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**Company Law Practice/Dispute Resolution**

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**The Permissibility of Ex-Parte Applications in Winding-Up Proceedings in Nigeria[[1]](#footnote-1)**

1. **Introduction**

Winding-up actions are *sui generis* proceedings[[2]](#footnote-2) governed by their own specialised set of rules known as the Companies Winding-Up Rules 2001 (“the Winding-Up Rules”) as well as some provisions of the Companies and Allied Matters Act 2020 (the “Act”), and in cases where the Rules are lacking, the Federal High Court (Civil Procedure) Rules.[[3]](#footnote-3)

1. **A Cursory Examination of Rule 4 of the Winding-Up Rules**

A key provision of the Winding-Up Rules stipulated in Rule 4thereof expressly prohibits ex-parte applications in winding-up proceedings by stipulating that every application in a winding-up action shall be by motion on notice.[[4]](#footnote-4) It provides thus:

Every application in Court other than a petition shall be made by motion, notice of which shall be served on every person against whom an order is sought not less than five clear days before the day named in the notice for hearing the motion. [Emphasis added]

By the tenor of Rule 4of the Winding-Up Rules, particularly the usage of the word “shall,” it is clear that the Rule mandates the service of every application on the respondent(s) and any deviation from the rule would be enough to vitiate the proceedings.[[5]](#footnote-5) In the case of **Argiji Properties Ltd v. Birni & Anor.,**[[6]](#footnote-6) per Hassan JCA pronounced on the effect of failure to comply with the provisions Rule 4of the Winding-Up Rules on the jurisdiction of an adjudicating court:

… In other words, in a petition for winding up of a company, save for the petition itself, any application filed before the Court in the proceedings shall be by motion on notice to the respondent and served on the respondent not less than five (5) days before the hearing of the motion by the Court. It goes without saying that the provision is clear, unequivocal and bereft of any ambiguity and it affords no discretion on the part of the applicant. Where, as in the instant case, the provision of Rule 4 was not complied with, the application ex-parte is not only incompetent, the Court lacks the requisite jurisdiction to hear, determine and grant the reliefs sought as per the application filed in default of Rule 4 of the Companies winding up Rules… Every Court has jurisdiction to enquire into whether it has jurisdiction over any matter or not, and if it finds that it does not have the requisite jurisdiction, it takes its hands off, and the matter ends there, because where a Court has no jurisdiction, the juridical basis for the exercise of power over such matter is absent... In the instant case, Rule 4 of the Winding Up Rules, 2001 provides for application of this nature to be on notice. But the respondents brought the application ex-parte which is in contravention of Rules 4 of the Winding Up Rules, having not been initiated with due process of law which rendered the ex-parte motion incompetent and the ruling delivered by the Court granting the order ex-parte is null and void with no effect - Madukolu Vs Nkemdilim (supra). The trial Court erred when it held that the winding up proceedings are taken on notice but still went ahead to grant the order Ex-parte, thus rendering the order made without jurisdiction and by extension this Court is also deprived of jurisdiction to entertain the appeal. It is my view that whether the appellant is disposing or transferring the assets of the company, it must be heard before any decision affecting its rights and obligations is made as provided by Section 36 (1) of the 1999 Constitution (as amended).[[7]](#footnote-7) [Emphasis added].

Essentially, the *raison d’etre* of Rule 4 of the Winding-Up Rule as interpreted in a long line of decided authorities, including **Argiji Properties Ltd.’s case (supra)**, is the necessity of allowing the respondent company an opportunity to be heard, given the potentially paralyzing impact of such proceedings.[[8]](#footnote-8)

1. **Exceptions to Rule 4 of the Winding-Up Rules: the Personal or Direct Impact Test**

In winding-up proceedings, prayers for orders of injunctions, appointment of a provisional liquidator or special manager, leave to advertise the petition, stay of proceedings, substitution of petitioner(s), leave to appear or defend, dismissal of petition, substituted service, extension of time to complete the winding up, leave to make a call on the contributories of a company, taking possession of properties, etc., are common. Some of these applications, such as substituted service, must as a legal necessity be made ex-parte. The question then arises on whether Rule 4 of the Winding-Up Rules prescribes a blanket prohibition and categorically forbids all or any ex-parte application in winding-up proceedings.

While the Court of Appeal was right to have dismissed the applicant’s motion *ex parte* in **Argiji Properties Ltd.’s case**[[9]](#footnote-9) seeking interim injunctive reliefs against the Respondent's Directors, officers, agents or servants or any of them however, it must be stated that there is a danger in making a sweeping assertion that Rule 4 of the Winding-Up Rules admits no exception or affords no discretion on the part of the applicant. It is instructive to note that Rule 4 of the Winding-Up Rules expressly mandates that notice of the motion must be served on every individual against whom an order is sought. This provision reflects the drafters' intention to ensure that individuals whose rights and interests may be significantly affected have the opportunity for a fair hearing. This principle aligns with public policy, emphasizing that orders capable of dissolving or affecting a company's assets and liabilities should not be granted without proper notice to affected parties, in contrast to applicants seeking innocuous applications.

Proceeding from the above explanation, it is clear that not every application in winding-up proceedings seeks an order against parties. Certain applications, such as applications for substituted service, leave to advertise, extension of time to complete the winding up, etc., would fall into this category. Could these applications therefore be validly brought *ex parte*? This question was first answered in **Provisional Liquidator, Tapp Ind v. Tapp Ind**,[[10]](#footnote-10) where the Supreme Court while interpreting Rule 4 of the repealed Companies Winding Up Rules 1983 which is *in pari materia* with the extant Rule 4 held:

This rule appears to allow for ex-parte applications being brought except where an order is being sought against any person in which case such person will have to be put on notice of the motion. As I have earlier observed, the appellant's motions of 5/12/88 and 12/12/88 did not seek an order against any of the parties. I, therefore, hold that these motions could be brought ex parte under the Companies (Winding Up) Rules, 1983.

In that case, the Supreme Court allowed the liquidator's applications for an extension of time within which to complete his task of winding up the company. In the more recent case of **Partnership Securities Ltd & Ors v Ekpe**,[[11]](#footnote-11) the Court of Appeal aligned itself with the decision of the Supreme Court in **Provisional Liquidator, Tapp Ind v. Tapp Ind(supra)**and upheld the view that where an application sought would not affect the respondent personally, such application can be brought by motion ex-parte. In that case, the Court of Appeal held:

… I am of the view that once upon the filing of a Petition for winding - up of a company, an application is filed which is likely to affect the Respondent in the Winding - up Petition personally, such an application if made ex - parte must be ordered to be made by Motion of Notice so that the Respondent is put on Notice. Thus, it is only when such an application would not affect the Respondent personally, as in an application for substituted service and such formal application and/or any other application not personally directed at the Respondent that such an application can be made by Motion ex - parte and none other, and I so hold... Thus, having considered the reliefs sought Ex - Parte by the Respondent vide his Motion Ex - Parte filed on 31/10/2016, that were granted by the Court below Ex - Parte on 8/11/2016, I find that whilst relief number one as sought and granted was not in any way on its face, since it was apparently innocuous, seeking anything in particular against the Appellants save the appointment of a Provisional Liquidator, and therefore, in my view valid, it is not so with relief number two, which even on its face alone was clearly against the assets of the Appellants and therefore, in law and as required by their right to fair hearing as protected under Section 36 (1) of the Constitution of Nigeria 1999 (as amended) they ought to have been put on notice by the Respondent on the direction of the Court below rather than granting such relief affecting the legal rights of the Appellants without putting them on notice and hearing from them before such an order is made.[[12]](#footnote-12) [Emphasis added].

In light of the decisions in **Provisional Liquidator, Tapp. Ind. v. Tapp Ind** **and Partnership Securities Ltd & Ors v Ekpe** a court faced with an *ex-parte* application in winding-up proceedings is obligated to apply “the personal or direct impact test” to determine its *vires* to hear and grant such an application.

1. **Conclusion**

In conclusion, although **Rule 4 of the Winding-Up Rules** unequivocally mandates that applications in winding-up proceedings be made by motion on notice, there are exceptions to this general rule, as established in the cases of **Provisional Liquidator, Tapp Ind v. Tapp Industries Ltd.** and **Partnership Securities Ltd & Ors v Ekpe.** These decisions demonstrate that some applications that do not immediately impair the respondent's rights and responsibilities can be presented *ex parte*. This is more so since *ex-parte* motions may be permitted in applications for procedural matters such as substituted service, leave to publicize the petition, or an extension of time to complete the winding-up as they do not affect the respondent directly. As a result, the balance between procedural efficiency and respondent rights is maintained, ensuring compliance with both the text and spirit of the law.

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For further information on this article and area of law,

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2. See, Afribank Nigeria Plc. v. Nigeria Deposit Insurance Corporation [2015] LPELR-24654 (CA). [↑](#footnote-ref-2)
3. See, Order 183 of the Companies Winding-Up Rules, 2001. [↑](#footnote-ref-3)
4. Order 4, Companies Winding-Up Rules 2001; this order originates from Order 8(1) of the abrogated English Companies (Winding-Up) Rules of 1949 which is *in pari materia* with the extant provision except that the English Rules provides for an allowance of two clear days (as opposed to five) for the time between the service and hearing of the motion on notice. [↑](#footnote-ref-4)
5. See, Honeywell Flour Mills Plc v. Ecobank Nigeria Limited [2016] 16 NWLR (Pt. 1539) 387 and Cansco Dubai LLC v. Seawolf Oilfield Services Ltd & Anor [2018] LPELR-43674 (CA). [↑](#footnote-ref-5)
6. [2018] LPELR-45858(CA). [↑](#footnote-ref-6)
7. *Ibid* at pp. 18-21 paras C-C. [↑](#footnote-ref-7)
8. See, Afribank Nigeria Plc. & Ors v Nigeria Deposit Insurance Corporation (supra). [↑](#footnote-ref-8)
9. (supra). [↑](#footnote-ref-9)
10. [1995] 5 NWLR (Pt.393) 9. [↑](#footnote-ref-10)
11. [2021] LPELR-54557(CA). [↑](#footnote-ref-11)
12. *Ibid* at pp. 29-37 paras F-E, per Georgewill JCA. [↑](#footnote-ref-12)