ISSN: 2230-9926

Available online at http://www.journalijdr.com

IJDR

International Journal of Development Research
Vol. 12, Issue, 05, pp. 55727-55729, May, 2022
https://doi.org/10.37118/ijdr.23385.05.2022

RESEARCH ARTICLE OPEN ACCESS

EFFICACIOUS AND PRAGMATIC METHODS IN DEBT RECOVERY PROCESSES

***Kathleen Okafor**

Baze University, Abuja, Nigeria

ARTICLE INFO

Article History:
Received 10th February, 2022
Received in revised form
20th March, 2022
Accepted 19th April, 2022
Published online 20th May, 2022

Key Words:

Attempts to provide, Ensure compliance, Reditor relationship.

****Corresponding author: Kathleen Okafor,***

ABSTRACT

This paper attempts to provide a simple guide to mainly lawyers, law teachers and other professionals on the necessary appropriate process for debt collection. It is assumed that before issuing letters of demand and pre-action notices, efforts would have been made to achieve amicable settlement of the debt recovery. it is posited that Lawyers are to ensure compliance with rule of law and not apply police intervention in purely civil matters. The preservation of debtor and reditor relationship is crucial for business continuity as in many cases; the debtors do not deliberately default on loans but may have been subject to macro-economic headwinds political risks and long indebtedness by government agencies for executed contracts.

Citation: ***Kathleen Okafor.*** "Efficacious and pragmatic methods in debt recovery processes*", International Journal of Development Research*, 12, (05), 55727-55729.

INTRODUCTION

In a developing economic system as we have, it is evident that lawyers are always intentional about quickest recovery of debts to earn their professional fees. Upon consultation of a lawyer, a Letter of Demand is initiated to the debtor, warning about dire consequences if payment is not received on or before a stipulated date (usually 7 days after the delivery of the letter). If the debtor is a Company, a Statutory Letter of Demand for winding up of the Company will be served on the Company and upon expiration of the statutory period (3 weeks), a winding up proceeding be commenced against the Company for the Court to appoint a receiver to liquidate and sell off the insolvent Company's assets.

A Letter of Demand will show the debtor your level of seriousness to recover the debt and serves as a pre-action notice for a debt recovery proceeding. The debtor may pay up or negotiate an installment payment once he hears from a lawyer. The Court has the power to hear and determine an action for debt recovery and enforce payment against a recalcitrant debtor. A lawyer, acting on behalf of the creditor, will commence a debt recovery action and for damages for breach of contract. The lawyer may also bring an application for the preservation of the moveable and immoveable property of the debtor pending the final determination of the court proceedings. Where the debtor is a company, winding-up proceedings may be commenced along with the action for Summary Judgment against the debtor. It is trite law that in an action for the recovery of debt, the cause of action accrues upon demand for the payment of the debt. Where no demand is made, a cause of action does not arise and no action can be commenced in court. So until such a letter of demand is issued, no right of action would arise and accrue to enable commencement of legal action in a Court of law for the recovery of the debt in question. In the case of Hung v. E.C. Invest. Co. Nig. Ltd[1], this stance confirmed was that: – "In a claim for recovery of a debt, the cause of action accrues when a demand is made and the debtor refuses to pay." A letter of demand serves as a pre-action notice for a debt recovery proceeding. The debtor may pay up or negotiate an instalmental payment once he or she has received a demand notice. The initiation of a debt recovery process generally depends on the nature of default and the response of the debtor. Accordingly, the following practical steps may be used:

1. **Issue a reminder**: This is the first step a creditor should adhere to. Thus, the creditor is to send a reminder through written letters, mails or SMS reminding the debtor of his failure to pay the debt as and at when due and the importance of doing so as refusal may make the creditor to institute the matter in court. Where the debtor does not make payment after the reminder, a further mail to the

1

debtor, referring to the reminder earlier sent should be made. The letter of reminder can be drafted by the creditor or through his lawyer.

2. **Negotiate on new terms of payment**: It is important for the creditor to give room for discussion and negotiate with the debtor on new terms of payment of the debt where it is glaring that the debtor is desirous of paying the debt but for circumstances beyond his/her control, was unable to do so at the actual date fixed for paying the debt. Thus, payment in installments, a new date for the payment of the debt or selling of valuable goods or property of the debtor to settle the debt could be used as a form of paying up the debt owed.
3. **Fall back to the agreement earlier made**: Where the parties have made an agreement before the loan, goods or services were given out, it is important for the creditor to fall back on the said agreement to know if an alternative method of resolving the problem before going to court should default be made in paying the debt, was stated therein. Where such is the case, the creditor should first follow such method before going to court.
4. **Letter of demand:** A letter of demand can be issued to the debtor(s) stating the debt owed, the date which such loan, goods or services were given out, the agreed date it ought to have been paid and the deadline stating that the creditor will commence an action in court where the debt remains unpaid. This letter is an evidence that the creditor has in fact notified the debtor of the debt owed and such payment has not been made. The letter can be drafted by the Creditor's lawyer. Hence the need for the creditor(s) to employ the services of a lawyer.

In the case of Unity Bank v Olatunji[2], the appellant instructed the respondent's law firm to take necessary measures to recover a specified amount owed by debtors of the appellant. The letter of instruction provided that the respondent's fee was "10 percent of the amount recovered". The respondent instituted an action against the appellant's debtors and judgment was given against the debtors for the payment of the debt on 26 October 2008. The debtors thereafter filed an application and obtained an order for instalmental payments. The appellant terminated the respondent's brief on 23 October 2008 and the respondent filed an action for 10 percent of the balance of the total (judgment) debt yet to be paid.

In a similar case, of Savanah Bank v Opanubi (supra) neither the court nor counsel in Olatunji made reference to the Supreme Court decision. The appellant instructed the respondent (a legal practitioner) to recover about N99.3m owed to the appellant by a debtor. The letter of instruction stated that the respondent's fee would be 10 percent of the actual amount recovered by the respondent. The respondent filed an action against the debtor resulting in a judgement in terms of the claim. The debtor paid N50m out of the judgement debt from which the respondent was paid N5m. The appellant thereafter terminated the brief and afterwards received a further payment of N47.5m from the Central Bank of Nigeria on behalf of the debtor. Although the Supreme Court held that the debriefing of the respondent constituted a breach of contract, the action failed on the ground that the respondent's claim was defective. The respondent had alleged that his claim was based on a quantum meruit**,** however the reliefs which he sought and the averments in his statement of claim did not support a quantum meruit claim as the respondent gave no particulars or information in his bill of charges upon which the court could fairly assess his claim on a quantum meruit basis.

> The Court of Appeal held that the respondent was only entitled to 10 percent of the debt recovered (i.e., paid) prior to termination of the respondent's brief on 23 October 2008. The court noted that the letter of instruction clearly stated that the respondent was to be paid 10 percent of the "amount recovered". This phrase, according to their Lordships, was used in the past tense not in future tense, e.g., "amount to be recovered"; hence, the respondent was only entitled to the actual amount paid by the debtors during the lifespan of the brief. Their Lordships relied on the settled principle that parties are bound by terms of their agreement and neither the courts nor a party can unilaterally rewrite the same. Accordingly, where the words used in contractual documents are unambiguous, courts must give the operative words their simple and ordinary meaning.

5. **Procedure agreed on by both parties in their agreement**: It cannot be overemphasized that an agreement should always be drafted when parties are getting into any form of contract, especially when it involves payment from one party to the other. The parties are allowed to include how any obligation or resulting debt owed to another party can be enforced or recovered in their agreement upon a breach by either party. They may resort to using the procedure they have chosen to follow under the agreement, which may include arbitration or any other alternative dispute resolution. The parties may resort to using a neutral third party in resolving the issues if stipulated in the agreement. It could be by way of mediation, which will involve bringing a mediator to help resolve the issues
6. **Apply Alternative Dispute Resolution Mechanism**: It is important for the creditor to explore other methods of dispute resolution before resorting to litigation. Hence, the need for the creditor to use the Alternative Dispute Resolution mechanism to tackle the issue at hand. Parties often times include the Alternative Dispute Resolution clause in their agreement as a means of solving any problem in case of default but where that is not the case, the creditor can still use this means in solving the issue at hand. The Alternative Dispute Resolution methods include Mediation, Conciliation, Negotiation and Arbitration etc.
7. **Summary Judgment**: This is a fast approach to recovering the indebtedness of a person or entity especially when the debt is undisputed or has been admitted by the writing of letters or issuance of cheques or other forms of communication. As the name goes, "summary judgment" is a judgment obtained summarily, without going through the rigours of a full trial. In some Nigerian jurisdictions like Lagos, it is provided for under Order 13 of the High Court of Lagos State {Civil Procedure} Rules 2019, whereas in Abuja it is provided for under Order 11 of the High Court of the Federal Capital Territory {Civil Procedure} Rules 2018, and Order 35 of the High Court of the Federal Capital Territory {Civil Procedure} Rules 2018, which also provides for actions in the "undefended list. It should be noted that the sum being claimed must be liquidated money demand {that is the sum must be arithmetically ascertainable and precise}. The Creditor must also have the belief that the Debtor has no defense to the sum being claimed. To arrive at this belief that the Debtor has no defense to the claim, he is expected to furnish the Court with some relevant documents which will aid in proving the liquidated sum.

The documents are: Contract documents such as loan offer letters, duly executed deeds of guaranty and indemnity {where suing the guarantor of the loan} from which the claim or debt arose Statement of account or other instruments like receipts, invoices, vouchers, tellers establishing the debt that is being claimed Letters of demand from the Creditor and letters from the Debtor showing

[2] (2016) LCN/830 (CA)

admission of some debt or obligation on the part of the Debtor, Once the above conditions and criteria are met, then the applicant can proceed with the summary judgment procedure or the undefended list procedure to recover the indebtedness of the Debtor. Once judgment is obtained, the Creditor can enforce the judgment against the Debtor, without further delay.

8. **Enforcement under Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)**

Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958. Hence, the convention applies in Nigeria. Section 54 of the Arbitration and Conciliation Act 1990 domesticates the convention. Nigeria has a reciprocal obligation under the convention to recognise and enforce arbitral award granted in other co-signatory states.

9. **Instituting an action upon the award:** A plaintiff can bring an action upon the award in a Nigerian court and it would have effect as the judgement of the court.

The plaintiff will need to establish that:

i. there is an existence of arbitration clause in the agreement;
ii. the arbitration was properly conducted in compliance with the agreement; and the award is valid.

A defendant may be left to challenge the award, the conduct of the arbitration or the jurisdiction of the arbitral tribunal.

1. **Enforcement under the International Centre for Settlement of Investment Disputes (ICSID)**

Nigeria domesticated International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act on 29th November, 1967 for enforcement of awards given by ICSID. The ISCID Act allows for the recognition and enforcement of arbitral awards granted by ICSID. A copy of the award duly certified by the Secretary-General of the Centre is deposited with the Supreme Court by the party seeking its recognition and shall be enforced like a judgement of the Apex court.

Conclusions and Recommendation

i. Debt collectors, creditors and insolvency lawyers should be enlightened and trained on the debt recovery processes.
ii. Creditors should incorporate the process chosen in the debt instrumentse.g loan agreement, which should be well worded. Lawyers who are versed in insolvency matters must word such instruments efficiently.
iii. All parties must recognize the pivotal essence of business continuity and ensure optimum use of alternative and non-adversarial options.
iv. The Rule of Law must be adhered to at all times e,g Audi AlteramPartem, equality of parties before the law, independence of the judiciary and proof of the debt.

****