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THE RIGHT OF CREDITORS TO ATTACH A JOINT ACCOUNT WHERE ONLY ONE PARTY IS INDEBTED



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Introduction

Dr Martin Tallhause looked out of his 15th-floor office window at the busy façade of the hustle and bustle of Ikoyi. He looked like he had just seen a ghost; worst still, he looked like he had just seen red; red on the bank account he maintains jointly with his business partner, Mr Chip Munk. His account officer had just informed him on the phone that pursuant to the Central bank of Nigeria’s Operational Guidelines on Global Standing Instruction (GSI) Individual, (“GSI Guidelines” or the “Guidelines”) [1]

the joint account he maintains with Mr Munk for the purpose of pooling resources for their tech start-up has been debited.

Mr Chip is indebted to a Moneybag bank to whom he had granted a GSI mandate. Dr Tallhause is not a party to that transaction; but because he maintains a joint account with Mr Munk, the funds in their joint account have been charged to satisfy the debt owed by Mr Munk.

This article therefore examines the foregoing scenario, especially with regards to the powers of creditors to charge or levy enforcement of a judgement on a joint account maintained by a debtor and a third party.


Attachment of a Joint Account

A joint account is a bank account shared between two or more persons, natural or juridical. While their contributions may not be the same, they have equal access to the account and equal obligations to pay the charges that arise during the use of the account.

In other words, each one has a right to deposit and withdraw from it without the consent of the other, subject to any specific mandate to the contrary. A creditor might choose to go after the funds in a joint account either because it is easier to access or because a debt remains unsatisfied even after charging or liquidating the other assets of the debtor.

The question that arises, therefore, is - can a creditor attach, garnish, or otherwise enforce a judgement on an account a debtor jointly holds with a third party? The Central Bank of Nigeria (CBN) , under the GSI Guidelines, has taken the position that a creditor bank or Financial Institution can attach funds standing to the credit of a debtor in any account maintained by the said debtor in any Nigerian bank. This is provided that the said debtor has executed a GSI mandate in favour of the bank. This applies only to individuals and not corporates.

[1] Central Bank of Nigeria Operational Instruction on Global Standing Instruction (GSI) Individual < <https://www.cbn.gov.ng/ohr/2020/CCD/CBN%20-%20Operational%20Guidelines%20on%20Global%20Standing%20Instructions%20GSI%20-%20Individuals.pdf> accessed on 15 April 2021. The GSI Guidelines provide a framework from which financial institutions can recover bad debts from all accounts of the borrower connected to their BVN without recourse to the courts. It was introduced to reduce the incidences of Non-Performing Loans(NPLs). This applies only to individual debtors and the protocol for a GSI for corporate debtors is currently being contemplated. See the African Business No reprieve for Nigeria's chronic loan defaulter <https://african.business/2020/10/finance-services/no-reprieve-for-nigerias-chronic-loan-defaulter/> accessed 12 April 2021.



This restricted application constitutes a significant source of frustration to banks and other financial institutions, mainly since loans to corporates constitute more than 65 percent of the financial sector's average outstanding loans [2]. The question as to whether a bank can attach a joint account belonging to individuals is quite straightforward in light of the CBN GSI guideline. The question of the legality of such attachment, especially with regards to the rights of a third party over such funds, is untested in court [3].

Another situation worthy of interrogation is one in which corporates, or a mix of an individual and a corporate, operate a joint account. Where the creditors of one of the parties seek to attach, through a garnishee proceeding, the funds standing to their joint credit, can such funds be attached by a court to the detriment of a non-debtor party? [4]

Sections 88, 89 and 90 of the Sheriffs and other Process Act [5] (SCPA), deal specifically with a situation where a third party has

interest in an account that is subject to attachment by a judgment creditor. Section 88 of the SCPA provides viz:

Whenever in any proceedings to obtain an attachment of a debt it is suggested by the garnishee that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it, the court may order such third person to appear and state the nature and particulars of his claim upon such debt.

It follows, therefore, that a third party has the right to address a court on their interests in a joint account if they so choose and if the court permits them. If they are successful in convincing the court as to the legitimacy of their claims, then the court will bar the execution of judgement on that account.


However, a difficulty arises out of the special nature of garnishee proceedings as the judgment debtor is not a party to the garnishee proceedings.

[2] Debtors Africa Report: NPLs and Bad Debtors-The case for a new industry Approach<https://www.proshareng.com/admin/upload/report/13484-Debtors%20Africa%20Executive%20Summary%20-May,%202020_Subscribe-proshare.pdf> accessed on 15 April 2021

[3] This question will form the crux of a follow-up article.

[4] Ibid (n2)

[5] Sheriffs and Civil Process Act cap S6 Laws of the Federation of Nigeria (LFN) 2004



Where the garnishee elects not to disclose the interest of a third party for any reason, such as its own interest or inadvertence, would an action lie against such garnishee in favour of the third party for such election or omission? After all, the status of a garnishee in such a proceeding is not one of advocate for a judgement debtor. Where a garnishee fails to inform a third party about the proceedings, what is the role of the court since the section above does not impose a positive duty to disclose an encumbrance?

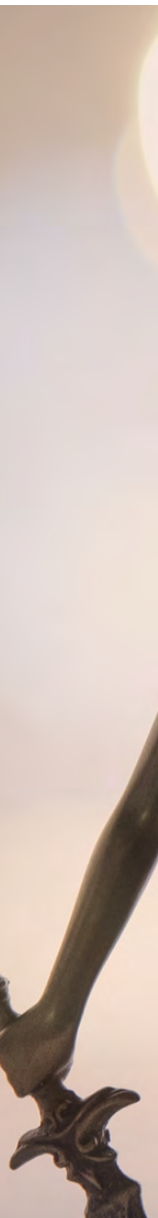
Although the law presumes the good faith of a garnishee, it does not leave the third party at the mercy of the garnishee. The courts have therefore held in a plethora of cases that, where a third party interest is disclosed in a garnishee proceedings, the court has a duty to inquire into the said interest once it has been brought to its knowledge by any means or at any stage of the proceedings see: **Skype Bank Plc V Haruna & Ors (2014) LPELR - 41078 (Ca)**, **Idosu Vs Ojikutu 14 WACA 88**, **A Barzasi Vs B. Visinoni & Anor (1975) NCLR 6**, **Siemens Export KG Vs West German and Nigerian Trading Co Ltd (1985-1989) NBLR 27** and, **Ecobank Nig Plc Vs Ette (2014) LPELR 23444**.

It is therefore in the interest of a third party to approach the court and state the nature of his interest in such joint accounts if it has notice of a third party's attempt to attach it. A problem arises where a third party has no knowledge of the garnishee proceedings on an account which he has an interest. The argument can be made that a court which is presented with an account which on the face of it, is a joint account should direct that the second party not named as judgment creditor be put on notice. However the court in **Skype Bank Plc v.Colombara [6]** interpreted the word 'may' in section 88 of the SCPA to give the court the discretion to not call a third party to appear before it to state its interest. This suggests that a court might not be willing to make such a universal doorway for every third-party interest. However, it is our view that an interest as strong as a joint account holder will be strong enough to persuade a court to order such an appearance.

While the right of the third party to be heard is well established by statute and case law, the standard of proof, or what constitutes proof of ownership of the funds and what such a third party has to prove to be discharged from the attachment is unclear. In some other jurisdictions[7] there are clear rules about what kind of joint accounts maybe attached by a creditor.

[6] (2015) 5 NWLR pt1453

[7] Fortis Law, Garnishee Orders - The threshold for creditors to claim on joint bank accounts Garnishee Orders - The threshold for creditors to claim on joint bank accounts <https://www.lexology.com/library/detail.aspx?g=dbae4051-88a2-4315-9173-bd7d4398b873> accessed 13 April 2021, Hg.org Legal, Can a Joint Account Be Garnished? < <https://www.hg.org/legal-articles/can-a-joint-account-be-garnished-34869>> accessed 12 April 2021



While the specifics of those rules cannot be covered in this article, it is worth noting that a court would usually consider the quantum of contribution by each party and the purpose for setting up the account as eligibility factors.

Thus, the amount of the funds in the account traceable to the contribution of the third party is usually a safe place to begin. A creditor will only be entitled to take only up to the amount contributed by the debtor and not all the funds in the account. Where it can be proved that a joint account is a convenience account such accounts are ineligible for attachment by the creditors of one of the joint account holders in those jurisdictions. Such accounts can be created by parents who add their children for convenience. So, while the children have access to the funds, the ownership of the money remains with the parents. Another scenario where this is important is, where a financier elects to fund an account pursuant to a loan arrangement but decide instead of charging the account to set the account up as a joint account for the purpose of monitoring activities on the account and decide how funds are spent in support of a project.

In both of these cases, a third party can show that the money in the account, is not directly traceable to the debtor and as such, does not belong to the debtor.

Another approach adopted in these jurisdictions is the creation by statute of an exemption list, specifying types of accounts or conditions where joint bank accounts are beyond the reach of any creditor. A combination of all these exists as rules in different jurisdictions like the USA, the United Kingdom, Singapore and many others.

The position under the common law as expressed in the English cases of **Plunkett V Barclays Bank Limited 1936 2 Kb 107, 1936 1 All Er 635, and Hancork v. Smith, 41 CH.D 456**, is that a joint account cannot be garnished in respect of a debt by one of the parties.

Thus, while the case law in Plunkett indicates that a joint account cannot be garnished, it is suggested that a better approach to the issue is rules around quantum of contribution by each party to the joint account and, a limitation on the amount or type of joint account would better serve the interests of all parties. It is urged that this approach be adopted especially for the exercise of a right pursuant to a contract without recourse to the courts.

Conclusion

The question of the right of a creditor of one party to a joint account to attach or garnish a joint account for the purpose of satisfying a debt owed by only one of the account holders is not very clear. It is also unclear whether the CBN guideline on GSI will stand judicial scrutiny. This guideline has the potential to work hardship against third parties whose funds are commingled with that of a debtor and even if ultimately the said third party prevails in court, the period for which they are denied access to the account may prove to be incapable of restitution.

The position of the courts on the issue also leaves a lot to be desired. There is little judicial guidance on what a third party needs to prove to defeat an attempt to garnish their joint account. The legitimate claim of a creditor may also be subverted by the machinery of a joint account if the position as enunciated in Plunkett's case is given strict interpretation. It is submitted that clear rules around these need to be made to balance out the competing rights.



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