wind up.

4.2.4.1 Procedure of compulsory liquidation

The Petition is presented to the High Court by any of the persons listed under ***Section 92 (1)*** of the Insolvency Act.[121] Petition is served on persons concerned as they are listed under Regulation ***88*** and after which a Public notice of the petition is given within 7 days after filing of petition.[122] An affidavit in reply to petition should then be filed within 15 days after service of the petition[123]and the same should be served on the petitioner[124].

Then all persons who intend to appear and are head on the petition should give notice of their intentions[125] and after which the Petitioner prepares a list of creditors who have given notice of intention to appear[126].

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[118] Regulation 85 of the Insolvency Regulations.
[119]Section 91 of the Insolvency Act.
[120] (1957) E.A 241.
[121] See form 19 of the Insolvency Regulations of 2013 together with Reg. 86 of the Regulations for the A sample.
[122] See form 4 of the Insolvency Regulations for a sample and Regulation 89 for emphasis.
[123] See Regulation 90(1) of the Insolvency Regulations.
[124] Regulation 90(2) of the Insolvency Regulations of 2013.
[125]Regulation 91 and Form 5 of the Insolvency Regulations.
[126]Section 92 and Form 6 of the Insolvency Regulations.

Court will then sets down the petition for hearing and the petitioner must takes out hearing notice and serve them on the debtor and every person who gave notice of their intention to be heard on the petition and to the Official receiver.[127]

Court will the hear the parties and if satisfied, it will makes an order to wind up or appoint provisional liquidator[128] and if a provisional is appointed, then s/he must sends a copy of the order to the official receives within 7 working days[129] *and must also* give public notice of his/her appointment within 14 days[130]

The Creditors will then go ahead to appoint a liquidator at the meeting[131] wherein after the Provisional liquidator within 14 days after the creditors meeting files a report and minutes of the meeting in court and to the official receiver[132].

The appointed Liquidator should then give public notice of his appointment[133] which s/he must also deliver to the official receiver.[134]

The Liquidator then goes on to collect and distribute the assets of the company[135] in accordance with ***Section 12*** *of the Insolvency Act* and after which s/he will delivers to the official receiver a final report and account of liquidation.[136]

And the Company is deemed to be liquidated and removed from the companies register after 3 months.

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[127]Regulation 93 of the Insolvency Regulations.
[128] Regulation 97 [Ibid].
[129] Ibid.
[130]Section 95 of the Insolvency Act of 2011 and Regulation 99 together with Form 12 of the Insolvency Regulation of 2013.
[131]Regulation 99 (5) of the Insolvency Regulations of 2013.
[132] Regulation 100 of the Insolvency Regulations of 2013.
[133] Section 96 of the Insolvency Act of 2011 and Form 4 of the Insolvency Regulations of 2013.
[134] Ibid.
[135]Section 99 of the Insolvency Act of 2011.
[136] Section 114 (1) [Ibid].

4.3. Consequences of Liquidation

The date when dissolution becomes effective marks the termination of the company's legal personality, and hence of its existence. It is this consequence of the winding up regardless of whether it is the voluntary or the compulsory mode, which is employed to constitute the fundamental point of distinction between the insolvency of a corporation and that of an individual[137].

Every creditor and every person with a claim of any kind against the company should therefore bear in mind that at the conclusion of the liquidation all liabilities will be extinguished forever. Since there will be no subsisting legal person by whom any liability is owed nor any prospect that unsatisfied liabilities may be settled out of a sense of moral obligations by a person against when no legal enforcement is capable of taking place.[138]

In the matter of winding up of **Muddu Awulira Enterprises Limited in the High Court Commercial Division companies Cause No. 14 of 2004**, after the winding up proceedings had commenced, Stanbic Bank appointed a receiver under a debenture that they held. The court had to rule on whether the bank's action was contrary to Sections 227 and 228 of the [now repealed] Companies Act Cap.110. It was held that the commencement of the winding up proceedings in court or a resolution for winding up does not preclude a debenture holder from appointing a receiver. It was further held that the crystallization of a debenture and the taking possession of all the company's assets both present and future during the currency of the winding up proceedings is an execution/attachment in violation of section 228 of the Companies Act.

[137] See Chapter 10 of chrispas Nyombi & Alexander Kibandandama's Principle of Company Law in Uganda, Law Africa Publishing 2014, pages 241-278.
[138] Law of Insolvency & Liquidation/ Winding up of Companies By ADV Jock Mcconnachie July 2012.

4.3.1. General effect of Liquidation

Section 97 of the Act provides that at the commencement of liquidation the liquidator shall take custody of the property and control the company's property, the officers of the company shall remain in office but cease to have any powers ,functions or duties other than those required or permitted to be exercised by this Act, proceedings execution or other legal process required or shall not be commenced or continued, distress shall not be levied against the company or its property, shares of the company shall not be transferred or other alteration made in the rights o liabilities of any company share holder and a shareholder shall not exercise any power under the companies memorandum and articles of association; and the memorandum and articles of association of the company shall not be altered, except the liquidator may change the companies registered office or registered post address.

The purpose of winding up is to realize the company's, assets and pay its dues however, the courts have through various judicial pronouncements clarified this normally. For example the Bombay High Court in ***Ambey Flour Mills (p) limited V Vimal Chanal Jain***[139] held that the machinery of winding up will not be allowed to be utilised merely as a means for realising debts from the accompany.

4.3.2. Consequences faced by company directors,

Section 73(2)[140] indicates that with the appointment of a liquidator, the powers of the directors cease except where authorized by the company in general meeting for the members' voluntary liquidation or the committee of inspection sanctions their continuance and if no committee, the creditors sanction their continuance.

[139] (1978)4 Comp.cas 402 [Guj].
[140]Insolvency Act of 2011.

From above, the implication is envisaged on the position of the directors in that they become ceremonial officials of the company but any liabilities that was incurred by the directors is investigated and the directors will be held liable thereafter for any loss.

Once a company is wound up directors position ceases that is s/he can no longer be a director of a company that has been scraped off the registry their powers is limited to that of a liquidator chosen by the creditors but they have to attend meetings in order to account for their personal liability.

In ***Dorchester Finance Co. Ltd v Stebbing***[141] **Foster** J said:

(a) A director is required to exhibit in performance of his duties such a degree of skill as may reasonably be expected from a person with his knowledge and experience.

(b) A director is required to take in the performance of his duties such care as an ordinary man might be expected on his own behalf.

(c) A director must exercise any power vested in him in good faith and in the interest of the company.

The same principle was further advanced in the case of **Re City Equitable Fire Insurance**[142]where it was held that in duty of care or due diligence means that the director must not abdicate involvement or responsibilities he therefore risks liabilities if he neglects to attend board meeting and leave all decision to others, if he fails to apply his judgment to the advice of outsiders or if he signs cheques without inquiry.

[141] (1988) BCLC 488.
[142] (1925) CH 47.

4.3.3 Consequences on the share holders

Any transfer of shares made after the commencement of winding up/Liquidation is void. Accordingly shareholders are prevented from evading this liability as contributory by transferring their shares to some impecunious person after winding up has commenced. Where the winding up petition has commenced and the debs are insufficient to satisfy the creditors, the contributories are under obligations to bring in the sums due to them and when all the debts have been paid and there are surplus assets then these are available for the repayment of capital to the contributories and in certain cases residue may exceed the normal capital of the company and there may be even longer to distribute. The way in which the balance is distributed among the contributories will depend upon the rights attaching the particular shares.

Section 14 of the Insolvency[143] provides for surplus assets and section 14(b)[144] in particular provides that in the case of liquidation, the liquidator shall distribute the company's surplus assets in accordance with the memorandum and articles of association of the company in question. This means that each shareholder takes what they are entitled to under the memorandum and the articles of association or in simplicity each takes in accordance with the number of shares they own in the company as indicated under the companies Memorandum and articles of association.

4.3.4 Consequences towards new and old contracts of the company.

Contracts may be of employment contracts or of business transactions, Section 186[145] provides inter alia that a receiver shall be personally held liable for any contract entered into by him or her in the exercise of any of the receivers powers, in other wards the appointment of a receiver does not determine

[143] Act of 2011.
[144] Ibid.
[145] Ibid.

contracts entered before the appointment. In the case of ***Grifiths V Secretary of State for Social Services***[146] court held that the appointment out of court by debenture holders of a receiver and manager of a company to act as an agent of the company did not operate to terminate the contracts of the company unless the appointment was accompanied by the sale of business.

It is important to note that contracts which where binding on the company when the receiver was appointed continue to bind the company though any enforcement as by the selling the company assets is subject to the priority rights of debenture holders over the assets. The receiver may in his obligation fulfill the old contracts although he has discretion he should not disregard the contracts if to do so would damage the company, good will or affect the realization of its assets and thus in the case of **Re New Digate Collierly**[147] where the receiver and the manager of mining company could have made a greater profit by disregarding contracts for the former sale, he was not allowed to drop the contracts because of the damage to the company goodwill.

4.3.5. Consequences faced by the business of the Company

In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except in far as may be required for the beneficial winding up of the company. The best term to be used in such a circumstance is called halt of business activities.

Insolvency of businesses leads to loss in tax collections by governments since the tax base is reduced by a number directly related to the number of businesses declared insolvent. This reduction in total revenue collections by government has a direct impact on delivery of public goods and services such as health, education and transport infrastructure. This in particular affects the country. Corporate re-organization are more valuable weapons in a firm's strategic harmony, employed for a variety of business purposes, they exist in

[146] UKEAT/03713/JOJ.
[147] (1912) 1 CH 468.

numerous forms including amalgamations. Share for share exchange divisive-re-organization and liquidation[148].

4.4. Cross Cutting Issues of Winding up / Liquidation in Other Legislations.

4.4.1 The Financial institutions' Act of 2004 No.2 as amended by Act No.2 of 2016.

Under Section 97 voluntary winding up of a financial Institution is outlawed. On the other hand, under Section 82, the Central Bank is given powers to intervene in the management of the affairs of a financial institution deemed to be operating to the prejudice of the depositors which may include solvency issues. The options available to the central bank include replacing management and or the board of directors with persons appointed by the central bank, ordering additional capital injection, appointing advisors to the troubled company, ordering certain activities not to be done and other such measures.

On the other hand, under **Section 94 to 96**, the central bank is authorised to put an insolvent financial institution under receivership, and the receiver is among others empowered to arrange mergers between the troubled financial. Institution and another, sell its assets or liquidate the company. But still on the other hand, the Central Bank may if it deems it fit, place the financial Institution in compulsory Liquidation.[149]

4.4.2 The Cooperative Societies Act, Chapter 112, Laws of Uganda.

Under this law, the relevant provisions are Sections 58 to 66. Under Section 58, the Registrar of cooperative societies can wind up a cooperative society after inquiry under Section 52, and appoint a liquidator. Under Section 59 it is provided that upon a liquidation order being made by the said Registrar, the

[148] www.mayok.com/...incometax accessed on the 9th day of July 2018 at 8:00 pm.

[149] See Section 99 of the Financial Institutions Act No.2 of 2oo4 as amended by Act No.2 of 2016 Laws of Uganda.

provisions of the Companies Act (by such importation, now The Insolvency Act, 2011), relating to wining up of companies shall apply as if reference to companies is a reference to cooperative Society.

4.4.3 The Public Enterprises Reform and Divestiture Act, Chapter 98, Laws of Uganda.

Under Sections 19 to 20, public/statutory corporations can be restructured or otherwise reformed to make them more viable, and in practice this has taken the form of corporate rescue.

Further, under Part Vi of the Act, insolvent and other corporations deemed non-viable can be divested and liquidated at the discretion of the Minister of Finance. This power has also been used to divest and/or liquidate a number of public enterprises. it is however important to note that, this Act specifically provides for the protection of workers' and contractors' rights in the face of what would have been adverse consequences of liquidation.

4.4.4 The Micro Finance Deposit Taking Institutions Act No.5 of 2003.

This particular Act establishes the Microfinance Deposit Taking Institutions. Under Part VII of the Act, the Central Bank may upon determining that a microfinance Deposit Taking Institution (MDI) should be liquidated, make an order for the winding up of the affairs of that institution. It further provides that the Central Bank or any other person appointed by the Central Bank Acts as the Liquidator of the Institution.

4.4.5 The Tier 4 Microfinance Institutions and Money Lenders`Act No. 18 of 2016.

This establishes the Tier 4 Microfinance Institutions. Under Part IX of the Act proceedings for the winding up and liquidation of a Tier 4 Microfinance Institution cannot be commenced except by the regulatory authority or the institution itself with the prior approval of the regulatory authority. The

Insolvency Act and the Companies Act apply, with necessary modifications, to the liquidation of a Tier 4 Microfinance Institution[150].

In conclusion therefore, a liquidated company which has applied any of the above discussed modes to put an end to its business has got a number of consequences it poses on itself, its directors, shareholders, the business for its formation together with both the company's old and newly signed contracts which causes liquidation not to be a good principle for a financially struggling company. However, where a person decides to employ the principle of liquidation onto his company, he must bear in mind the need to read and understand the nature of his company as different companies have different guidelines for their business to be wound up as discussed herein above.

[150] Uganda Insolvency Law Handbook of 2018 by Nelson Nerima at pg. 169.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSSIONS

5.1 Findings

5.1.1 The law of Insolvency in Uganda is wanting in a few areas.

If this law were to be reviewed in relation to its faults, the practice of Insolvency in Uganda will nearly flawless. Insolvency will be seen as one of the best solutions to financing a debt by Individuals, companies and also, one of the best solutions for creditors in realizing their debts. Insolvency should not be looked at as just a step towards the company's winding up but rather it should be looked at as a solution to an insolvent Individuals/ company in financing its debts.

The laws of Insolvency should provide mechanism that enables both the debtor and creditor to participate with the least possible delay and expense and it should also so far as is convenient and practical, support the commercial and economic processes of the community. The laws governing Insolvency and its practice have not been understood and as a result, there is at least a whole generation of lawyers, businessmen and financial consultants who cannot appreciate or understand the workings and functions of insolvency. Recommendations are discussed below in relation to amendment of the Insolvency laws in Uganda.

5.1.2 Insolvency is seen as a means as of enhancing growth

It is a common and undisputed fact that economic growth of any nation largely hinges on the levels of access and availability of credit. Entrepreneurs, traders, investors and other businessmen often luck funds to establish and promote their enterprises and undertakings. Their recourse is to take out credit from financial institutions. However, no financial institution will avail credit unless it is confident it will recover its money. Through Insolvency proceedings either on Individuals /companies, creditors are given the confidence that their monies advanced can be recovered from the defaulting debtors.

5.1.3 Insolvency is looked at as a solution to inability to pay debts.

It is not always true that the businesses that get financial challenges are entirely hopeless cases. Some can be saved and rehabilitated while others are simply irredeemable. Through its corporate rescue mechanism, a good and fair insolvency proceeding should be able to identify the viable businesses that are in financial difficulties, provide for their rehabilitation and save them from total collapse. This procedure saves the investment, jobs and also protects trade and commerce from the unsavory effects of losing a trading company.

Insolvency should be looked at as a solution to the inability to pay debts of companies rather than it being looked at as a way of the company going out of business, and eventually winding up. Insolvency through receivership should be looked at as one of the best solutions to the inability to pay debts by the company and recourse to it must be made before the recourse to winding up of the company.

5.1.4 Inefficiencies and delays in the dispensation of commercial justice

The delays and inefficient of the Ugandan court systems in the dispensation of justice have discouraged creditors from invoking this law. It is only logical that where a country's enforcement regimes are unreliable, transactions will be carried out through some other form of private enforcement[151]. Therefore, the

[151]Pistor Katharine, 2000, patterns of Legal change, shareholder and creditor Rights in Transaction Economics. The European Business Organisation Law Review Vol.1 no.1 pages 59-108 states, it is the effective enforcement of laws rather than the quality of laws, which matters in determining an effective legal system of effective enforcement do. That the challenge is to make our commercial justice system effective to foster credit confidence. Also, stijnclaessens and Leora F Klapper, November 2002, Bankrupt Around the World: Explanations of its Relative Use (a World Bank study).

delays in the resolution of matters before court and the other forms of inefficiencies can only serve to keep creditors from using the court systems.

5.2. Recommendations.

Having found out that insolvency law is lacking in a few areas, is a mean of enhancing growth, a solution to inability to pay debts but it is also characterized by inefficient and too much delays in the dispensation of commercial justice as discussed above, the following are my recommendations.

5.2.1 Improve on jurisprudence

Ugandan courts have little jurisprudence on insolvency proceedings because the law has stays untested in our statute books sometimes for such a considerable period of time. This presents a serious challenge in the development and interpretation of the law. There is therefore a need to build capacity and expertise so as to develop an insolvency regime that is relevant to the country's unique needs. It important to note that except the other branches of laws which are filed and disposed of every day, the insolvency proceedings are only filed once in a while.

5.2.3 A special Legal training of the insolvency practitioners.

Insolvency practitioners should be required to have had legal training in the practice of insolvency. With this it will ensure that the only people who can practice insolvency are trained in that particular field. Because the law is not frequently in those qualified to practice it, there is lack of knowledge and expertise of its functions and operations at the bar. The challenge causes consideration concern as it presents a real possibility of miscarriage of justice in insolvency matters.

The lack of understanding of the law and practice is even more profound among the business community. Consequently, many members of the community execute agreements providing for enforcement of securities through receiverships without appreciating the nature and functions of receivership and the other insolvency administrations. Many others are suffering under serious debts burdens not knowing that they can petition to be declared bankrupt and be discharged from their debts obligations.

5.2.4 Need for further codification of the insolvency law in Uganda.

Despite the fact that the Insolvency Act's preamble stating that its main purpose for enactment was to the relating to Insolvency, this particular branch of laws remains scattered in many other legislations in that for one to appreciate its effects, s/he needs to peruse through a variety of other legislations one of them being the company's Act of 2012 still holds provisions relating to insolvency. This codification should come hand in hand with the amendment of the affected laws so as to ease research and practice in this field.

5.2.5 Increase on the period for the protection the Interim Protective Order given to a bankrupt.

As discussed herein, the Order is only valid for 14 days. This period is too small to be given to a person who is under financial challenges. My recommendation is that let this be increased to at least a month to give the debtor enough time to arrange himself to pay the debts owed to him. This period can be relatively be enough for the bankrupt to formulate an opinion on the next course of action he may need take to clear his debtors as opposed to the 14 days provided under the current insolvency law. Without increasing this period, the purpose for which the interim protective order is given stands defeated as the bankrupt will still be in a state of panic which may cause him to make more losses by selling out his /her business property at a loss.

insolvency law and practice held at Golf Course Hotel-Kampala Uganda on the 31st day of January 2012.

L S Sealy and RJA Holy, "Commercial Law Text, cases and Materials", 3rd Edition (2003) LexisNexis UK,1171.

Slaughter and May, "An Introduction to English Insolvency Law" of 2015.

The World Bank Draft "Report on effective Insolvency Systems": Principles and Guidelines of 2000.

PUBLICATIONS.

Monitor News Paper publication of 11th April 2016 at the front page.

WEBSITES.

www.monitor.co.ug accessed on the 05th day of July 2018.

www.amazon.com accessed on the 1st April 2018 at 12:30 pm

DICTIONARIES

Black's Law Dictionary Abridged 8th Edition.

Downes, John, and Jordan Elliot Goodman (2003). Dictionary of Finance and Investment Terms. Hauppauge, NY: Bawens Educational Series, 2003. Print.