

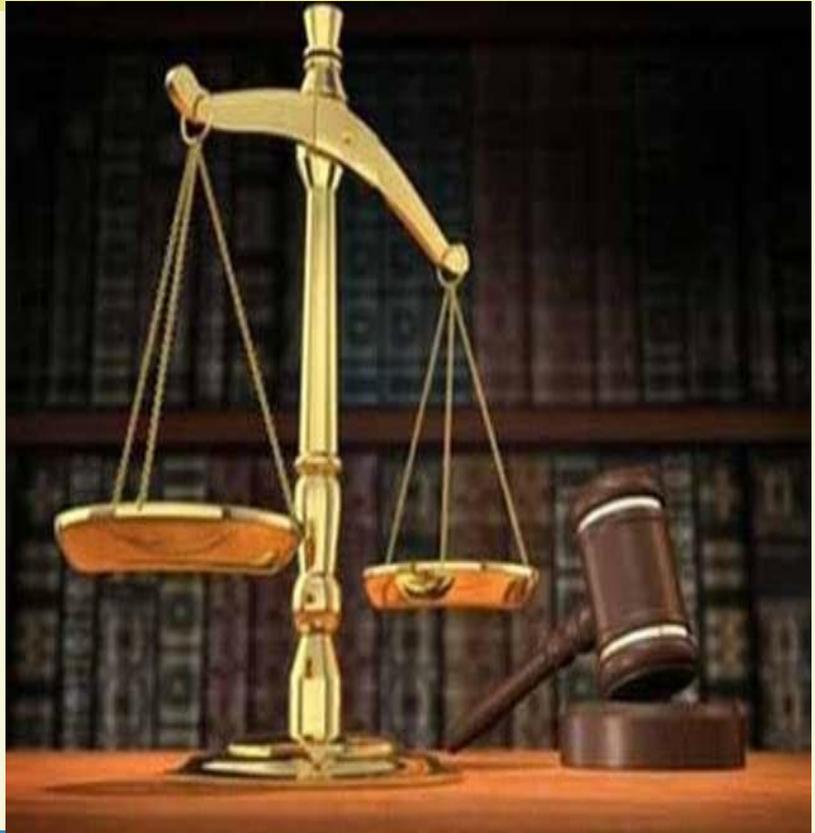
LITIGATION NOTES

JUDICIAL DECISION ALERT – 26 March 2021

FEDERAL HIGH COURT RULES THAT AN ERSTWHILE EMPLOYEE LACKS THE *LOCUS STANDI* TO INSTITUTE WINDING UP PROCEEDINGS OVER UNREMITTED PAYE TAXES

A. INTRODUCTION

In a ruling delivered on Friday, 26 March 2021, in **Suit No: FHC/L/CP/748/2020 Ikemefuna Stephen Nwoye v. Aluko & Oyebode** pending at the Federal High Court of Nigeria, Lagos Judicial Division, the Federal High Court was called upon to determine amongst other legal issues (i) whether the Petitioner has the *locus standi* to institute the winding-up proceedings against his former employer the partnership law firm of Messrs Aluko & Oyebode on account of its non-remittance of his deducted PAYE taxes? (ii) Whether the Winding Up Petition is incompetent having not been preceded by a statutory demand or a valid statutory demand?



The Federal High Court in its ruling dismissed the Winding-Up Petition and held that the Petitioner lacks the *locus standi* to institute the case against the Respondent given that the debt (PAYE taxes) are owed to the LIRS and not the Petitioner directly. Further that the Petitioner failed to fulfil the conditional precedent required for the commencement of the Winding Up proceedings having issued a Statutory Demand Notice with a different amount less than that stated in the Petition and that the debt is disputed by the Respondent. The Court then award costs of N500,000 in favour of the Respondent.

B. SUMMARY OF RELEVANT FACTS

The Petitioner had on 22nd June 2020 filed a Winding-up Petition at the Federal High Court of Nigeria, Lagos Judicial Division against his former employer the partnership law firm of Messrs Aluko & Oyebode (the “**Respondent**”) over debts (personal income tax) owed to the Lagos State Internal Revenue Services (“**LIRS**”) on his personal income tax account.

It was the Petitioner's case that during two employment stints as a fee earner with the Respondent covered by three employment contracts issued by the Respondent's erstwhile Managing Partner Mr. Oluwagbemiga A. Oyebode (alias Gbenga Oyebode), the Respondent deducted various amounts of monies from the Petitioner's gross monthly salary as PAYE taxes. However, all the deducted amounts of monies were misappropriated by the Respondent and not remitted to the LIRS, the competent tax authority responsible for the collection of personal income tax (PAYE) in spite of the monthly payslip issued by the Respondent to the Petitioner confirming that the deducted PAYE taxes have been remitted to the LIRS on behalf of the Petitioner as obligated by law.

The Respondent then filed a Preliminary Objection by way of a Motion on Notice dated 6th July 2020 seeking for an order of Court striking out the Winding -Up Proceedings on the following grounds –(i) The Petitioner lacks *locus standi* to institute the Winding Up Petition (ii) The filing of the Petition was not preceded by a statutory demand or a valid statutory demand. **Alternatively**, an order dismissing the Winding-up Petition on grounds that it is vexatious, abusive, and oppressive given that (i) the debt is disputed by the Respondent (ii) the Petition was brought *mala fide* by the Petitioner with no possible object other than to attempt to harass, extort, smear, and embarrass the Respondent. In addition to the above reliefs, the Respondent also sought orders restraining the advertisement of the Petition by the Petitioner and the award of costs for the time it spent defending the litigation.

The Petitioner on its part filed a Counter-Affidavit and Written Address dated 16th July 2020. He maintained that he had the *locus standi* to present the Winding-Up Petition on account of being the taxable person with a chose in action on the payment receipt of his PAYE taxes and that the LIRS' assigned the right to enforce the payment of the debts (PAYE taxes) to him. The Petitioner further submitted that the debt is not disputed *bona fide* because the Respondent without reasonable excuse refused to pay the debt to the LIRS on the Petitioner's account or secure or compound for it to the satisfaction of the Petitioner. On the issue of the Winding-up Petition been brought *mala fide* and an abuse of the process of court, the Petitioner submitted that this case was instituted on justified grounds of a debt that is liquidated and already ascertained. Importantly, before instituting the litigation, the Petitioner through a Letter dated 4th May 2020 notified the Respondent of the vacuum in his personal income tax report issued by the LIRS. It was after this Letter was ignored, that the statutory demand notice dated 18th May 2020 was issued by the Petitioner virtue of being the creditor assignee.

The Respondent also filed a Further Affidavit of 14th October 2020 deposed to by one Hamid Abdulkareem in response to the Petitioner's Counter Affidavit of 16th July 2020 and a Reply on Point of Law dated 14th October 2020. The Petitioner with leave of Court then

filed a Further-Counter Affidavit deposed to on 27th October 2020 in response to the Respondent's Further Affidavit of 14th October 2020.

C. THE SUMMARY OF DECISION OF THE COURT

The Federal High Court in its ruling dismissing the winding up Petition held that the Petitioner lacks the *locus standi* to institute the case against the Respondent given that the debt is owed to the LIRS and not the Petitioner. Further, the Petitioner has failed to provide any evidence that the debt was validly assigned to him by the LIRS and that even though the collection of tax cannot be assigned by the LIRS, given the provisions of Section 21(b) and (c) of the Lagos State Revenue Administration Law 2006 which grants the LIRS the powers to collect any tax due to the State Government and Section 82 of the Personal Income Tax Act, which stipulates that unpaid PAYE is recoverable as a debt due by the employee to the relevant tax authority and that it is the LIRS that is entitled to the tax and not the Petitioner. Importantly, the Petitioner does not come within the definition of those who can present the Petition under Section 410 of the Companies and Allied Matters Act, 2020, thus the Petitioner lacks the *locus standi*.

On the issue of whether the Winding Up proceeding is incompetent having not been preceded by a statutory demand or a valid statutory demand. The Court observed that the Petition was predicated on the sum of N96,128.13k and N48,060.89K being alleged debts allegedly not remitted to the LIRS. However, the statutory demand dated 18th May 2020 only disclosed the sum of N96,128.13K and that the Statutory Demand is not a valid demand for the payment of the alleged debt. Having not issued a Statutory Demand for the entire debt the Petition is incompetent, and it is hereby dismissed.

The Court further held that the debt is disputed by the parties especially the Respondent that the dispute must be resolved first as a Winding Up Petition is not a debt recovery action especially in the case where the debt is owed to the LIRS and not the Petitioner. That until the dispute surrounding the debt is resolved, the Winding-up Petition cannot be allowed to proceed, and it ought to be dismissed and that the Petition is an abuse of court process and it is hereby dismissed. The Court observed that the disputed facts are fact in the Respondent supporting Affidavit that the Respondent paid the PAYE taxes, but the payment receipts were issued in the name of the Respondent. On the other hand, the Petitioner stated fact in his counter-affidavit that his PAYE tax report issued by the LIRS does not indicate that the said taxes were paid as Personal Income Tax using his taxpayer ID and that important PAYE is personal and cannot be paid in the name of the Respondent.

The costs of N500,000 was awarded in favour of the Respondent which is automatic given that cost follows the event and that the winning party must be compensated.

D. COMMENT

Pending when the Petitioner appeals the decision to the Court of Appeal. It is important to note the following:

- a) The winding-up petition was predicated upon payment of debts (PAYE taxes) for which the Petitioner is the ultimate taxpayer (debtor if not paid), and the Respondent is mere a statutory agent obligated by law to remitted deducted PAYE taxes to the LIRS on behalf of the Petitioner who is the actual taxpayer. Important the Petitioner has a chose in action in the PAYE taxes payment receipts. The Winding-up Petition was instituted on amongst other grounds that it fair and equitable for the Respondent to be wound up having been used as an instrument of fraud.
- b) The Companies and Allied Matters Act, 2020 has a saving provision for all actions commenced under the repealed Companies and Allied Matters Act 1990 and it recognise that a minimum amount of N100 is sufficient basis to issue a statutory demand notice.
- c) Decisions of Appellate Courts have maintained that the mere dispute of a debt is not sufficient basis to disallow a Winding-up Petition from proceeding. It must be a disputation that is substantial. Importantly, that a law firm committed fraud of presenting unstamped and uninitialed 'LIRS' receipts with its name as the taxpayer cannot with all due respect be said to amount to a substantial disputation of debt.
- d) The award of costs is required by the extant rules of the Federal High Court and judicial precedents to be exercised judicially and judiciously taking into account the entire circumstances of the case.