

35/1962

No. ¹⁵ of 1961

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N

MUSABHAI NOORMOHAMED TEJANI
EBRAHIM NOORMOHAMED TEJANI
and
ALIBHAI SULEMAN KABA

Appellants

68279

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- and -

THE OFFICIAL RECEIVER

Respondent

C A S E FOR THE RESPONDENT

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1. This is an Appeal, by leave of that Court, from a Judgment of the Court of Appeal for Eastern Africa delivered on the 27th day of July 1960 and the Order of the same date made pursuant thereto dismissing (so far as the Appellants were concerned) an appeal from the Judgment delivered on the 11th day of March 1960 and the Order of the 9th day of March 1961 of the High Court of Uganda dismissing the application of the Appellants and another for the discharge of an ex parte Order made by the High Court of Uganda on the 25th day of January 1960 under the provisions of the Companies Ordinance for the public examination of (inter alios) the Applicants as to the conduct of the business and dealings of Industrial Oil Products Corporation Limited (in Liquidation) as Directors.

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p. 32

p. 35

p. 16

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2. Industrial Oil Products Corporation Limited (hereinafter called "the Company") was incorporated in Uganda on the 28th day of July 1951. The Appellant Musabhai Noormohamed Tejani became a Director thereof on the 1st day of May 1952 and

pp. 2-3

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remained a Director thereof until the 1st day of February 1957. The Appellant Ebrahim Noormohamed Tejani became a Director thereof on the 1st day of May 1952 and remained a Director thereof until the 1st day of January 1957. The Appellant Alibhai Suleman Kaba became a Director thereof on the 18th day of June 1953 and remained a Director thereof until the liquidation of the Company.

p. 1 3. The Company was ordered to be wound up compulsorily by the High Court of Uganda by Order dated the 3rd day of April 1959, the cause being No. 11 of 1959. 10

p. 2 4. On the 22nd day of October 1959 the Official Receiver, in pursuance of Section 182 (2) of the Companies Ordinance (which corresponds to Section 182 (2) of the United Kingdom Companies Act 1929) presented a Further Report to the Court. In the course of this Report, after setting out the facts relating to the Directorships of the Appellants as stated above, the Official Receiver alleged:

p. 4, 1.12 (i) That since the end of 1955 the Directors of the Company appeared to have been aware that the Company was insolvent not only in the sense that it could not meet its debts but also that there was a deficiency of assets over liabilities; 20

p. 5, 1.7 (ii) That the Directors of the Company appeared to have carried on business with intent to defraud creditors and for fraudulent purposes;

p. 6, 1.21 (iii) That the Directors of the Company appeared to have made illegal payments;

and gave full details of each matter of complaint showing that the Appellants were Directors of the Company at the date of each such matter of complaint. 30

5. Section 214 of the Companies Ordinance (which corresponds to Section 216 (1) of the United Kingdom Companies Act 1929) provides as follows :-

"214. (1) Where an order has been made for winding up of a company by the court, and the official receiver has made a further report under this Ordinance stating that in his opinion a fraud had been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the 40

court may, after consideration of the report, direct that that person, director, or officer shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof".

6. The said Further Report accordingly concluded :-

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"WHEREFORE in view of the facts hereinbefore recorded the Official Receiver is of the opinion that a fraud has been committed by the undermentioned directors since the formation of the Company and accordingly requests that this Honourable Court shall direct the undermentioned directors of Industrial Oil Products Corporation Limited to attend before the Court at a date to be appointed for the purpose and be publicly examined as to the conduct of the business of the company and as to each of their conduct and dealings as a Director thereof :-

p.7, 1.40-
p.8, 1.15

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(inter alios)

(c) Musabhai Noormohamed Tejani P.O.Box 1371 Kampala

(e) Ebrahim Noormohamed Tejani P.O.Box 1371 Kampala

(g) Alibhai Suleman Kaba P.O.Box 1559 Kampala."

7. By virtue of Section 356 (1) of the Companies Ordinance, the United Kingdom Companies (Winding-Up) Rules 1929 are made applicable to Uganda. By Rule 8 (2) thereof :-

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" (2) Every application in Chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons".

By Rule 59 thereof :-

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"59. The consideration of a report made by the Official Receiver pursuant to subsection (2) of section 182 of the Act shall be before the Judge of the Court personally in Chambers, and the Official Receiver shall personally, or by counsel or solicitor, attend the consideration of the report, and give the Court any further information or explanation with

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reference to the matters stated in the report which the Court may require".

And by Rule 223 thereof :-

"223(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

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(2) No defect or irregularity in the appointment or election of an Official Receiver, Liquidator, or member of a Committee of Inspection shall vitiate any act done by him in good faith."

p.16

8. By an Order of the High Court of Uganda (K.G. Bennett, J.) of the 25th day of January 1960 made in Chambers on considering the said Further Report it was Ordered that the persons whose names appeared at the foot of the said Report should attend before the Court to be publicly examined as to the conduct of the business of the Company and as to their conduct and dealings as directors.

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9. The said Order of the 25th day of January 1960 was made by the learned Judge without any Summons having been taken out by the Official Receiver, or at all, and the Official Receiver did not, either personally or by Counsel or Solicitor, attend the consideration of the said Report by the Judge.

pp.16-22

10. On the 26th January 1960 the learned Judge, on application made, adjourned the public examination to a date to be fixed by the Registrar: this date was apparently fixed for the 14th March 1960.

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p.29

11. On the 9th day of March 1960 the Appellants made an application to the High Court of Uganda for discharge of the said Order of the 25th day of January 1960 on the grounds :-

(a) That rules 8 (2) and 59 of the said Winding Up Rules had not been complied with: and

(b) That the Further Report did not disclose sufficient evidence of fraud committed by them.

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12. On the 11th day of March 1960 the High Court of Uganda (Sheridan J.) delivered judgment dismissing the said application. With regard to the first ground of objection to the said Order of the 25th day of January 1960, the learned Judge observed as follows :-

p.32

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"There should have been a summons to move the Court, but no one was prejudiced by this omission as it was not to be served on the Applicant. At that stage only the Official Receiver and the Court were involved. I am satisfied that this formal defect does not invalidate the proceedings as no substantial injustice has been caused by it: see rule 223 of the Rules: and

p.34, 11.3-31

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"Further, in Palmer's Company Precedents (15th Edn) Part 2 at page 316 alternative forms are given (1) upon hearing the Official Receiver and (2) upon reading the reports: which would seem to support the view that a Judge in Chambers can make an order on the strength of the report, and that it is not absolutely essential for the Official Receiver to be present."

13. With regard to the second ground of objection, the learned Judge observed as follows :-

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"I fail to see how I can discharge the order of a brother Judge who was satisfied that the report warranted the public examination of the applicants, nor can I see how this can be argued to be a question of jurisdiction".

p.34, 11.37-41

14. By his Order dated the 9th day of March 1960 the learned Judge accordingly dismissed the Appellants' application for the discharge of the ex parte Order, but gave them leave to appeal to the Appeal Court for Eastern Africa against the said order of dismissal. And by a further Order of the 9th day of March 1960 the learned Judge adjourned the public examination pending the decision of any appeal.

p.31 & p.35

p.31

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15. From the said Order of the 9th day of March 1960 the Appellants appealed to the Court of Appeal for Eastern Africa, upon the following grounds :-

1. The learned Judge erred in law in holding that noncompliance with Rule 8 (2) of the Companies Winding Up Rules 1929 was a formal defect not invalidating the proceedings for the following reasons :-

p.37; 1.1-
p.38, 1.6

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- (a) A proper construction on the provisions of Rule 8 (2) of the Companies Winding Up Rules 1929 would necessitate a summons to invoke the jurisdiction of the court and making the chamber summons mandatory.
- (b) The court had no power to make an Ex Parte order without an Ex Parte chamber summons being filed before the order was made.

2. The Learned Judge misdirected himself in law in holding that it is not absolutely essential for an Official Receiver to be present in person or by counsel pursuant to Rule 59 of the winding up Rules for the following reasons :-

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- (a) The provisions of Rule 59 are mandatory.
- (b) Court has no jurisdiction or power to dispense with the presence of an Official Receiver or a counsel representing Official Receiver.
- (c) Rule 223 of the Rules could not be invoked to cure the cumulative effects of non-compliance with Rule 8(2) and 59.

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3. The Learned Judge did not sufficiently appreciate the arguments advanced by the Appellants when he said "I fail to see how I can discharge the order of a brother Judge who was satisfied that the report warranted the public examination of the Appellants" for the following reasons :-

(a) There was not a specific allegation of fraud nor were there facts constituting a prima facie case of fraud against any Appellant.

(b) A general allegation of fraud against 5 directors (the allegation against Kassamali Kaba, one of the directors was withdrawn at the hearing of the application) was not sufficient.

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(c) The court has not jurisdiction to order a public examination if frauds have been committed upon members of the outside public when such frauds were not connected in any way with the promotion or formation of the company.

16. In support of the last ground of appeal the Appellants relied upon the following passage from the Judgment of Vaughan-Williams J. (as he then was) in

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Re Medical Battery Co. Limited [1894] 1 Ch. 444 at
pp. 447-8 :

10 "In my judgment, I should be acting very wrongly if I held that Section 8 (of the Companies (Winding-Up) Act, 1890) was intended to apply to a case where the charges made were brought against the company of having committed frauds in the course of its business with the outside world, and not connected in any way with the promotion or formation of the company - that is to say, of its conduct towards persons dealing with it other than shareholders as regards their membership of the company."

17. The Court of Appeal for Eastern Africa (O'Connor P., Gould Acting V-P., and Windham J.A.) delivered its Judgment on the 27th day of July 1960, the leading Judgment (in which the other members of the Court concurred) being delivered by Gould, Acting V-P.

pp.42-55

18. The learned Acting Vice-President dealt with the first grounds of appeal as follows :-

20 " I am in agreement with the learned judge that neither of these defects in procedure caused any substantial injustice, and it follows that, provided that they are properly to be regarded as falling within the category of formal defects or irregularities, and do not go to the root of the jurisdiction of the Judge to make the order, they must be regarded as cured by rule 223 (1). As to the requirement of rule 59 that the Official Receiver shall be present in chambers when the report is considered I think there can be little doubt. His presence is for the benefit of the Judge, in case he may require further explanation or information, and there would be little point in his being present if the Judge did not require such assistance. The Official Receiver is an officer of the court (see rule 207) and the Judge could direct his attendance at any time if he so desired. I think these considerations are sufficient to indicate that rule 59 is properly construable as directory only and non-compliance with it would not go to jurisdiction" and

p.46, l.44-
p.47, l.23

40 " If an application is necessary it should have been by summons in order to comply with rule 8 (2), but if the court chose to treat the report itself as an ex parte application I think that that amounted to no more than an irregularity in procedure, and not to a fundamental and incurable error. That is one way of

p.47, l.37-
p.48, l.6

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"looking at the question. There is another approach. The wording of section 214 (1) of the Ordinance, when compared with a number of other sections, is significant. It states categorically that the court may direct the examination of the person concerned when three things have happened: when an order has been made for winding up by the court, when the Official Receiver has made a further report to the court and when the court has considered that further report. There is nothing about an application in the sub-section."

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p.49, 1.5 He concluded that, upon either of the two approaches, what took place did not go beyond mere irregularity.

19. He then dealt with the last ground of appeal, and after consideration of the wording of the relevant sections of the United Kingdom Acts and the Uganda Ordinance, especially the words "in relation to the company since its formation" in S. 214 (1) of the Ordinance concluded as follows :-

p.52,
11.11-17

" I am, with respect, unable to accept what was said in Re: Medical Battery Co. Ltd. as a full exposition of the meaning of the section under consideration then and here, and I think that the further report alleges fraud of a type covered by the section and that this ground of appeal must consequently fail".

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20. As to the remaining ground of appeal, the learned Acting Vice-President said :-

p.52,
11.20-41

" Sheridan J. took the view that he could not discharge the order of Bennett J. who was satisfied that the report warranted the public examination of the appellants. He did not think that the matter could be argued as a question of jurisdiction. With respect I do not think this is quite the right approach. In In re Great Kruger Gold Mining Co. (1892) 3 Ch. 307 at p.314 Vaughan Williams J. pointed out that the order for examination would be discharged if it was made without jurisdiction, or if it was oppressive or an abuse of the court's powers. It would I think be clearly oppressive if the order were made upon a report which did not, as required by In re Barnes (1896) A.C. 146, contain allegations which would amount to a prima facie case against the individual to be examined. The Order for examination is normally made ex parte

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"and, in my opinion, upon an application for its discharge the judge hearing the application must be satisfied upon this question."

He proceeded to state that he had considered the Further Report in this case, and, without going into details, was of the opinion that it clearly supported the opinion of the Official Receiver in the case of the Appellants.

p.53, l.37

10 21. The Court of Appeal for Eastern Africa accordingly by its Order dated the 27th day of July 1960 dismissed the appeals of the Appellants. From their Judgment and Order the present Appeal is proffered final leave so to do having been granted by the Court of Appeal for Eastern Africa on the 4th day of May, 1961.

pp.56-57

p.58

22. The Respondent humbly submits that the Judgments of the Supreme Court of Uganda and of the Court of Appeal for Eastern Africa were correct and that the present appeal ought to be dismissed for the following among other

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R E A S O N S

(1) BECAUSE the issue of an ex-parte summons was not a condition precedent to the exercise by the Court of its jurisdiction under Section 214 of the Companies Ordinance.

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(2) BECAUSE the failure of the Respondent to comply with the provisions of Rules 8 (2) and 59 of the Companies (Winding Up) Rules 1929 were at the highest mere formal defects or irregularities which under Rule 223 would not invalidate the Order of the 25th day of January 1960 unless the Court was of opinion that substantial injustice had been caused by the defect or irregularity and that the injustice could not be remedied by any order of the Court, a condition which was not satisfied.

(3) BECAUSE the Further Report of the Respondent disclosed such facts as establish a prima facie cause of fraud against each of the Appellants as an Officer of the Company.

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(4) BECAUSE the dictum of Vaughan Williams J. (as he then was) in the Re Medical Battery Co. Ltd. case cannot upon the true construction of the relevant statutory provisions be supported.

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- (5) BECAUSE for the reasons therein given the Judgment of the High Court of Uganda was correct.
- (6) BECAUSE for the reasons therein given the Judgment of the Court of Appeal for Eastern Africa was correct.

RAYMOND WALTON.

No. ¹⁵ 8 of 1961

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA

B E T W E E N

MUSABHAI NOORMOHAMED
TEJANI EBRAHIM
NOORMOHAMED TEJANI

and
ALIBHAI SULEMAN KABA Appellants

- and -

THE OFFICIAL RECEIVER Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2.