

John Adebayo - - - - - Appellant

v.

The Official Receiver of Nigeria - - - - - Respondent

FROM

THE WEST AFRICAN COURT OF APPEAL

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 6TH APRIL, 1954

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*Present at the Hearing:*

LORD OAKSEY

LORD KEITH OF AVONHOLM

SIR LIONEL LEACH

[*Delivered* by LORD KEITH OF AVONHOLM]

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This appeal arises out of the liquidation of a company under the Companies Ordinance, Chapter 38, of the Laws of Nigeria, 1948.

The Nigerian Farmers and Commercial Bank Limited is a limited liability company incorporated under the laws of Nigeria and having its registered office in Lagos. By extraordinary resolutions passed at an extraordinary general meeting held on the 12th December, 1952, it was resolved—

(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 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.

At the statutory meeting of creditors held on the 29th December, a Mr. Akintola Williams, Chartered Accountant, was appointed as joint liquidator in place of Mr. Gairdner. The proper procedure was for an application to be made to the Court for the appointment of this person as joint liquidator but as Mr. Williams subsequently declined to act and as this matter does not enter into the appeal their Lordships make no further reference to it.

At the same meeting a further resolution was passed that "Whereas it is the opinion of the majority of the creditors that the said Bank should be reconstructed and that it should resume normal business and that a compromise be arrived at for the benefit of creditors. Be it resolved therefore that the aforesaid Nigerian Farmers and Commercial Bank Ltd. in Liquidation be reconstructed and that Mr. John Adebayo of 4, Coates Street, Ebuute Metta, and Akintola Williams, Chartered Accountant, liquidators are hereby instructed to convene special meeting according to law for the purpose of discussing and approving the scheme of reconstruction and compromise".

A protest was recorded by a Mr. A. M. Ferguson who represented a number of creditors who had forwarded Bills for collection by the Bank on the ground that the minute did not accord with the provisions of section 181 (2) of the Ordinance and was *ultra vires* and that the vote was not properly conducted in that creditors by number and value were not identified.

On the 31st December, 1952, the appellant (hereafter referred to as the liquidator) filed a motion for an Order that he might 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 and that directions be given as to the method of convening the meeting and for any further order or orders.

Before this motion was disposed of the Official Receiver (the respondent in this appeal) presented a petition to the Court praying that for reasons set out therein the Bank should be wound up by the Court under section 132 (2) of the Companies Ordinance, that the Petitioner be appointed liquidator and that Mr. Adebayo be ordered to hand over all books, papers and other documents in his possession relating to the affairs of the company together with an account of his dealings with the affairs of the company since the date of his appointment. This petition was accompanied by an affidavit of the Official Receiver and various annexures including a letter dated 9th January, 1953, received by the Official Receiver from Mr. Ferguson.

After sundry procedure the motion of the liquidator of 31st December, 1952, and the petition of the Official Receiver came up for further hearing on the 4th February, 1953. In the meantime the liquidator had filed a counter affidavit and had applied for subpoenas on 36 persons whom he wished to call as witnesses and filed a number of affidavits of creditors who were prepared to give evidence.

At the hearing on the 4th February before Mr. Justice Gregg counsel for the liquidator asked for an adjournment to hear witnesses and stated that the whole purpose of the voluntary liquidation was reconstruction. He also stated that he wished Mr. Ferguson to be called. Counsel for the Official Receiver supported his petition and opposed an adjournment. Mr. Justice Gregg adjourned the petition to the 6th February, stating that he would give his decision on whether evidence would be taken in this matter or whether the Official Receiver's petition would be granted forthwith on that date.

A motion for the liquidator for leave to appeal against this order was made and refused on the 6th February. On the same date the judge gave his decision on the adjourned petition. He stated in his judgment that there was no denial of three important averments made by the Official Receiver in his petition. These were—

1. That the directors of the company are Mr. Adeboyo Shobayo Olumuyiwa Coker and Mr. Tijani Afolabi Adeosun ;
2. That the issued capital of the company is £25,194 made up of 500 preference shares and 24,694 ordinary shares ;
3. That Mr. Coker holds the whole of the 500 issued preference shares and 24,455 of the 24,694 ordinary shares.

This last averment means, he said, that the company was virtually a one-man company and that the liquidator was the nominee of Mr. Coker who had complete control of the company. "On these facts" he added, "which are in themselves sufficient, in my opinion, to justify a winding up by the Court I see no reason to call evidence; and that being so I do not think it necessary to allow evidence to be called in relation to other matters. . . . No fraud is alleged by the Official Receiver; but in my 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 accordingly ordered the company to be wound up by the Court.

Against this judgment an appeal was taken by the liquidator to the West African Court of Appeal. The judgment of the Court was given on the 18th May, 1953, dismissing the appeal on the only point with which their Lordships are concerned, viz. the order for a compulsory winding-up. Sir Stafford Foster Sutton, the President of the Court, who delivered the judgment of the Court, said that it was a well settled principle that the Court would not interfere with an exercise of discretion, as this was, by a lower Court unless it had proceeded upon a manifestly wrong ground. In his view the grounds stated by the learned trial judge were sufficient to entitle him to exercise his discretion in favour of making a compulsory order. He referred to *In re Medical Battery Company* [1894] 1 Ch. 444, as illustrating an order made by Vaughan Williams, J. on similar grounds. From this judgment the present appeal has been taken.

Their Lordships have arrived at the conclusion, looking to the procedure followed before the trial judge, that the judgments of the Court of Appeal and of the trial judge cannot stand. In their Lordships' opinion the liquidator should have been allowed to lead the evidence that he desired to call and, he having been refused that opportunity, it cannot be said that the learned trial judge was in a position properly to exercise a discretion to order a compulsory winding-up.

Section 132 (2) of the Companies Ordinance is as follows:

"Where a company is being wound up voluntarily or subject to supervision, a petition may be presented by the official receiver attached to the court, as well as by any other person authorised in that behalf under the other provisions of this section, but the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up or winding up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories."

Reference should also be made to section 140 which reads:

"The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence."

In the light of these sections and in the circumstances of the present case it appears to their Lordships that the wishes of the creditors were relevant matter for consideration. It was said that the evidence was intended only to prove a desire by the creditors for reconstruction of the company. Even if this be so it seems to their Lordships to be immaterial as the creditors may still prefer reconstruction to be carried out under a voluntary winding-up. There may also be other matters arising out of the affidavit and counter-affidavit on which the Official Receiver or the liquidator may wish to lead evidence including the position of Mr. Ferguson. Their Lordships would leave this entirely open to the parties.

With regard to the ground of judgment on which both the trial judge and the Court of Appeal proceeded their Lordships would point out that it does not necessarily follow that, because a company is controlled

by one shareholder and a liquidator in a voluntary liquidation may be regarded as a nominee of that shareholder, a voluntary winding-up cannot be continued with due regard to the interests of the creditors. In the case of *In re Medical Battery Company* there were circumstances clearly sufficient to disqualify the liquidator from acting as an independent party. The control of the company and of the debenture holders were in the hands of the managing director and his family and the liquidator was also receiver for the debenture holders. In these circumstances he was not in a position to act impartially in the interests of the unsecured creditors. Their Lordships do not find it necessary to enter more fully into this aspect of the present case or to examine the other authorities cited on this point as any question of prejudice to creditors will have to be considered anew in the light of all the evidence that may be made available at a new trial.

A question was raised whether the wishes of creditors should not be ascertained by meeting directed under section 209 of the Ordinance. That is not in their Lordships' opinion a matter on which they should give any direction. The question will, if raised, have to be considered by the judge who takes the re-trial.

In these circumstances their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the orders of the Court of Appeal and of Mr. Justice Gregg and to order a re-trial of the Petition. The respondent must pay the costs of this appeal and of the hearing in the West African Court of Appeal. The costs of the hearing before Mr. Justice Gregg shall abide the decision on the re-trial.



In the Privy Council

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JOHN ADEBAYO

v.

THE OFFICIAL RECEIVER OF NIGERIA

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DELIVERED BY LORD KEITH OF AVONHOLM

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