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16, 1954

In the Privy Council.

37700

No. 35 of 1953.

ON APPEAL FROM THE WEST AFRICAN  
COURT OF APPEAL  
(NIGERIA SESSION)

UNIVERSITY OF LONDON  
W.C.1.  
24 FEB 1955  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

IN THE MATTER OF THE NIGERIAN FARMERS & COMMERCIAL BANK  
LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ORDINANCE, CAP. 38 OF THE  
LAWS OF NIGERIA, 1948.

BETWEEN

JOHN ADEBAYO (Voluntary Liquidator) ... .. APPELLANT

AND

THE OFFICIAL RECEIVER OF NIGERIA ... .. RESPONDENT.

CASE FOR THE APPELLANT

RECORD.

1.—This is an Appeal from a Judgment of the West African Court of Appeal, sitting at Lagos, dated the 18th May, 1953, affirming in part p. 73 a Judgment of the Supreme Court of Nigeria (Lagos Judicial Division), p. 41 pronounced by Mr. Justice Gregg on the 6th February, 1953.

2.—The Nigerian Farmers and Commercial Bank Limited is a private p. 6, l. 29 limited liability Company incorporated for the purposes of banking under the Companies Ordinance, cap. 38 of the Laws of Nigeria, 1948, and having its registered office at 18 Tinubu Street, Lagos. The Company has over 35 branches in Nigeria and a branch at 85 Long Lane, London, E.C.1.  
10 The nominal capital of the Company is £300,000, divided into 1,000 preference shares of £1 each and 299,000 ordinary shares of £1 each. The p. 7, l. 1 issued capital is £25,194 made up of 500 preference shares and 24,694 ordinary shares. The Directors are Mr. A. S. O. Coker and Mr. T. A.

RECORD

Adeosun. Mr. Coker holds the whole of the preference shares and 24,455 of the ordinary shares.

3.—At an Extraordinary General Meeting held on the 12th December, 1952, the following extraordinary resolutions were duly passed :—

(1) That the Nigerian Farmers and Commercial Bank Limited cannot, by reason of its liabilities and other difficulties, continue its business and that it is advisable to wind up the same and that the Company be wound up voluntarily accordingly.

(2) That Mr. John Adebayo, English Accountant of No. 4 Coates Street, Ebute Metta, Nigeria, and Mr. Charles D. Gairdner, Chartered Accountant, of No. 23 Lawrence Lane, London, W.C.2, be and they are hereby appointed liquidators of the Company to conduct the winding up.

Mr. Adebayo (hereinafter called "the Appellant") was appointed to act in respect of the assets of the Company in Nigeria, and Mr. Gairdner, in respect of the assets in the United Kingdom. The Appellant is an accountant of some experience and qualified to wind up a local company.

4.—The Appellant duly convened a meeting of creditors for the 29th December, 1952. He had trouble over the Gazette Notices but advertised in two of the three regional Gazettes, and in six local newspapers, including four Lagos newspapers, and posted notices to all creditors, in accordance with Section 181 (1) of the Companies Ordinance. The Respondent alleges that one notice, to a creditor in Lagos, was posted late. The Appellant does not admit this and says that, in any case, sufficient notice of the meeting was given.

5.—The meeting of creditors was duly held on the 29th December, and the minutes (in septuplicate) are contained in Exhibits Nos. 1 to 7. Two resolutions were duly moved, seconded and carried by a majority in number and value of the creditors present. The first concerned the office of liquidator. Under Section 181 (2) it is competent for the creditors to determine to apply to the Court for the appointment of a liquidator, in place of or jointly with the liquidator appointed by the company, and in this case the creditors appointed Mr. Akintola Williams, Chartered Accountant, as joint liquidator with the Appellant in the place of Mr. Gairdner. There seems to have been a good deal of discussion about the company's future. Mr. Ferguson, a solicitor, who represented the Bank of British West Africa, was in favour of a winding up by the Court, but a majority of the creditors in number and value clearly favoured a continuation of the voluntary winding up, with a prospect of obtaining fresh capital and reconstructing the company as a public company. The meeting therefore passed a second resolution to the effect that the company be reconstructed and that the Appellant and Mr. Williams as joint

p. 11,  
Annexure " A "

p. 7, l. 15  
p. 9, l. 26

p. 18, l. 24  
p. 19, l. 1

p. 19, l. 7  
p. 20, l. 9  
pp. 24, 25,  
Exhibits 10, 11, 12

p. 10, l. 8  
p. 12, l. 1

Exhibits 1-7

- liquidators should convene a special meeting for the purpose of discussing and approving schemes of reconstruction and compromise. Mr. Ferguson recorded his protest on the grounds (1) that the minutes did not accord with the provisions of Section 181 (2) of the Ordinance and (2) were *ultra vires*, and (3) that the vote was not properly conducted, in that creditors by number and name were not identified. The resolution, however, does not contravene the section, and therefore is not *ultra vires*, and the Appellant in his affidavit swears that the creditors were identified. Mr. Ferguson's clients were creditors for £15,299 15s. 11d., and there was another creditor (for £80) who was opposed to reconstruction, but the majority of creditors present numbering about 400, whose claims came to a total of £38,897 10s. 5d. supported the resolution. The minutes, containing both resolutions, were signed by the creditors and copies of their signatures, with particulars, are attached to one or other of the copies of the minutes contained in Exhibits 1 to 7.
- 6.—The Appellant's Solicitors filed a Motion under Section 120 of the Companies Ordinance, for an order that the Appellant might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme or schemes of arrangement (reconstruction) to be drawn up and this came before the Court on the 5th January, 1953. The Judge adjourned the motion to the 12th January, to enable a draft direction for approval to be filed and the other joint liquidator (Mr. Williams) to swear to an affidavit. The draft Direction was filed on the 10th January, but Mr. Williams declined to act, and on the 12th January the Motion was adjourned to the 26th January. Apparently there was another motion pending in connection with the same company, which had already been fixed for hearing on the same date.
- 7.—Mr. Ferguson seems to have spoken to the acting Registrar of Companies and Administrator-General, who is also the Official Receiver. At any rate, the Official Receiver made enquiries of Mr. Williams and he also asked Mr. Ferguson for information and received a long letter in reply, giving Mr. Ferguson's version of the proceedings at the meeting of creditors. On this *ex parte* statement the Official Receiver based a petition to the Court, dated the 23rd January, 1953, praying
1. That the Company might be wound up by the Court under Section 132 (2) of the Companies Ordinance.
  2. That the Petitioner be appointed liquidator.
  3. That the present Appellant be ordered to hand over all books, etc., relating to the affairs of the Company.
- The Petitioner alleged that the Appellant was a Director of a subsidiary company, but the Appellant denies this.
- 8.—The two motions mentioned in paragraph 6 came up for hearing on the 26th January, together with the petition of the Official Receiver, and were all adjourned to the 27th January, 1953, the petition to be taken

RECORD.

Exhibit 5

Exhibit 5

p. 22, l. 4, p. 23,  
l. 12  
Exhibits 1-7

p. 1

p. 4, l. 1

p. 4, l. 21  
p. 5, l. 20  
p. 6, l. 13p. 12, l. 29  
Annexure "C"  
p. 8, l. 33  
p. 10, l. 23  
p. 14  
Annexure "D"  
p. 12  
Annexure "C"  
p. 6, l. 17

p. 8, l. 10

p. 18, l. 22

p. 16, l. 26  
p. 17  
p. 7, l. 28

RECORD.  
p. 18, l. 22

first, on the ground that if it should be granted the motion on behalf of the Appellant would be unnecessary. On the 27th January, 1953, the Petition was adjourned to the 4th February, 1953, to allow service to be effected on the Appellant and the filing of a counter affidavit by him if necessary, and also to allow the calling of witnesses if Counsel for the Appellant saw fit. On the 3rd February, 1953, the Appellant filed his counter affidavit, in which *inter alia* he denied that he was a director of a subsidiary company when he was appointed Liquidator.

p. 26  
p. 42, l. 21  
pp. 28-36

9.—On the morning of the 2nd February, 1953, Appellant's Solicitors applied for subpoenas on 36 witnesses, 17 of whom lived close at hand, in Lagos or its suburbs, but apparently none of these subpoenas was issued. They also, between the 27th January and the 4th February, 1953, filed 12 affidavits by creditors who supported voluntary liquidation, and 10 of whom had come specially to Lagos, or were already there, prepared to give evidence. 10

pp. 36, 37

10.—On the 4th February, 1953, the date fixed for the hearing of the petition, a preliminary objection was taken that a petition was a suit, and under the Supreme Court Rules, Order 2, Rule 1, should be commenced by a writ, but this objection was over-ruled. After hearing parties and an application on behalf of the Appellant for an adjournment to enable him to call witnesses, the Court adjourned the petition to the 6th February, 1953, to give its decision on whether evidence would be taken in this matter or whether the Official Receiver's petition should be granted forthwith. On the 6th February the Appellant moved for leave to appeal against the Order of the 4th February, and that in any event the Petition and all suits in the same cause or matter should be transferred before another Judge, and that all further proceedings in this matter be stayed in the meantime. The Appellant's main objection was that the Appellant would be precluded from opposing the Petition, should the Judge decide that evidence was not necessary. This motion was refused on the ground that the Order of the 4th February, 1953, was not an interlocutory order. 20 30

p. 37, l. 40

p. 40, l. 26  
p. 40, l. 16

p. 41, l. 10

p. 41

11.—On the same day, the 6th February, 1953, the Judge gave his decision on the point reserved on the 4th February. He held that the Company was virtually a one-man company, and that the Appellant was the nominee of Mr. Coker; that these facts were sufficient to justify a winding up by the Court, and that there was no reason to call evidence. No fraud was alleged but it would be contrary to public interest and against the interest of the creditors generally to allow the company to continue a voluntary winding up under the circumstances mentioned. If the purpose of the voluntary liquidation was to enable the company to evolve a scheme of reconstruction, it seemed odd to the Judge that the resolution to wind up the company voluntarily should state that the company was unable to continue its business. If the company had in fact a scheme of reconstruction in view, this could be considered after the Official Receiver took over. The Court was satisfied, in accordance with Section 132 (2) of the Companies 40

p. 43, ll. 6 & 7

p. 43, l. 17

p. 43, l. 27

Ordinance that the voluntary winding up of the Company could not be continued with due regard to the interests of the creditors, and the Court therefore ordered :—

RECORD.

1. That the Nigerian Farmers and Commercial Bank Limited be wound up by the Court. p. 43, l. 40
2. That the Official Receiver of Nigeria be appointed Liquidator of the said Company, and
3. That the local Liquidator of the said Company, Mr. John Adebayo, hand over to the Official Receiver all books, papers and other documents in his possession relating to the affairs of the said Company, together with an account of his dealings with the affairs of the said Company since the date of his appointment as Liquidator, namely the 12th December, 1952.

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On the application of the Appellant's Solicitor, one month was allowed within which to hand over the books, etc. This decision was given effect to by three Orders of the same date :—

1. Setting out the terms of the decision ; pp. 44, 45, 46
2. ordering a refund of fees for witness subpoenas paid by the Appellant, and
3. refusing the Motion for leave to appeal against the decision of the 4th February, 1953.

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- 12.—On the 13th February, 1953, the Appellant filed Notice of Appeal to the West African Court of Appeal, against the decision of the 6th February, 1953. Grounds of Appeal were filed. On the same date the Appellant filed a motion, in the West African Court of Appeal, asking for a stay of execution. This was heard on the 26th February, by Mr. Justice de Comarmond, sitting as a single Judge of Appeal, and refused on the 26th February, 1953. The conditions of Appeal were duly fulfilled. Meanwhile, three other motions were filed in the West African Court of Appeal. The first was by the Appellant, for an order that the Order for Stay of Execution be reversed. The second was by the Official Receiver for an Order to extend the time for calling the first meetings of creditors and contributories, and the third was on behalf of the Appellant, for an Order for an extension of time to hand over books, etc., to the Official Receiver. These three motions came before the West African Court of Appeal on the 15th April, and were adjourned until after the hearing of the Appeal from the decision of Mr. Justice Gregg. The Order for handing over books, etc., to the Receiver, which had already been extended by Mr. Justice Jibowu, was stayed until the determination of the Appeal. These motions were finally disposed of on the 19th May, 1953, after judgment had been delivered by the West African Court of Appeal.

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13.—The Judgment of the West African Court of Appeal was delivered by the President, Sir Stafford Foster Sutton, on the 18th May, 1953. p. 73

## RECORD

p. 73, l. 13

The following grounds were argued at the hearing of the appeal :—

1. That while it would have been in order for a creditor to lodge a Petition such as the one lodged here, the Official Receiver had no *locus standi* to do so at the present juncture.

2. That the grounds put forward by the Official Receiver were insufficient to justify the Court in making an Order for the winding up of the Company by the Court.

3. That the Court below had no jurisdiction to appoint the Official Receiver as liquidator because by paragraph (b) of Section 144 (3) of the Companies Ordinance, Chapter 38, on an Order for winding up a Company being made by the Court, the Official Receiver becomes *ipso facto* the provisional liquidator, and that no liquidator can be appointed until a meeting of creditors has been summoned under Section 147 of the Ordinance. 10

p. 73, l. 27

p. 73, l. 33

14.—In its Judgment the West African Court of Appeal held that the first ground was disposed of by the provisions of sub-section (2) of Section 132, of the Companies Ordinance which (in the opinion of the Court) clearly empowered the Official Receiver to present a Petition when a Company was in Voluntary liquidation. On the second ground, the Court of Appeal recited the facts found by the trial Judge, and his conclusions that the Company was virtually a one-man company, and that the Appellant was the nominee of Mr. Coker. The Court of Appeal considered that the grounds stated by the learned trial Judge were sufficient to entitle him to exercise his discretion in favour of making a compulsory Order and that the Court of Appeal would not interfere with such exercise of discretion. The Court of Appeal observed that a compulsory order was made by Vaughan Williams, J., in the case of *In re Medical Battery Company* (1894) 1 Ch. D. 444, on similar grounds. The grounds in that case, however, were considerably dissimilar. That was the case of a creditor's petition, and the grievance was that the very man who had been appointed receiver in a debenture-holders' action, had become the liquidator in a voluntary winding up. Had he retired from the receivership, observed Vaughan Williams, J., the result might have been different. There was, moreover, a background of suspicion of fraud, even though the Judge ignored this. Counsel for the Respondent conceded the third point taken by the Appellant, and the Court accepted this view, and observed that a similar view was taken in the case of *In re John Reid & Sons, Ltd.* (1900) 2 Q.B.D. 634. The Court of Appeal therefore deleted that portion of the Order of the Court below which appointed the Official Receiver Liquidator of the Company, but dismissed the appeal upon the other grounds raised, and made no Order as to costs. 20 30 40

p. 74, l. 21

p. 81

15.—Leave to Appeal to the Privy Council was granted on the 14th July, 1953.

16.—The Appellant humbly submits that the said Judgment of the West African Court of Appeal, dated the 18th May, 1953, which affirmed in

part the Judgment of the Supreme Court of Nigeria (Lagos Judicial Division), dated the 6th February, 1953, is erroneous and should be reversed and this Appeal allowed, with costs throughout, for the following among other

### REASONS

1. BECAUSE the trial Judge based his Judgment upon information contained in the *ex parte* unsworn statement of a Solicitor (Mr. Ferguson) who represented particular interests.
- 10 2. BECAUSE the Appellant was appointed Liquidator by resolution passed at an Extraordinary General Meeting, and his appointment was confirmed at the subsequent meeting of creditors, and he was not a nominee.
3. BECAUSE the unsworn allegation made against the Appellant that he was a director of a subsidiary company was denied by him on oath.
- 20 4. BECAUSE the trial Judge should have accepted the statement in the Appellant's affidavit that he was appointed liquidator by resolution passed at an extraordinary general meeting and not by Mr. Coker; alternatively, if he was nominated by Mr. Coker, this was quite legal.
5. BECAUSE the case of *In re Medical Battery Company* (1894) 1 Ch. D. 144, on which the West African Court of Appeal relied, was not completely analogous to the present case.
6. BECAUSE the Company was legally incorporated, and as constituted was entitled to resolve to go into voluntary liquidation, and to appoint a liquidator.
7. BECAUSE if the Liquidator was not independent, the proper course was to replace him, not to terminate the voluntary winding up.
- 30 8. BECAUSE the voluntary liquidation was *bona fide* and should have been allowed to continue.
9. BECAUSE, in the absence of fraud, a public investigation under a compulsory winding up was unnecessary.
10. BECAUSE a very strong case on the evidence was required to justify the interference of the Court, and the Judge's discretion if the matter was a matter of discretion was not exercised judicially.
- 40 11. BECAUSE on the evidence before the Court it is contended no sufficient case was disclosed for ordering the compulsory winding up of the Company.

12. BECAUSE the Courts below should have allowed the voluntary liquidation to proceed and awaited the results before interfering.
13. BECAUSE the Judgment virtually prohibits a company which has a principal and controlling shareholder from going into voluntary liquidation.
14. BECAUSE the trial Judge's finding that the voluntary winding up could not be continued with due regard to the interests of creditors was directly contrary to the creditors' own opinion that their interests could best be served by 10 continuing the voluntary winding up.

G. GRANVILLE SHARP.

T. B. W. RAMSAY.

E. GARDINER SMITH.

In the Privy Council.

No. 35 of 1953.

ON APPEAL FROM THE WEST AFRICAN COURT  
OF APPEAL (NIGERIA SESSION).

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BETWEEN

JOHN ADEBAYO ... .. APPELLANT

AND

THE OFFICIAL RECEIVER  
OF NIGERIA ... .. RESPONDENT.

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CASE FOR THE APPELLANT

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