

16, 1954

In the Privy Council.

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

ON APPEAL
 FROM THE WEST AFRICAN COURT OF APPEAL
 HOLDEN AT LAGOS.

IN THE MATTER of THE NIGERIAN FARMERS AND COMMERCIAL
 BANK LIMITED (in Liquidation)

and

37701

IN THE MATTER of the Companies Ordinance cap. 38 of the
 Revised Laws of Nigeria.

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BETWEEN

JOHN ADEBAYO *Appellant*

AND

THE OFFICIAL RECEIVER *Respondent.*

Case for the Respondent

RECORD.

1. This is an appeal from a judgment of the West African Court p. 75.
 of Appeal dated 18th May 1953 which dismissed an appeal of the Appellant
 from an order of Gregg, J., made on 6th February 1953 in the Supreme Court p. 44.
 of Nigeria that the Nigerian Farmers and Commercial Bank Limited be
 20 wound up by the Court, but deleted from that order such portion as
 appointed the Official Receiver as Liquidator of the Company.

2. The Nigerian Farmers and Commercial Bank Limited is a private
 limited liability company incorporated under the Companies Ordinance
 in Nigeria on 7th January 1947 whose registered office is in Lagos.
 According to the records in the Company's Registration Office, the nominal p. 7.
 capital is £300,000 consisting of 1,000 Preference Shares of £1 each and
 £299,000 Ordinary Shares of £1 each. The issued capital is £25,194 made
 up of 500 Preference Shares and 24,696 Ordinary Shares. Of these all
 the Preference Shares and 24,455 of the Ordinary Shares are held by
 30 Mr. A. S. O. Coker. The directors of the Company are Mr. A. S. O. Coker
 and Mr. T. A. Adeosun.

p. 11.

3. On 12th December 1952 the Company passed two extraordinary resolutions at an Extraordinary General Meeting namely :—

(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. 10

4. In accordance with Section 181 of the Companies Ordinance (Laws of Nigeria (1948) c. 38) a liquidator is required within seven days of his appointment to send notice by post to all persons who appear to him to be creditors that a meeting of the creditors will be held not less than 14 or more than 21 days after his appointment. At such meeting the creditors are required to determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the Company.

p. 18.

On 29th December 1952 a meeting of creditors of the Company was held, having been convened by Mr. John Adebayo, joint liquidator. According to an affidavit of the latter, notices of the meeting were published in a number of newspapers but the date of such publication did not appear nor were any copies of the newspapers put in evidence. According to the same affidavit notices were served on those persons whose names appeared as creditors in the books of the Company. The length of notice was not stated but in one case it was alleged by the Official Receiver that the notice was not posted until 7th January 1953. The meeting purported to pass resolutions— 20

p. 10.

Exhibits 1-7.

(1) Appointing the said John Adebayo and one Akintola Williams, Chartered Accountant, joint liquidators ; 30

(2) That the Company be reconstructed.

p. 12.

5. The meeting of 29th December 1952 was attended by a number of creditors mostly for small amounts and also by a Mr. A. M. Ferguson representing overseas creditors to an amount exceeding £15,000 and whose eventual claims are likely to exceed £20,000. On 9th January 1953 the said Ferguson wrote a letter to the Official Receiver protesting against the manner in which the meeting was conducted in that (*inter alia*)—

(A) No attempt was made to ascertain that all the persons voting were creditors or for what sums ; 40

(B) The meeting had no right, under the Companies Ordinance, to transact any business other than the appointment of a Liquidator and in particular had no right to consider the question of reconstruction ;

(c) No attempt was made to explain to the creditors the implication of a reconstruction, and no facts or figures were produced to show the financial position of the Company, and it was not explained how, if the Company could not pay its creditors, funds could be found for reconstruction.

The said Ferguson, on behalf of his clients, indicated that he would support a petition for the appointment of the Official Receiver as Liquidator.

6. On 31st December 1952 Mr. John Adebayo filed a motion in the
10 Supreme Court of Nigeria that he be at liberty to convene meetings of
creditors for the purpose of discussing and approving a scheme or schemes
of arrangement (reconstruction) and compromise to be drawn up. p. 1.

7. On 8th January 1953 Mr. Akintola Williams, whom the meeting
of 29th December had appointed joint liquidator, informed the Official
Receiver by letter that he did not intend to act. It appears from the said
letter that, although he had communicated his refusal to Mr. Adebayo,
Mr. Coker and the Bank's Solicitor on 30th December 1952, he was
nevertheless notified of his appointment as Liquidator by letter on
7th January 1953. He was not consulted before the resolution appointing
20 him was passed. p. 14.

8. On 23rd January 1953 the Official Receiver presented a Petition
asking that the Company be wound up by the Court. In his Petition and
in the affidavit sworn in support the Official Receiver stated :— p. 6.
p. 8.

(1) That Mr. A. S. O. Coker by virtue of his shareholding (as set
out in paragraph 2 of this Case) had complete control and direction
of the Company ;

(2) That the appointment of Mr. John Adebayo was made in
effect by Mr. Coker by virtue of his shareholding ;

30 (3) That Mr. Charles D. Gairdner, the other liquidator appointed
by the shareholders, would only act, if at all, in respect of the assets
of the Company in the United Kingdom ;

(4) That Mr. John Adebayo was a business associate of
Mr. A. S. O. Coker and not an independent person ;

(5) That Mr. John Adebayo was not a member of any of the four
generally recognised bodies of professional Accountants in England
or Scotland ;

(6) That the meeting of creditors held on 29th December
1952 was not properly convened or conducted ;

40 (7) That it was contrary to public policy and against the
interest of creditors generally that the liquidation should be
conducted by a nominee of Mr. Coker who had complete control
of the Company ;

(8) That since the Company could not pay its debts it was
just and equitable that it be wound up by the Court.

- p. 16. 9. The application of the Liquidator and the Petition of the Official Receiver came before the Court on 26th January 1953 and were adjourned to 27th January 1953. On 27th January 1953 the proceedings were adjourned for a week until 4th February 1953, the Court stating that this would allow the filing of an affidavit by the liquidator and the calling of witnesses if he thought fit.
- p. 17.
- p. 18. 10. An affidavit in opposition to the Petition was filed by the Liquidator Mr. John Adebayo on 3rd February 1953. He said that he was a member of the English Association of Accountants and Auditors and had been practising as Accountant and Auditor in Nigeria since 1930, and that he had acted as Auditor to over 100 Companies, partnerships and individual merchants. He said that he checked the list of persons who had attended the meeting of 29th December 1952 and was satisfied that they were all creditors. He stated that Mr. Ferguson had moved at the meeting that the Official Receiver be appointed Liquidator, and the motion was defeated. He believed that the Official Receiver had been conducting subversive activities against the success of the voluntary Liquidation, that he had been appointed Liquidator by certain other banks whose liquidation was not yet concluded and that, if he were to take over, the reconstruction of the Company would be jeopardised. Certain other affidavits or statements were filed by creditors supporting a voluntary winding up for purposes of reconstruction.
- pp. 21-35. 10
- p. 36. 11. On 4th February 1953 the Petition of the Official Receiver came on for hearing. After the Court had heard, and overruled, an objection on behalf of the Liquidator to the form of proceedings, the Liquidator's contention being that the Official Receiver should have proceeded by writ, an adjournment was applied for in order that witnesses should be called. The Registrar informed the Court that he only received application for subpoenæs that morning. The Court stated that it would consider its decision whether evidence should be taken or whether the Official Receiver's petition should be granted forthwith, and give its decision on 6th February 1953. 30
- p. 38. 12. On 5th February 1953 the Liquidator applied for leave to appeal against the decision of the Court given on 4th February 1953. On p. 41. 6th February 1953 Gregg, J., refused the application on the ground that no interlocutory order had been made on 4th February 1953.
- p. 41. 13. On 6th February 1953 Gregg, J., delivered his judgment on the Official Receiver's petition. He first stated that he had enquired into the date when subpoenæs were applied for on behalf of the Liquidator and found that this was in fact 2nd February 1953, but held that even so this showed 40 delay for which no explanation had been offered. He then pointed out that there was no denial by the Liquidator of certain important averments made by the Official Receiver, namely :—
- pp. 42-43. (1) That the directors of the Company were Mr. Adebayo Shobayo Olumuyiwa Coker and Mr. Tijani Afolabi Adeosun ;

(2) That the issued capital of the Company was £25,194 made up of 500 preference shares and 24,694 ordinary shares ;

(3) That Mr. Coker held the whole of the 500 issued preference shares and 24,455 of the 24,694 ordinary shares.

The latter averment meant in effect that the Company was virtually a one-man Company. Further the Liquidator had not denied that he was the nominee of Mr. Coker who had complete control of the Company.

On these facts which were in themselves, in his opinion, sufficient to justify a winding-up by the Court, he saw no reason to call evidence, and that being so he did not think it necessary to allow evidence to be called in relation to other matters. In his opinion, it would be contrary to public interest and against the interest of creditors generally to allow a company to continue a voluntary winding-up under the circumstances mentioned. He referred to the resolution for winding-up on the grounds that the Company could not by reason of its liabilities and other difficulties continue in business, and said that if the Company in fact had a scheme of reconstruction in view there was nothing to stop this being considered by creditors after the Official Receiver took over. He concluded that he was satisfied in accordance with Section 132 (2) of the Companies Ordinance that the present voluntary winding-up of the Company could not be continued with due regard to the interests of creditors and he ordered :—

p. 44.

(1) That the Nigerian Farmers & Commercial Bank Limited be wound up by this Court ;

(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, 12th December 1952.

14. The Liquidator appealed against the decision of Gregg, J., to the West African Court of Appeal and on 13th February 1953 applied for a stay of execution pending the appeal. The decision on this application was given on 26th February 1953 by De Comarmond, J., sitting as a single judge of the West African Court of Appeal. After considering the judgment of Gregg, J., and certain authorities, the learned judge stated that he would require some very special and convincing reason for granting a stay of execution. The reason put forward, namely, that the creditors had a scheme of reconstruction but that those interested in financing the Company would not supply the necessary funds if the Company was to be wound up by the Court, did not impress him. The creditors could express their views at the statutory meetings. The learned judge therefore refused a stay.

p. 48.

p. 53.

p. 56. 15. The Liquidator applied to the Full Court of the West African Court of Appeal that the order of De Comarmond, J., be reversed or varied, and on 15th April 1953 at a sitting of the full court, it was ordered that the application be adjourned pending hearing of the appeal.

p. 64.

p. 72.

16. The appeal was heard before the West African Court of Appeal (Sir Stafford Williams Powell Foster Sutton, President, Sir John Verity and Sir James Henley Coussey) on 28th April 1953. On 18th May 1953 the Court delivered judgment in which it declared that the portions of the Order of Gregg, J., by which the Official Receiver was appointed Liquidator should be deleted but otherwise dismissed the appeal. 10

p. 73.

17. In the reasons for the judgment of the West African Court of Appeal the President said that three grounds were argued at the hearing in support of the appeal, first that the Official Receiver had no *locus standi* to lodge a Petition, secondly that the grounds put forward by the Official Receiver were insufficient to justify the Court in making an order for winding up by the Court, and thirdly that the Court had no jurisdiction to appoint the Official Receiver as Liquidator.

The first ground was disposed of by Section 132 (2) of the Companies Ordinance (Revised Laws of Nigeria C. 38) which clearly empowered the Official Receiver to present a petition when the Company was in voluntary winding up. On the second point, the grounds stated by the learned trial judge were sufficient to enable him to exercise his discretion in favour of making a compulsory order. 20

The third point had been conceded by counsel for the Official Receiver. The Official Receiver became automatically provisional liquidator until the appointment of a permanent liquidator under Section 147 (1) of the Companies Ordinance.

18. On 14th July 1953 leave to appeal against the judgment of the West African Appeal Court to Her Majesty in Council was granted to the Appellant. 30

19. The Respondent submits that the judgments of Gregg, J., and of the West African Court of Appeal are right and ought to be affirmed for the following amongst other

REASONS

- (1) BECAUSE Gregg, J., was right in holding that the voluntary winding up could not be continued with due regard to the interests of creditors or alternatively because there was material on which Gregg, J., could have so found, and such finding, which was concurred in by the West African Court of Appeal, ought not to be disturbed. 40
- (2) BECAUSE the making of a compulsory winding up order was a matter for the discretion of the trial judge and a Court of Appeal ought not to interfere with the exercise of his discretion.

- (3) BECAUSE a compulsory winding up order ought in the circumstances to have been made.
- (4) BECAUSE there are concurrent findings on a matter of fact in favour of the Respondent.

R. O. WILBERFORCE.

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CHARLES RUSSELL & CO.,

37 Norfolk Street,

Strand, W.C.2,

Solicitors for the Respondent.