

SUPREME COURT OF NIGERIA
FRIDAY 3RD FEBRUARY, 1995. SC. 231/1988
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
S. U. ONU, Y. O. ADIO, A. I. IGUH, JJSC

1. S.H.O.WILLIAMS (JUNIOR)
2.WESTERN LAUNDRY & CO. LIMITED APPELLANTS

AND

J. OLABODE WILLIAMS RESPONDENT

COMPANY LAW - Petition pursuant to 5.207 Companies Act - Need to prove oppressive operation of the Company - When petitioner is held to have shown oppression.

COMPANY LAW - Relief under 5.207 Companies Act - Facts relied upon should justify winding up - For petitioner to be entitled to the relief.

COMPANY LAW- 5.207 Companies Act - Prayers sought thereunder - Whether to be granted - Where petitioner failed to aver - That winding up will unfairly prejudice the oppressed members.

COMPANY LAW - Winding up petition - Petitioner to prove existence of the Company's assets - But a petition based on failure to supply account and information to the petitioner - Does not require plea of the Company's solvency.

PLEADINGS - No triable issue - Disclosed from averments in a claim - Whether possibility of application for amendment - Can save such an action.

PRACTICE & PROCEDURE - Demurrer - Where properly raised - Whether Court has inherent jurisdiction - To dismiss or strike out the claim.

PRACTICE & PROCEDURE - Demurrer - Where raised by a defendant - He is deemed to have admitted all plaintiff's allegations of fact - Circumstances under which demurrer will properly arise.

FACTS

The Petitioner/Respondent filed a petition at the Federal High Court Ibadan alleging that the affairs of the 2nd appellant company were being run by 1st appellant in a manner oppressive to him. The petition was brought pursuant to S.201 of Companies Act, 1968 (a section affording a petitioner relief in cases of oppression). Appellants filed a motion seeking to dismiss the petition on the ground that it disclosed no grounds for the relief under S.201 of the Companies Act to be granted. The trial judge struck out the Appellants' motion. Appellants appealed to court of Appeal which also dismissed the appeal.

The Appellants have further appealed to the Supreme Court to determine inter alia whether the Court of Appeal was right not to dismiss the Respondent's petition in view of the fact that the petition did not allege that winding up would unfairly prejudice the oppressed members as provided under s.201 of the Companies Act 1968.

HELD (Unanimously allowing the appeal per lead judgment of ***IGUH JSC***)
Circumstances under which demurrer will arise

1. It is trite law that whenever a demurrer is raised before trial, a defendant shall be taken as having admitted all the allegations of fact contained in the plaintiffs claim, and accordingly, no evidence respecting matters of fact shall be allowed. Where a plaintiffs statement of claim or, indeed, a petition does not ex facie disclose a cause of action so that even if all the allegations of fact therein averred are established, such a plaintiff or petitioner would still not be entitled to the relief sought, the defendant will be perfectly entitled to move the court to have the case dismissed without any answer on questions of fact from the defendant or respondent. This procedure, it must however be emphasized, is only available where from the facts before the court, there is a good legal or equitable defence to the action. Where, therefore, it is obvious from the facts before the court that no further proceedings would help a case, there is inherent jurisdiction in the court to dismiss or strike out the claim as the case may be on submission made to it in the absence of any amendment of the proceedings. (P. 353 C)

Need to prove oppressive operation of the company

2. The first requirement to be satisfied by a petitioner under section 201 of the Companies Act, 1968 is that at the time of the presentation of the petition, the affairs of the company were being conducted in a manner oppressive to some part of the members including the petitioner himself. This

requirement has been held to involve an invasion of one's legal rights, displaying lack of probity or fair dealing on the part of those conducting the company's affairs and affecting the petitioner in his capacity as a shareholder or member of the company. (P. 355 F)

When petitioner is held to have shown oppression

3. From a close study of the averments in the respondent's petition, there are copious facts in support of the first requirement to the effect that at the time of the presentation of his petition, the affairs of the company were being conducted in a manner oppressive of himself as a shareholder in and member of the company. (P. 356 C)

Relief under s. 201 Companies Act - Justification of winding up

4. It is the law that for a petition to succeed under section 201 of the Companies Act, the facts relied upon should justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. This requirement has been held to mean that the circumstances of the case 'should be such as to justify the making of a winding up order at the suit of the petitioner. Where, therefore, the circumstances of a case do not admit of a winding up order, relief under section 201 of the Companies Act, 1968 may not be available to a petitioner. (P. 356 H)

A petition that does not require plea of the Company's Solvency

5. The well established principle that where a contributory presents a winding up petition, he ought, to succeed, allege and prove, at least, to the extent of a prima facie case, the existence of assets which would give him a tangible interest in the winding up, cannot apply to a petition of this nature which based on failure by the appellants to supply accounts and information to the respondent. In my view, there is no way the respondent in this class of petition can plead the fact of solvency in the face of his averment that he knows nothing about the running of the company. (P. 358 C)

Pleadings - No triable issue disclosed

6. Where, from the pleadings or averments in a claim, no triable issue in law is disclosed, mere speculation as to the possibility of an application for the amendment of the proceedings cannot save such an action. In the present case, a material averment which ought to have been pleaded and established at the trial as one of the conditions precedent to the grant of any reliefs under section 201 of the Companies Act, 1968 was not so pleaded. (P. 361 C)

Failure to aver that winding up will unfairly prejudice oppressed members
 7. In the present case, the petition in its present form does not disclose sufficient cause to justify the granting of the prayers sought under section 201 of the Companies Act since there is no averment to the effect that to wind up the company would unfairly prejudice the oppressed members. For this reason, I am of the opinion that, assuming all the allegations contained in the present petition are capable of proof and would be substantiated by evidence, the petition discloses no ground for relief under section 201, and is accordingly demurrable. In the final result, this appeal succeeds.
 (P. 362 B)

NOTABLE POINTS OF INTEREST.

IGUHJSC

1. Oppression of minority shareholders - Right to petition the court

It has always been the law that if a majority acts in oppression of the minority, the latter may petition the court to wind up the company on the ground that it is just and equitable to do so. In this context “*oppressive*” has been taken to mean burdensome, harsh and wrongful. But it does not include an isolated act of oppression. There must be a continuing cause of oppressive conduct for such a petition to succeed. (P. 353 G)

2. S. 201 of Companies Act does not give unlimited jurisdiction

It has to be emphasized however that section 201 does not give the courts unlimited jurisdiction to intervene in the affairs of the company. The courts can exercise their jurisdiction only if the requirements of the section are satisfied. (P. 355 E)

3. When a petitioner is not bound to aver as to - On the company's solvency

It cannot be the law that where a petition is based on a failure to supply accounts and information, the petitioner is bound in such a situation to aver that the company has surplus assets when he is clearly not in any position to make that assertion. It is also not the law that the petitioner is bound in such a situation to make vague statements in respect of the company's accounts which he knows nothing about. (P. 357 D)

4. Whether solvency is condition precedent to grant of relief under s.201

It does not seem to me completely settled that solvency is a definite condition

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precedent to the grant of each and every relief under section 201 of the
Companies Act, 1968. (P. 358 F)

5. When an order under s.201 Companies Act cannot be made

The first point that must be made here is that an order under section 201 of
B the Companies Act, 1968 cannot be made unless the court is of the opinion
that to wind up the company would unfairly prejudice the oppressed
members including the petitioner. Secondly, it seems to me crystal clear that
a petitioner under section 201 of the law must ex facie disclose facts upon]
which the court could rely in coming to the conclusion that to wind up
C company would unfairly prejudice the oppressed members. Thirdly, it
apparent from the petition itself that there was not a single averment then
suggesting, no matter how remotely, that to wind up the company unfairly
prejudice the oppressed members. (P. 360 E)

REPRESENTATION

D A. Williams (Mrs.) for the appellants.
Respondent absent and unrepresented.

CASES REFERRED TO

E Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598
Enwezor v. Onyejekwe (1964) 1 All NLR 14
Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958) 3 All E.R.
H.L.
Re Westbourne Galleries Ltd. (1970) 3 All E.R. 374
Ebrahimi v. Westbourne Galleries Ltd (1972) All E.R. 492
F Re Jermyn Street Turkish Baths Ltd (1970) 1 WLR 1194
Re H.R. Harmer Ltd (1959) 1 WLR 62 C.A.
Elder v. Elder and Watson (1952) S.C. 49
George v. Dominion Flour Mills Ltd (1963) 1 All NLR 71
Njoku v. Erne (1973) 5 SC 293
G Emegokwue v. Okadigbo (1973) 4 SC 113
In Re Five Minute Car Wash Service Ltd (1965) 1 WLR 745
Re Bellador Silk Ltd (1965) 1 All ER 667
Re Newman and Howard Ltd (1961) 2 All ER 495
Re S.A. Hawken Ltd (1950) 66 TLR (Pt 2) 138
H Re Rica Gold Co. (1879) 11 Ch D

STATUTES & RULES REFERRED TO

Supreme Court Rules 0.2 r.11 (1), 0.6 r.8 (6)
 Companies Act 1968 ss. 201, 375, 397 sched. 15
 English Companies (Winding-Up) Rules 1949 Rule 226(1)
 English Companies Act 1948 s. 210

B

BOOK REFERRED TO

Palmer's company Law 21st Ed. P. 515

LEAD JUDGMENT BY IGUH JSC

On the 19th of January, 1987, J. Olabode Williams (therein referred to as the petitioner) filed a petition at the Federal High Court, Ibadan against S.H.O. Williams (Junior) and Western Laundry and Co. Limited (therein referred to as the respondents) in which he averred as follows:-

C

"PETITION BY MINORITY SHAREHOLDERS

The humble petition of J. Olabode Williams of 18 Dejo Oyelese Road, Bodija, Ibadan, Oyo State of Nigeria a minority shareholder in Western Laundry & Co. Ltd. shows as follows:

D

1. *That the Western Laundry & Co. Ltd. (hereinafter referred to as "the Company") was in the year 1965 incorporated under the Companies Ordinance, Cap. 37, 1958 (now Companies Decree 1968) as a private Company Limited by shares.*

E

2. *That the registered office and place of business of the Company is situate at 343, Ekotedo, Ibadan Oyo State of Nigeria.*

3. *That the nominal share capital of the Company is N20,000.00 divided into 10,000, ordinary shares of N2 each. The amount of the capital paid up to date is N 13,620.00 made up of 6,810 ordinary shares of N2 each.*

F

4. *The main object for which the Company was established is: "To carry on the business of launderers, cleaners, dyers, dry-cleaners and carpet beaters and to carry on the business of repairing all articles sent for cleaning and beating."*

G

5. *That "the Company commenced business immediately after incorporation and has since been in operation.*

6. *That the first Respondent, Mr. S.M.O. Williams, is one of the 23 shareholders of the Company; while your humble petitioner is also one and holds 250 shares of N2 each covered by share Certificate No. Five issued on the 27th day of June, 1967.*

H

7. *That since the incorporation of the Company in -1965 the first*

Respondent, Mr. S.M.O. Williams (Junior) was appointed as the Managing Director of the Company and has since been in control of the management of the Company.

B 8. *That since the incorporation of the Company in 1965 your humble petitioner has not been put in a position to know how the Company is being run as the first Respondent has refused/neglected to arrange for the Annual General Meetings of the shareholders of the Company.*

C 9. *That your humble petitioner persistently requests through the first Respondent for the holding of the Annual General Meetings of the Company to enable the shareholders to be properly and adequately briefed of the situation of things in the Company; to declare dividends where distributable profits have been made and so that the shareholders will from time to time be acquainted with the progress or otherwise being made by their Company.*

D 10. *That when your humble petitioner persistently complained about the irregularities in the management and conduct of the Company the first respondent attempted to buy over the shares held by your petitioner. Your petitioner shall rely on the various correspondence that passed between himself and the first respondent in 1981.*

E 11. *That since the incorporation of the Company your petitioner has not received any notice of the Annual General Meeting; any copy of the Accounts of the Company or any dividend on his shareholding when in fact the Company has continuously operated at full capacity."*

The petition was concluded with the following prayers -

F "Your Petitioner therefore humbly prays for the following:

1. *That this Honourable Court to appoint an independent investigator knowledgeable in Law and Accountancy to investigate the affairs and finances of the Company, and, in particular to:*

G (a) *find out how the revenues accruing to the Company, and all other funds available to he Company, at various times since incorporation, were utilised.*

(b) *find out if, and how much of, the company's funds have been misappropriated by the Managing Director and/or and of the persons engaged/employed by him.*

H (c) *determine the role of the Managing Director and/or members of the Company in the general management of the Company.*

2. *That this Honourable Court do after such investigation direct:*

(a) *that the Managing Director or member of staff of the Company found to have mis-appropriated the funds of the Company shall re*

pay to the Company, within a period that this Honourable Court shall think fit, any such money found to have been misappropriated by such Managing Director or member of staff with interest thereon at such rate and for such period as the Honourable Court shall think fit.

(b) that any such person so found to have misappropriated the funds of the Company shall not hold office either as the Managing Director or in any other capacity in the Company for such period as the honourable Court shall think fit.

3. That this honourable Court shall declare that the petitioner is a shareholder of the Company and is entitled to be acquainted with the progress, or otherwise, being made by the Company since its incorporation up to date.

4. An order that the petitioner be paid all dividends that have accrued on his shareholding since the incorporation of the Company up to date.

5. An order that the first and second respondents must strictly comply with the provisions of the Company's Articles of Association, in particular, holding of annual general meetings, declaration and payments of dividends.

6. Or that such other order or orders may be made in the premises as shall be just."

The petition was duly verified by an affidavit sworn to by one Leonard Okpara who described himself as a Law Clerk in the chambers of the petitioner's solicitors.

Before further proceedings were gone into, the respondents by a motion on notice dated the 8th April, 1987 sought to dismiss the petition on the ground that it did not disclose any grounds for reliefs under the Companies Act, 1968. The court was addressed on this application at great length but the learned trial Judge, without doing justice to the various issues raised in learned counsel's addresses, *brevi manu* struck out the motion and indicated his preparedness to go on with the proceedings. He ruled as follows:-

"If this petition had been brought appropriately, under Section 201 of the Companies, Decree seeking a winding up Order. I would have had no hesitation in dismissing it as requested by the learned counsel for the respondents but, as the petitioner has not sought, and is not seeking, a winding up Order. I find no substance in the application of learned counsel for the respondents and it is accordingly struck out."

The respondents, being dissatisfied with this ruling lodged an appeal to the Court of appeal, Ibadan Division. The said court in a unanimous decision dismissed the appeal, holding that although the learned trial Judge advanced a wrong reason for declining to dismiss the petition, the

respondents' complaints were nonetheless misplaced and lacking in substance. It is against this decision of the Court of Appeal that the respondents have further appealed to this court. I shall hereinafter refer to the petitioner and the respondents in this judgment as the respondent and the appellants respectively.

B *The one ground of appeal filed by the appellants complains as follows:"*

The learned justices of the Court of Appeal erred in law in failing to allow the appellants' appeal before them and in failing to dismiss the petition filed by the respondent before the Federal High Court, Ibadan.

C *Particulars of Error*

The petition, as presented, fails to disclose all of the grounds necessary to enable the grant of the reliefs claimed therein."

D The parties acting pursuant to the rules of court filed and exchanged their written briefs of argument. The two issues identified on behalf of the appellants which this court has been called upon to determine are -

1. Whether the petition as filed in the Federal High Court can succeed upon the assumption that all the allegations contained therein are true.

E 2. Whether or not the failure of the petition to allege that to wind up the second appellant company would unfairly prejudice the oppressed petitioner is a matter that permits the dismissal of the petition in limine upon a demurrer.

The respondent on the other hand, submitted one issue as arising in this appeal for determination. This goes as follows:-

F 1. Whether or not the Court of Appeal was correct in refusing to allow the appeal for the reasons given by it.

I have closely examined these questions set out by learned counsel in their respective briefs and it seems to me that the issue formulated by the respondent is sufficiently encompassed by the two issues identified by the appellants. Besides, the questions raised by the appellants are clearly more consistent with the issue raised in their grounds of appeal. I will accordingly adopt the appellants' issues for my consideration of this appeal.

G At the hearing of the appeal, learned counsel for the appellants, A. Williams (Mrs.) proffered additional arguments in further elucidation of the submissions contained in her written brief. Both the respondent and his H learned counsel, Babatunde Oni Esq, who settled the respondent's brief of argument were absent in court at the hearing although they were duly served with hearing notice in respect of the hearing of the appeal. Accordingly the court proceeded with the hearing of the appeal ex parte pursuant to the provisions of Order 2 Rule 11 (1) and Order 6 Rule 8(6) of the Rules of this

court on the briefs already filed by both parties.

The main thrust of the appellants' complaint is that the petition before the Federal High Court seeks reliefs available under the provisions of section 201 of the Companies Act, 1968, that is to say, the alternative remedy to winding up in cases of oppression of minority shareholders. They therefore submitted that for the petition to succeed, four basic requirements ought to be established. These, according to their learned counsel, are as follows:-

(i) That the affairs of the company are being conducted in a manner oppressive to some of the members of the company including the petitioner:

(ii) That it is just and equitable that the company should be wound up; and in order to establish fact (ii);

(iii) That the petitioner would have a tangible interest in the company upon its being wound up; and

(iv) That to wind up the company would unfairly prejudice the oppressed members.

She stressed that the appellants' application before the Federal High Court for the dismissal of the petition was by way of demurrer. The appellants therefore, conceded without necessarily admitting the truth of all the facts contained in the petition but went further to submit the petition disclosed insufficient grounds in law to warrant the making of the orders sought under section 201 of the Companies Act. She contended that the court below would appear to have accepted the view that a cause of action under section 201 of the Companies Act would not arise unless the four requirements are alleged in the petition and established at the trial. The court, however, went on to hold that failure by the respondent to alleged that to wind up the 2nd appellant company, hereinafter referred to as "the company", would unfairly prejudice the oppressed shareholders was insufficient to warrant the dismissal of the petition in limine.

Learned appellants' counsel next dealt with the treatment by the Court of Appeal of the issue of onus on the respondent to allege and establish the solvency of the company as a condition precedent to the making of an order by the court under section 201. She described the court's castigation of learned appellants' counsel and the dismissal of his submissions on the issue as uncharitable. She stressed that all that learned counsel tried to do was to place the various judicial pronouncements pertaining to the matter before the court. This was in an apparent bid to assist the court in arriving at its own decision on the issue in which there was paucity of authority to rely on. She dismissed as unsound and untenable the view of the court below that an amendment in the course of the proceedings could be granted

if necessary to save the petition by pleading unfair prejudice to the oppressed members if the company is wound up. She contended that since no such amendment was sought before the trial court, the court below ought to have allowed the appeal and dismissed the petition since it failed
B to disclose all the basic facts necessary to entitle relief under section 201 of the Companies Act, 1968. She urged the court to allow this appeal, set aside the decisions of the Court of Appeal and the trial court and to substitute therefore an order dismissing or striking out the petition on the grounds she canvassed.

C Learned counsel for the respondent in his own brief conceded that the reliefs sought in the petition were under section 201 of the Companies Act. He however submitted that if, as contended by the appellants, the solvency of the company was a condition precedent to the granting of reliefs under the said section 201 of the Companies Act, then, as a result of
D pleading, it was for the appellants to raise the issue of insolvency in their answer to the petition. By so doing, solvency would automatically become an issue in the proceedings. The learned trial Judge considered the argument and decided in favour of the respondent but on a ground different from those urged before him. For that reason, learned counsel stated that he could not support the decision of the learned trial Judge. He however
E invited the court below to affirm the decision of the trial court on a different ground, namely, that the application was misconceived. This, the Court of Appeal did, holding that the requirement to aver the solvency of the company does not apply to a petition wherein one of the complaints is the respondent's failure to let the petitioner have information relating to the
F accounts of the company.

Learned counsel submitted that the Court of Appeal was right in holding that the facts averred in the petition showed sufficient allegations of oppression. He contended that since one of the complaints was that the accounts of the company were kept away from the respondent and that no
G annual general meetings were held at which such accounts of the company were laid before the shareholders, the requirement to allege solvency would not apply. He submitted in the alternative that although solvency is a condition precedent for the granting of a relief at the instance of a member of a company under section 201 of the Companies Act, it need not be pleaded
H by the petitioner. In his view, solvency must be presumed in favour of a petitioner pursuant to the maxim *omnia praesumuntur rite esse acta*. According to the respondent's counsel, it is for the appellants as respondents to the petition to raise the issue in their answer by averring that the company was insolvent. I should, perhaps, observe that the respondent in his brief failed to advance any answer whatsoever in reply to the appellants'

submission that failure of the petition to allege that to wind up the company would unfairly prejudice the oppressed petitioner is a matter that permits the dismissal of the petition in limine upon a demurrer. This submission was however rejected by the court below which held that an amendment of the petition might, if necessary, be made and granted to plead that fact and save the petition. I will now deal with the two issues raised by the appellants together. B

The first observation that must be made is that the appellants' application for the dismissal of the petition in issue was filed by way of demurrer. A preliminary point was taken on the petition to the effect that it is demurrable. The point being made was that even if all allegations contained in the respondent's petition were successfully established, the petition would nonetheless fail. C

It is trite law that whenever a demurrer is raised before trial, a defendant shall be taken as having admitted all the allegations of fact contained in the plaintiff's claim, and accordingly, no evidence respecting matters of fact shall be allowed. Where a plaintiff's statement of claim or indeed a petition does not ex facie disclose a cause of action so that even if all the allegations of fact therein averred are established such a plaintiff or petitioner would still not be entitled to the relief sought, the defendant will be perfectly entitled to move the court to have the case dismissed without any answer on questions of fact from the defendant or respondent. This procedure it must however be emphasized, is only available where from the facts before the court, there is a good legal or equitable defence to the action. See *Chief (Mrs.) Akintola & Another v. Mrs. C.F.A.D. Solano* (1986) 2 NWLR (Part 24) 589 at 623. Where, therefore, it is obvious from the facts before the court that no further proceedings would help a case, there is inherent jurisdiction in the court to dismiss or strike out the claim as the case may be on submission made to it in the absence of any amendment of the proceedings. See too *Joseph Enwezor v. Joseph Onyejekwe* (1964) 1 All NLR 14. D E F

Turning now to the petition in issue there can be no doubt that it was brought pursuant to section 201 of the Companies Act, 1968. Both counsel for the parties expressly accepted this view in their respective briefs of argument and I am in full agreement with them on the point. G

It has always been the law that if a majority acts in oppression of the minority, the latter may petition the court to wind up the company on the ground that it is just and equitable to do so. In this context "*oppressive*" has been taken to mean burdensome, harsh and wrongful. See *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1958) 3 All E.R. 66 at 71 H.L. But it does not include an isolated act of oppression. There must be a H

continuing cause of oppressive conduct for such a petition to succeed. See *Re Westbourne Galleries Ltd* (1970) 3 All E.R. 374 at 385 and *Ebrahimi v. Westbourne Galleries Ltd.* (1972) 2 All E.R. 492 H.L. The conduct must also be such as to be oppressive to the petitioner in his capacity as a
B member of the company.

In many cases, however, it is not in the interest of the oppressive minority to have the company wound up. It is in this regard that the law gives the oppressed minority shareholder an alternative remedy to a petition for compulsory winding up of the company altogether under the “*just and equitable*” clause pursuant to section 201 of the Companies Act, 1968.
C I will now examine this provision of our law.

Section 201 (1) and (2) of the Companies Act, 1968 provides as follows:

“201 (1) *Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some*
D *part of the members (including himself) or, in a case falling within section 161(3) of this Decree the Registrar, may make an application to the court by petition for an order under this section.*

(2) *If on any such petition the court is of opinion -*
(a) *that the company’s affairs are being conducted as aforesaid; and*
E (b) *that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up: the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the*
F *conduct of the company’s affairs in future, or for the purchase of the shares of any members of the company by both members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company’s capital, or otherwise,”*

G Under the said section, any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members, including himself, may petition the court which, if satisfied that the facts would justify the making of a winding-up order on the ground that it was just and equitable but that this
H would unfairly prejudice that part of the members, may make such an order as it thinks fit. The relief, afforded by this section is clearly an alternative remedy to the winding up of a company and has the enormous advantage over winding up that it is less drastic and more flexible. Instead of “*killing*” the company outright, it confers jurisdiction on the court to impose

whatever solution it considers just and equitable. See *Re Jermyn Street Turkish Baths Ltd.* (1970) 1 WLR 1194 at 1210 and *Re H>R> Harmer Ltd.* (1959) 1 WLR 62 CA. I should, perhaps, point out that section 201 of the Companies Act, 1968 is indisputably in *pari materia* with the provisions of section 210 of the English Companies Act, 1948.

A close study of the provisions of section 201 of the Companies Act, 1968 does disclose that three conditions or requirements must be established by a petitioner as conditions precedent to a successful grant of any remedies or reliefs' claimed under the section of the law. This, in effect means that the alternative remedy provided under section 201 of the Companies Act is available upon three conditions. These conditions are as follows:-

(i) That the affairs of the Company are being conducted in a manner oppressive to some part of the members of the company including the petitioner; and

(ii) That the facts relied upon would justify the making of a winding up order on the "just and equitable" ground; but

(iii) That such winding up of the company would unfairly prejudice the oppressed members of the company including the petitioner.

Upon the presentation of such petition by any member of the oppressed minority, with the said three conditions duly established, the court may make such order as it thinks fit for ending the matters complained of. It has to be emphasized however that section 201 does not give the courts unlimited jurisdiction to intervene in the affairs of the company. The courts can exercise their jurisdiction only if the requirements of the section are satisfied. I will now consider to what extent the petition in issue was able to satisfy the three conditions pursuant to which the reliefs therein claimed under section 201 may be successfully considered by the court.

The first requirement to be satisfied by a petitioner under section 201 of the Companies Act, 1968 is that at the time of the presentation of the petition, the affairs of the company were being conducted in a manner oppressive to some part of the members including the petitioner himself. This requirement has been held to involve an invasion of one's legal rights displaying lack of probity or fair dealing on the part of those conducting the company's affairs and affecting the petitioner in his capacity as a shareholder or member of the company. See *Re Jermyn Street Turkish Baths Ltd.* (1971) 1 WLR 1042 CA and *Elder v. Elder and Watson* (1952) SC 49.

It needs be emphasized that the trial court in the present case is a superior court of record and not a court of summary jurisdiction. It is also a court of pleadings and matters not pleaded go to no issue and any evi-

dence regarding them are in law not admissible; and if erroneously admitted should be discountenanced. See *George v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71 (1963) 1 SCNLR 117; *Njoku & Others v. Eme and others* (1973) 5 SC 293, *Emegokwue v. Okadigbo* (1973) 4 S.C. 113 etc.

Unless, therefore a petition alleges facts which are capable of establishing
 B that the company's affairs were at the time of its presentation being conducted in the manner aforesaid, the petition would have disclosed no ground for the grant of any relief under section 201 and will be dismissed in limine on a proper application made in this regard. See *In Re Five Minute Car Wash Service Ltd.* (1965) 1 WLR 745 at 751.

C From a close study of the averments in the respondent's petition, there are copious facts in support of the first requirement to the effect that at the time of the presentation of his petition, the affairs of the company were being conducted in a manner oppressive of himself as a shareholder in and member of the company. This is amply demonstrated in paragraphs 6
 D to 11 of the petition set out earlier on in this judgment. Indeed learned counsel for the appellants quite rightly in my view, conceded the point and did not hesitate to accept that the respondent did in fact aver sufficient facts in his petition to establish alleged acts of oppression by the appellants against him.

E I think it ought to be observed that the same concession was made in the court below by the appellants' learned counsel, following which that court, per Sulu Gambari, J.C..A observed as follows:-

*"On the first hurdle, the learned counsel for the appellants conceded that the petitioner has alleged sufficient facts in his petition to show
 F acts of oppression against him."*

A little later in their judgment, the Court of Appeal further stated-

*"He (respondent's counsel) pointed out quite rightly as well that the appellants having conceded that the petition has alleged sufficient facts in his petition to show acts of oppression against him. the only point remaining for consideration, according to him, was whether as contended by
 G the appellants, the petitioner needed to alleged in his petition that the Company is not insolvent."*

(Words in brackets supplied).

H I am in agreement with the court below that sufficient facts are pleaded in the petition to establish prima facie acts of oppression by the appellants against the respondent.

Turning now to the second requirement, it is the law that for a petition to succeed under section 201 of the Companies Act, the facts relied upon should justify the making of a winding up order on the ground

Williams v. Williams (1995) 2 KLR Iguh JSC 357
that it is just and equitable that the company should be wound up. This requirement has been held to mean that the circumstances of the case should be such as to justify the making of a winding up order at the suit of the petitioner. See *Re Bellador Silk Ltd.* (1965) 1 All E.R. 667. Where, therefore, the circumstances of a case do not admit of a winding up order, relief under section 201 of the Companies Act, 1968 may not be available to a petitioner. B

I think I should mention that both learned counsel for the parties were in agreement that solvency is a condition precedent for the grant of a relief under section 201 of the Act. They were also ad idem that failure to disclose on the face of the petition that there would be a surplus of assets upon winding up might disentitle a petitioner to a relief under section 201 of the Act. The exception to this rule, they submitted is where the petition is based on failure to supply accounts and information in respect of the company with the result that the petitioner is not in a position to tell whether or not there will be surplus assets available for the contributories. Learned counsel for the respondent additionally submitted in the alternative that the issue of solvency being a condition precedent for the bringing of a petition of this nature needs not be pleaded by a petitioner. He argued that it is the duty of the respondent to raise it in his defence. D

All I need say in this regard is that it cannot be the law that where a petition is based on a failure to supply accounts and information, the petitioner is bound in such a situation to aver that the company has surplus assets when he is clearly not in any position to make that assertion. It is also not the law that the petitioner is bound in such a situation to make vague statements in respect of the company's accounts which he knows nothing about. See *Re Newman and Howard Ltd* (1961) 2 All E.R. 495 at 497 and 498 and *In Re SA. Hawken Ltd.* (1950) 66 TLR (Part 2) 138 at 141. My view is that learned counsel for the appellants is perfectly right when she conceded both in the court below and before us that it would not be necessary for the respondent to aver tangible interest or the issue of solvency in this case in which he claimed he was not afforded any information whatsoever about the running of the company nor was he furnished with accounts necessary to establish the solvency or otherwise of the company. E F G

Dealing with this issue, the Court of appeal observed as follows:-

"The complaint of the appellants is apparently narrowed down seriously. Firstly, he conceded that the petitioner has already sufficient facts in his petition to show acts of oppression against him. Secondly, he submitted that he must also allege and show at least by prima facie case that if the company is wound up, there would be surplus giving him a tangible interest in a liquidation. Thirdly, he himself provided the answer to that H

point by producing an authority which says that the petitioner would not be in a position to provide a prima facie case that there is a surplus assets or that he has tangible interest in a liquidation where his petition is founded upon a complaint based on a refusal by those in control of the company to furnish him with accounts and information from which it can be discovered whether or not a surplus did exist.

By this argument, the learned counsel for the appellants has posed some questions and has answered them positively in favour of the respondent. The only point which is left and upon which he hangs his appeal appears to me to be very thin; and this is that the petition must go on to allege that an order of winding up would unfairly prejudice the oppressed members."

I need only add that I agree entirely that the well established principle that where a contributory presents a winding up petition, he ought, to succeed, allege and prove, at least, to the extent of a prima facie case, the existence of assets which would give him a tangible interest in the winding up cannot apply to a petition of this nature which is based on failure by the appellants to supply accounts and information to the respondent. In my view, there is no way the respondent in this class of petition can plead the fact of solvency in the face of his averment that he knows nothing about the running of the company.

On the respondent's argument that the onus is on the appellants as respondents to the petition to plead insolvency to raise legal issue of the matter, it is my opinion that the same is now entirely academic and of no consequence in this appeal. This is in view of the concession by both learned counsel to the effect that the issue of insolvency does not apply to the present petition.

Before I leave this issue of solvency, I think I ought to point out that it does not seem to me completely settled that solvency is a definite condition precedent to the grant of each and every relief under section 201 of the Companies Act, 1968. I make this observation with profound respect to both learned counsel who argued the appeal on the basis that solvency is a recognised and settled requirement of the law for the grant of reliefs under section 201 of the Act unless a petition, like in the present case, is based on a failure to supply accounts and information to a petitioner. It appears to me that this further requirement that a petitioner must establish that the company is solvent at the time of the presentation of this petition before he may successfully claim a relief under section 210 of the English Companies Act seemed to have been introduced by Plowman, J. in the case of *Re Bellador Silk Ltd.* (1965) 1 All E.R. 667. This was based

upon the corresponding requirement where a contributory petitions for a winding-up order. In such a situation, the court, as a general rule, will not make a winding-up order on the petition of a contributory whose shares are fully paid unless he shows, on the face of his petition, a *prima facie* probability that the company is solvent and that there will be a substantial surplus of assets available for distribution among the shareholders. Since he will then have no tangible interest in the winding up of the company. See *Re Rica Gold Co.* (1879) 11 Ch. D 36, *Re Kaslo-Slocan etc. Corporation Ltd.* (1910) WN 13, *Re SA. Hawken Ltd.* (1950) 2 All E.R. 408. *Re Expanded Plugs Ltd.* (1966) 1 WLR 514 etc, etc. But in a petition for the alternative remedy under section 201 of the Companies Act, 1968, no distribution of the assets is generally contemplated and the petitioner invariably has a concrete interest in the order which the court will make. Indeed the learned authors of *Palmer's Company Law*, 21st Edition at page 515 did respectfully submit that the reputed requirement as to solvency in petitions under the alternative remedy in section 210 of the English Companies Act which as have already indicated is *in pari materia* with section 201 of our Companies Act, 1968 cannot be the correct position of the law.

I should perhaps add that this proposition found favour with Lords Keith and Denning in the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd. V. Meyer* (1951) AC 324 at 364 and 368 - 369. Said Lord Keith of Avonholm -

"It was said that appeal could not be made to section 210 unless the company had a continuing life ahead of it and here it was clear that the company would have to be wound up. But that means that if oppression is carried to the extent of destruction of the business of the company no recourse can be had to the remedies of the section. This would be to defeat the whole purpose of the section. The present position is due to the oppression and but for the oppression it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen"

Lord Denning in his own contribution put the matter as follows -

"Now, I quite agree that the words of the section do suggest that the legislature had in mind some remedy whereby the company, instead of being wound up, might continue to operate. But it would be wrong to infer therefrom that the remedy under section 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the matters complained of" that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it

should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice - destroying the value of his own shares with those of everyone else - the injured shareholders have. I think a remedy under B section 210."

The matter, however, has not arisen for consideration in this appeal as both parties are in agreement that the issue of solvency is inapplicable to the facts of this petition. In the circumstance, I will decline to decide the point in this present appeal. I will now consider the third and the C last requirement that a petitioner must establish before reliefs claimed under section 201 of the Companies Act, 1968 may be available to him.

As was rightly observed by the Court of Appeal, the last requirement now left and upon which the appellants hang this appeal is that the petition to succeed must go to allege and prove that a winding up order D would unfairly prejudice the oppressed members of the company including the petitioner. Said the court -

"As I have said earlier, the singular issue now before this court is whether, all other conditions having been fulfilled, failure of the petitioner to allege that an order of winding up would unfairly prejudice the oppressed E members will render the petition demurrable or would entitle the respondent to an order of dismissal on the ground that the petition discloses no ground for relief under the Companies Decree, 1968.

The first point that must be made here is that an order under section 201 of the Companies Act. 1968 cannot be made unless the court F is of the opinion "that to wind up the company would unfairly prejudice the oppressed members including the petitioner. See *Re Westbourne Galleries Ltd* (1970) 3 All E.R. 374. Secondly, it seems to me crystal clear that a petitioner under section 201 of the Law must *ex facie* disclose facts upon which the Court could rely in coming to the conclusion that to wind up the company would G unfairly prejudice the oppressed members. Thirdly, it is apparent from the petition itself that there was not a single averment therein suggesting, no matter how remotely, that to wind up the company would unfairly prejudice the oppressed members. The next question must be how the court below resolved the issue on failure by the petitioner to aver in the petition that to H wind up the company would unfairly prejudice the oppressed members.

The Court of appeal proceeded to consider this third requirement and came to the conclusion that failure to allege in the petition itself that to wind up the company would unfairly prejudice the oppressed members is insufficient to warrant the dismissal thereof upon a demurrer. The Court of

Appeal per the lead judgment of Sulu-Gambari, J.C.A. went on:-

"I am not inclined to regard the non-averment in the petition of the facts that to wind up the company would unfairly prejudice the oppressed shareholders as a matter that will render the petition to be dismissed in limine. In the course of the proceedings, an amendment may be granted to plead that fact if necessary. I think the case ought to be gone into and at the end of which the court may decide whether it is of the opinion that to wind up the company would unfairly prejudice the oppressed shareholders."

With very great respect. I am unable to agree that it was proper for the court below in deciding the appeal before it to consider the possibility of an application before the trial court for an amendment to the petition since, at all material times, no such application had either been made or granted. In my view, where from the pleadings or averments in a claim, no triable issue in law is disclosed, mere speculation as to the possibility of an application for the amendment of the proceedings cannot save such an action.

In the present case, a material averment which ought to have been pleaded and established at the trial as one of the conditions precedent to the grant of any reliefs under section 201 of the Companies Act, 1968 was not so pleaded. This resulted in an application by way of demurrer to dismiss the petition on the ground that it did not disclose all the necessary grounds for relief under the said section 201 of the law. No amendment of the petition was made or applied for up to the time a decision on the application was made. All the necessary material facts for reaching a decision having been placed before the trial court in the petition. The question was whether or not such pleaded facts entitled the petitioner to the reliefs sought and not whether there existed the possibility of an amendment of the petition. If they did not, the plain duty of the trial court was to strike out or dismiss the petition. See Chief Mrs. F. Akintola & Another v. Mrs. C. Solano (1986) 2 NWLR (Pt. 24) 59R at 623. There, this court, per Oputa J.S.C. observed as follows:-

"It is high time our trial courts (and counsel for the plaintiff especially) begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact has been raised. There the plaintiff's case should be considered on his pleadings and the applicable law. Where the plaintiff's Statement of Claim does not disclose a cause of action - that is where, even if all the allegations of fact therein averred are established yet still the plaintiff would not be entitled to the relief sought, there instead of filing a Statement of Defence, the defendant should move the court to have the case dismissed."

I must respectfully endorse the above observations of Oputa, J.S.C. The position in the present case is that the petition failed to disclose all the

necessary requirements for success under section 201 of the Companies Act, 1968. For this reason alone, it is my view that this claim under section 201 of the Act must fail. I therefore think that Mrs. Williams is entirely right in her contention that the petition must disclose all the material facts upon which the court would rely in coming to the conclusion that a case under section 201 was made out by the respondent.

In the present case, the petition in its present form does not disclose sufficient cause to justify the granting of the prayers sought under section 201 of the Companies Act since there is no averment of the effect that to wind up the company would unfairly prejudice the oppressed members. For this reason, I am of the opinion that, assuming all the allegations contained in the present petition are capable of proof and would be substantiated by evidence, the petition discloses no ground for relief under section 201, and is accordingly demurrable.

In the final result, this appeal succeeds and it is hereby allowed. The judgment of the court below which affirmed the ruling of the learned trial court on a different ground is hereby set aside. In its place is substituted an order striking out the petition. There will be costs to the appellants against the respondent which I assess and fix at N1,000.00.

BELGORE JSC

The judgment of my learned brother, Iguh, J.S.C., which I have been privileged to read in advance has reviewed all the facts of this case on appeal. I agree with his exhaustive discourse of the issues and the law and I agree with him that this appeal must succeed. For the reasons in the judgment, which I adopt also as mine, I allow this appeal and set aside the decision of Court of Appeal which affirmed the decision of trial Court. I instead enter a verdict of striking out of the petition.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Iguh, J.S.C. just delivered. I agree with the reasons' given by him which I also adopt as mine, that this appeal be allowed and the judgment of the Court below set aside. I however, wish to say a few words of my own.

The contents of the petitioner's/respondent's petition have been

set out in the lead judgment of my learned brother, I need not set them out again in this judgment. It is sufficient to say that from the contents the petition must have been brought under section 201 of the Companies Act 1968, subsections 1, 2 and 5 of which reads as follows:

“201 (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), in a case falling within section 161(3) of this Act the Registrar, may make an application to the court by petition for an order under this section.

(2) If on any such petition the court is of opinion-

(a) that the company’s affairs are being conducted as aforesaid: and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up: the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company’s affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company’s capital or otherwise.”

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

(5) In relation to a petition under this section, sections 373 and 375 of this Act shall apply as they apply in relation to a winding up petition. “

The Act, in section 375, provided for the making of rules of court by the Chief Justice of Nigeria. Section 397 and schedule 15 of the Act further provided that until such rules were made, the English Companies (Winding-Up) Rules 1949 as amended would apply.

A petition brought under section 201 must contain averments to the following effect -

(a) that the affairs of the company are being conducted in a manner oppressive to some of the members of the company including the petitioner; (b) that it is just and equitable that the company should be wound up; and (c) that to wind up the company would unfairly prejudice the oppressed members.

It is the contention of the respondents/appellants in this appeal that the petition filed in the Federal High Court by the petitioner/respondent failed to allege (c) above and that consequently the petition was incompetent and should be dismissed or struck out. The learned Judge of the trial High Court in a rather terse Ruling held:

"If this petition had been brought appropriately, under section 201 of the Companies Decree, seeking a winding up order, I would have had no hesitation in dismissing it as requested by the learned counsel for the respondent but, as the petitioner has not sought and is not seeking a winding up order, I find no substance in the application of learned counsel for the respondent and it is accordingly struck out."

There is no doubt that the above Ruling did not address the issues placed before the learned trial Judge. It is, therefore, not surprising that the respondents to the petition appealed to the Court of appeal against the ruling. That court dismissed the appeal. In his lead judgment in that court, Sulu-Gambari, J.C.A., (with whom Kutigi, J.C.A., as he then was and Omololu-Thomas J.C.A. agreed) observed as follows:

"The only point which is left and upon which he hangs his appeal appears to me to be very thin; and this is that the petition must go on to allege that an order of winding up would unfairly prejudice the oppressed members."

Discussing that only point, Sulu-Gambari JCA went on to say:
"As I have said earlier, the singular issue now before this Court is whether, all other conditions having been fulfilled, failure of the petitioner to allege that an order of winding up would unfairly prejudice the oppressed members will render the petition demur-rable or would entitle the respondent to an order of dismissal on the ground that the petition discloses no ground for relief under the Companies Decree, 1968."

After discussing the case of *Re: Westbourne Galleries Ltd.* (1970) 3 All E.R. 374; (1970) 1 WLR 1378 cited to him by learned counsel for the respondents/appellants, the learned Justice of Appeal then observed:

It will be seen clearly that the court did not decide that the petitioner must go on to allege that an order of winding up would unfairly prejudice the oppressed members. The learned trial Judge in Galleries' case did not say that. He said that an order under section 210 cannot be made unless the court is of opinion that to wind up the company would unfairly prejudice that part of the members. It is the court that must be satisfied and not that the petitioner must allege prejudice. In any case, the learned trial Judge further stated that he would not decide which of the parties' contentions is right. It follows that the matter is but an obiter dictum which cannot be relied upon or seriously contended by the learned counsel for the appellants.

I am not inclined to regard the non averment in the petition of the fact that to wind up the company would unfairly prejudice the oppressed shareholders as a matter that will render the petition to be dismissed in limine. In the course of the proceedings, an amendment may be granted to plead that fact if necessary. I think the case ought to be gone into and at

the end of which the court may decide whether it is of the opinion that to wind up the company would unfairly prejudice the oppressed shareholders."

(2nd and 3rd italics mine)

With respect to the learned Justices of the Court of Appeal, I think they are wrong in the view held by them on the third ingredient that must be established in the petition under section 201 of the Companies Act. B

It is the duty of a petitioner to plead in his petition facts which establish the requirements of the law and upon which the court could rely in finding in his favour. In the instant case the petitioner ought to have pleaded facts upon which the court could rely in coming to the conclusion that an order of winding up would unfairly prejudice the oppressed members. I refer in this respect to the decision of this Court in *In Re Farmart Produce and Shipping Line Ltd. v. Establishment De Commerce General* (1971) 1 All NLR 247. The Petition in the matter on hand failed to allege any fact(s) upon which the Court could come to that conclusion. The petition, therefore, in my respectful view, is deficient in that regard. The form of a petition under section 210 of the English Companies Act 1948 for alternative relief to winding up a company in case of oppression of shareholders is form 5A in the appendix to the Companies (Winding Up) Rules 1949 (as amended) which, by virtue of section 397 and schedule 15 of the Companies Act 1968, was the proper form to be used in this country before the coming into force of the Companies and Allied Matters Act. Cap. 59 Laws of the Federal Republic of Nigeria 1990 and Rules made thereunder. The form contains a paragraph to this effect: C D E

"In these circumstances your Petitioners submit that the affairs of the Company are being conducted in a manner oppressive to a part of the members' of the Company (including your Petitioners) and that while it would be just and equitable that the Company should be wound up to do so would unfairly prejudice your Petitioners and that part of the Members, as such winding-up would....." F G

That paragraph is not included in the petition before us nor are there facts averred therein from which it could be inferred that to wind up the company would unfairly prejudice the petitioner and such other oppressed members of the company. Rule 226(1) of the Companies (Winding Up) Rules 1949 (England) which provides: H

"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 proceedings 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."

Is of no assistance to the petitioner/respondent in saving his petition. As Madarikan J.S.C. delivering the judgment of this Court In *In Re Farmart Produce and Shipping Line Ltd. V. Establishment De Commerce General* (supra) observed at page 255 of the report:

B *"But where, as in this case, the nature of the defects goes to the root of the petition in that it failed to disclose sufficient cause for granting the petition, we find it difficult to agree that such defects could be cured by rule 226."*

Contrary to what the Court below held, it is the duty of the petitioner to allege facts from which a court could infer that to wind up a company would unfairly prejudice the oppressed members.

The court below, per Sulu-Gambari J.C.A., also observed that in the course of the proceedings the petitioner could seek an amendment to plead facts which would show that to wind up the company would unfairly prejudice the oppressed shareholders. This again, with respect, is a wrong view of the state of the law. In *In Re Farmat Produce and Shipping Line Ltd v. Establishment De Commerce General* (supra), following objections raised by learned counsel to the respondent to the petition in that case which objections the learned trial Judge had, as in this case, overruled and decided to proceed with the hearing of the petition, counsel for the petitioner subsequent to the ruling filed an application seeking to amend the petition to meet the objections. On appeal to this Court against the decision of the learning trial Judge over-ruling the objections raised by the respondent, Mr. Kotoye learned counsel for the petitioner argued that if the proposed amendments had been granted the defect in the objection would have been regularised. This Court, per Madarikan J.S.C., retorted at page 253 of the report:

"We cannot agree that it is proper for us in deciding this appeal to consider the contents of an application for amendments to the petition since the application was neither considered nor granted by the learned trial Judge."

G The case on hand is even worse than that case in that there was no application made to the trial court to amend the petition in order to meet the objection raised against it. A petition is to be considered in the form it is at the time when the court is ruling on the objection made to it. It is not for the court to speculate that in the course of proceedings an application for amendment might be made.

H For the reasons stated in this judgment and the other reasons given in the lead judgment of my learned brother Iguh, J.S.C. I too allow this appeal, set aside the judgment of the court below which affirmed the decision of the learned trial Judge, albeit on a different ground. In its place I make an order striking out the petition. I award N1,000.00 costs of this

ONU JSC

In the Federal High Court sitting in Ibadan, the respondent herein as petitioner, filed a petition dated 9th January, 1987 alleging that the affairs of the 2nd defendant/company were being run by 1st defendant (both being appellants herein) in a manner oppressive to him. He therefore, pursuant to section 201 of the Companies Act, 1968 (a section affording a petitioner relief in cases of oppression) in so far as minority shareholders are concerned, brought the petition giving rise to the appeal herein where he prayed:-

“Petition By Minority Shareholder

The humble petition of J. Olabode Williams of 12 Dejo Oyelese Road, Bodija, Ibadan, Oyo State of Nigeria a minority shareholder in Western Laundry & Co. Ltd. shows as follows:

1. *That the Western Laundry & Co. Ltd. (hereinafter referred to as “the Company” was in the year 1965 incorporated under the Companies Ordinance Cap. 37 1958 (now Companies Decree 1968) as a private company limited by shares.*

2. *That the registered office and place of the Company is situated at 343, Ekotedo Ibadan, Oyo State of Nigeria.*

3. *That the nominal share capital of the Company is N20,000.00 divided into 10,000 ordinary shares of N2 each. The amount of the capital paid up to date is N 13,620.00 made of 6,810 ordinary shares of N2 each*

..

4. *The main object for which the company was established is:*

“To carryon the business of launderers, cleaners, dyers, drycleaners and carpet beaters and to carryon the business of repairing all articles sent for cleaning and beating.”

5. *That the Company commenced business immediately after incorporation and has since been in operation.*

6. *That the first respondent, Mr. S.H.O. Williams, is one of the 23 shareholders of the Company; while your humble petitioner is also one and holds 250 shares of N2 each covered by share Certificate No. Five issued on the 27th day of June, 1967.*

7. *That since the incorporation of the Company in 1965 the first respondent. Mr. S.H.O. Williams (Junior) was appointed as the Managing Director of the Company and has since been in control of the management of the Company.*

8. *That since the incorporation of the Company in 1965 your*

humble petitioner has not been put in a position to know how the Company is being run as the first Respondent has refused/neglected to arrange for the Annual General Meetings of the share holders of the Company.

9. That your humble petitioner persistently requests through the first respondent for the holding of the Annual General Meetings of the Company to enable the shareholders to be properly and adequately briefed of the situation of things in the Company; to declare dividends where distributable profits have been made and so that the shareholders will from time to time be acquainted with the progress or otherwise being made by their Company.

10. That when your humble petitioner persistently complained about the irregularities in the management and conduct of the Company the first respondent attempted to buy over the shares held by the petitioner. Your petitioner shall rely on the various correspondence that passed between himself and the first respondent in 1981.

11. That since the Incorporation of the Company your petitioner has not received any notice of the Annual General Meeting; any copy of the Accounts of the Company or any dividend on his shareholding when in fact the Company has continuously operated at full capacity. The petition was concluded with the following prayer.

Your Petitioner therefore humbly prays for the following:

1. That this Honourable Court do appoint an independent investigator knowledgeable in Law and Accountancy: to investigate the affairs and finances of the Company, and, in particular to:

(a) find out how the revenues accruing to the Company, and all other funds available to the company, at various times since incorporation, were utilised.

(b) find out if, and how much of, the Company's funds have been misappropriated by the Managing Director and/or any of the persons engaged/employed by him.

(c) determine the role of the Managing Director and/or member of the Company in the general management of the Company.

2. That this Honourable Court do after such investigation direct:

(a) that the Managing Director or member or staff of the Company found to have misappropriated the funds of the Company shall repay to the Company, within a period that this Honourable Court shall think fit, any such money found to have been misappropriated by such Managing Director or member or staff with interest thereon at such rate and for such period as the Honourable Court shall think fit.

(b) that any such person so found to have misappropriated the

funds of the Company shall not hold office either as Managing director or in any other capacity in the company for such period as the Honourable Court shall think fit.

3. That this Honourable Court shall declare the petitioner is a shareholder of the Company and is entitled to be acquainted with the progress, or act in refusing to allow the Appeal for the reasons given by it. B

Now, Section 201 of the Companies Act, 1968 provides:

“201 (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within section 161 (3) of this Decree the Registrar, may make an application to the court by petition for an order under this section. C

(2) If on any such petition the Court is of opinion - (a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up; D

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit; whether for regulating the conduct of the company's affairs in future, or for the purchase or the shares or any members of the company by other members or the company of by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital or otherwise. E

3. X X X X F

4. X X X X

5. X X X X

A petition brought under the above section must therefore contain the following three requirements of ingredients which in turn form the main thrust of the appellants' complaint argued before us. They are: G

1. The petitioner must show that the affairs of the Company are being conducted in a manner oppressive to some of the shareholders including himself.

2. To be entitled to an order of court, the petitioner must show that the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. H

3. The petitioner has to satisfy the court that to wind up the Company would unfairly prejudice the oppressed members.

At the hearing of this appeal on 11th of November, 1994, learned

counsel for the appellants adopted their brief. As the respondent was absent and unrepresented his appeal was taken as argued on his brief *ex parte* pursuant to Order 2 Rule 11 Supreme Court Rules. The arguments have been fully appraised in the lead judgment of my learned brother. I do not
 B wish to set them out all over again. Suffice it to say, that I entirely agree with the reasoning and conclusions arrived therein by my learned brother Iguh, J.S.C. I need only seize the liberty herein to point out that it was appellants' contention before us that the petition filed in the trial Federal High Court by the respondent failed to allege the third requirement i.e. (3),
 C above and that because of that, the petition herein is incompetent and ought to be dismissed or struck out. I see the force in the argument. Albeit, a cursory reference to what the court below said in this regard becomes imperative. That Court (per Sulu-Gambari, J.C.A.) writing the lead judgment said, *inter alia*, as follows:

D *"I am not inclined to regard the non-averment in the petition of the fact that to wind up the company would unfairly prejudice the oppressed shareholders as a matter that will render the petition to be dismissed in limine. In the course of proceedings an amendment may be granted to plead the fact if necessary I think the case ought to be gone into*
 E *and at the end of which the court may decide whether it is of the opinion that to wind up the company would unfairly prejudice the oppressed shareholders."* [Italics mine]

With the utmost due respect, I do not agree with the view arrive at above. This is because the possibility of allowing an amendment of the
 F petition in the trial court clearly postulates that the petition was incomplete in that it disclosed no full cause of action. In effect, what it amounts to is that a material averment which ought to have been pleaded and established at the trial as one of the conditions precedent to the grant of any reliefs under Section 201 of the Companies Act, 1968 was not so pleaded.
 G In *In Re Farmart Produce and Shipping Line Limited v. Establishment De Commerce General* (1971) 1 All NLR 247, a case in which the petition for winding up was brought under Section 135 of the Companies Act, Cap. 37 - a Section in *pari materia* with Section 201 of the Companies Act, 1968 - the objections raised against the petitioner's petition in the trial High Court
 H were overruled and thenceforth for the petition to proceed to hearing. The appeal by the respondent/appellant was allowed by the Supreme Court in circumstances similar to those in the instant case wherein it held (per Madarikan, J.S.C.), *inter alia*, that

"In the instant case, we are satisfied that the petition, in its present

form, does not disclose sufficient cause to justify the granting of the prayer sought since it does not appear to us from the allegations therein that the substratum of the company has gone or that there has been a complete deadlock. A deadlock which can induce the court to exercise its jurisdiction under the "just and equitable" clause must be a complete deadlock., In our view, such deadlock does not exist here upon the grounds disclosed in the petition. Indeed, learned counsel for the petitioner, Mr. Kotoye, was candid enough to concede that this was so, but he argued further that the defect was not fatal We cannot agreed that it is proper for us in deciding this appeal to consider the contents of an application for amendments to the petition since the application was neither considered nor granted by the learned trial Judge."

In the case in hand, since in the trial court where it began its journey, no amendment of the petition was sought and granted, and none in fact could at the stage of the court below be applied for and made, faced with such a situation, the duty of the trial court was to have struck the petition out or dismissed it. But this it did not even consider, let alone pronounce on it.

It is for the above reasons that I see merit in the contention of the learned counsel for the appellants, Mrs. Williams, that the petition must disclose all the material facts upon which the court would rely in coming to the conclusion that a case under Section 201 of the Companies Act was properly brought by the respondent. It being apparent, therefore, that the petition in that form disclosed no ground that it was demurrable, the appeal herein must perforce succeed and it succeeds.

For the reasons given and the fuller ones set out in the lead judgment of my learned brother Iguh, J.S.C., a preview of which I had had before now, I too, allow the appeal. I make the same consequential orders inclusive of those relating to costs contained in the lead judgment.

ADIO JSC

I have had the privilege of reading, in advance, the judgment just delivered by my learned brother, Iguh, J.S.C., and agree that the appeal should be allowed. I too allow it and abide by the consequential orders, including the order for costs.