

SUPREME COURT OF NIGERIA
 16TH MAY, 1995. SC. 228/1991
CORAM:- M.L. UWAI, A.B. WALI, M.E. OGUNDARE,
U. MOHAMMED, A.I. IGUH, JJSC.

PROVISIONAL LIQUIDATOR OF TAPP
 INDUSTRIES LIMITED

..... LIQUIDATOR\APPELLANT

AND

FRANCIS UMEADI ONYEKWELU

..... PETITIONER/RESPONDENT

AND

1. TAPP INDUSTRIES LIMITED

.. 1ST RESPONDENT/RESPONDENT

2. WILLIAM ONYEKWELU ANAKWENZE
 & 6 OTHERS

..... 2ND-8TH RESPONDENTS/
 APPELLANTS/RESPONDENTS

COMPANY LAW- Companies (Winding Up) Rules 1983 - Allows for *ex parte* applications - In appropriate cases.

CONSTITUTIONAL LAW - Fair hearing - *Ex parte* motion filed by company's provisional Liquidator - Whether respondents' constitutional rights were breached.

COMPANY LAW - Provisional liquidator - Purpose of appointing - Whether there is a limitation of his powers - Vide the court's order that appointed him.

PRACTICE & PROCEDURE - *Ex parte* motion - By a company's provisional liquidator - For extension of time and court's aid - Whether proper - Seeing that no determination of parties' rights was in issue.

FACTS

The Petitioner/respondent petitioned the Federal High Court, Enugu, for compulsory Winding-up of Tapp Industries Ltd. With the consent of all the parties, the Court appointed Mr. Chike Ofodile SAN, as liquidator to the Company vide an order. In course of his assignment, the provisional liquidator who is now the appellant moved the trial court *ex parte* for extension of time and the court's further aid in the execution of his duties motions which were moved on different dates were all granted.

Thereafter, Respondents moved the trial court on notice for an order setting aside ex parte orders granted in favour of the provisional liquidator. They also sought to cause the liquidator restore the status quo by company's properties he has already taken possession of in his duties.

The trial court dismissed the said respondents' motion on notice. The respondents appeal to the Court of Appeal was allowed by that court which provisional liquidator cannot exercise the powers of a liquidator under the companies Act, as the trial court's order appointing him has set out exercised by him. Being dissatisfied, the provisional liquidator has appealed to the Supreme Court raising four issues which the ultimate court narrowed to one.

ISSUE FOR DETERMINATION:

Whether a provisional liquidator appointed by the court for a company can apply ex parte to the court for extension of time to complete his assignment and for an order to take custody of the company's property for safe keeping.

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Provisional liquidator - Purpose of appointing him

The principal purpose of appointing a provisional liquidator is to preserve the company's assets and prevent the directors from dissipating them before a winding up order can be made. It follows, therefore, that his first duty (as of liquidators generally) is to preserve the company's assets before a winding up order is made. This power was expressly provided for in section 224 of the Companies Act, 1968. Is there anything in the Order appointing the provisional liquidator that can be said to have taken away this power? I can find no such limitation. If anything, paragraph 3 of the Order which enjoins the parties to "surrender to the provisional liquidator ... such documents and items belonging to Tapp Industry Ltd..." not only tacitly confirms the power of the liquidator under section 224 but goes further to call for the cooperation of the parties in this regard. It would appear that the Order appointing the Appellant does not restrict his powers except as to the choice of an Accountant. As it would appear that the Appellant's powers are not required by section 223, he has, in my respectful view, the ordinary power of a liquidator. (p. 1109 H)

Ex parte motion by a provisional liquidator

2. As regards the 1st motion of 5/12/88 for extension of time it cannot be said that the determination of the civil rights and obligations of any of the parties, particularly the 2nd-8th Respondents, was in any way involved. In respect of the 2nd motion of

12/12/88, what the Appellant was asking for was an order of court to aid him carry out his principal duty of preserving the proper the 1st Respondent. The motion did not seek to determine who, in fact, owned the said properties, it only sought to preserve them pending such determination. The Appellant is not the agent of any of the parties but an officer of the court. And as an officer of the court he is subject to the control of the court. He, therefore, has a right to apply to the Court for directions as to how to perform his duties especially in the light of difficulties put in his way by some of the parties. (p. 1111 H)

Companies (Winding up) Rules 1983

3. This rule appears to allow for ex parte applications being brought except where an order is being sought against any person in which case such person will have to be put on notice of the motion. As I have earlier observed Appellant's motions of 5/12/88 and 12/12/88 did not seek for an order against any of the parties. I therefore, hold that these motions could be brought ex parte under the Companies (Winding Up) Rules 1983. (p. 1112 D)

Fair hearing - Ex parte motion

4. The conclusion I reach is that as the two motions under consideration did not involve a determination of the civil rights and obligations of any party to the petition proceedings, they were rightly moved ex parte and no breach of the constitutional rights of the 2nd-8th respondents to fair hearing section 33(1) of the Constitution was involved. The court below therefore, in error to have held the contrary. The remedy open to the 2nd-8th Respondents was to move the trial court by motion on notice to vary or discharge the orders made on the motions pursuant to rule 11 of Order XXXIII of the Federal High Court (Civil Procedure) Rules. (p. 1115F)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Ex parte orders obtained ex abundantia cautela

It ought to be emphasized at all events that the ex parte orders in question would appear to have been obtained ex abundantia cautela as, strictly speaking, they may rightly be described as surplusage. This is because the liquidator, by virtue of the powers conferred on him under section 224 of the Companies Act, had the relevant powers covered by the orders in issue. (p. 1118 E)

2. Suo motu issue - When raised erroneously

In the present case the issue of the worthlessness of the said affidavit of inventory was raised for the first time by the Court of Appeal sue motu. It was neither canvassed by the parties in the trial court nor before the court below. With profound respect, the court below was in gross error by failing to give

the parties an opportunity to address it on the status of the document before arriving at its decision on the worthlessness or otherwise of the said affidavit of invented of inventory. (p. 1120 E)

REPRESENTATION

Provisional Liquidator, Chike Ofodile, SAN in person with (C. O Okuusogu) Dr. ILochi Okafor (Mrs. Uche Nwene with him) for Petitioner/Respondent Dr. J.O, Ibik, SAN (Mrs. G.U.E. Peter-Okoye & Mrs. V. Ozioko with him) for 2nd-8th Respondents.

CASES REFERRED TO

Anakwenze v. Tapp Industry Ltd. (1 992) 7 NWLR 142
 Kotoye v. C.B.N. (1989) 1 NWLR 419
 7-UpBottling Company Ltd. v. Abiola & Sons Nigeria Ltd.(1995) 3 N. W.L.R. (Pt. 384) 257
 Bluston and Brawley Ltd. v. Leigh (1950) 2 K.B. 548
 Mohammed v. Kano N.A. (1968) 1 All N.L.R. 424
 Deduwa v. Okorodudu (J976) N.L.R. 236
 Oyeipo v. Oyinloye (1987) 1 N. W.L.R. (Part 50) 356
 Woluchem v. Wokoma (1 974) 3 S. C. 153
 Olusanya v. Olusanya (1983) 3 S.C. 41 at 56
 Overseas Construction Ltd. v. Creek Ent. Ltd. (1985) 3 N. W.L.R. (Part 13) 407 at 410
 Osafire v. Odi (1990) 3 N. W.L.R (Part 137) 130
 Chief Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 N. W.L.R (part 39) 1 at 34
 Kuti v. Balogun (1978) 1 S.C. 53
 Ugo v. Obiekwe (1981) 1 N. W.L.R. (Part 99) 566 at 581
 Oje v. Babalola (1991) 4 N. W.L.R. (part 185) 267 at 280
 A.P. Limited v. Owodunni (1991) 8 N. W.L.R. (Part 210) 391 at 423

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1979 s. 33(1)
 Companies Act 1968 ss. 223 (2), 375(1)
 Federal High Court (Civil Procedure) Rules Cap. 134 L.F.N. 1990 0.23 r. 7

BOOKS REFERRED TO

Halsbury's Laws of England 3rd. Ed. Vol. 6 p. 559
 Palmer's Company Precedents (Part 2) 17th Ed. pp. 102-103

LEAD JUDGMENT BY OGUNDARE JSC

The narrow question that calls for determination in this appeal is whether a provisional liquidator appointed by the court for a company can apply ex parte to the court for extension of time to complete his assignment and for an order to take custody of the company's property for safe keeping.

B Francis Umeadi Onyekwelu a shareholder in Tapp Industry Limited had filed a petition in the Federal High Court holden at Enugu (Ofili, J.) for the compulsory winding-up of the company. The 2nd - 6th respondents who are the other shareholders, in the company, are joined in the petition as respondents. The company itself is the 1st respondent. The 7th and 8th respondents, C were on their application joined as respondents in the proceedings by order of the trial court. With the consent of all the parties, the court, by order, appointed Mr. Chike Ofodile, S.A.N. as provisional liquidator to the company. Because of the importance of the order to the determination of this appeal, I need to set it out at this stage. The Order reads:-

D *"Upon this civil matter coming before the court and in compliance with the court's Order of 8th day of August, 1988; and after hearing Mr. J.C. Okonkwo (with him Mr. M.U. Echeozo and Mr. F. Onyekwelu) of counsel to the petitioner and Dr. Ibik (with him Miss A.C. Ugwumba) of counsel to the respondents agreeing to the court's nomination of Mr. Chike Ofodile, S.A.N. as a provisional liquidator, after full consultation with their clients.*

E *IT IS HEREBY ORDERED AS FOLLOWS:-*

1. That Mr. Chike Ofodile, S.A.N., a former Attorney General of the Federation and a counsel resident at Onitsha is hereby appointed a provisional liquidator on agreement by both parties and counsel.

F *2. That the provisional liquidator is vested with the power to appoint any Chartered Accountant of his choice from and within Anambra State, excluding the Six Chartered Accountants previously suggested and rejected by both parties.*

For the purpose of clarity, these names are as follows:-

- G *(i) Messrs. Lancaster Okoro and Company*
(ii) Messrs. O. I. Nnam and Company
(iii) Messrs. Innocent Dike Eniribe and Company
(iv) Messrs. Onochie-Amobi and Company
(v) Messrs. Akintola-Williams and Company
(vi) Messrs. Izunwanna and Company

H *That the parties shall surrender to the provisional liquidator, documents of all descriptions, related to and pertaining to Tapp Industry Limited. All the parties shall further surrender documents and items belonging to Tapp Industry Limited, right from the date of incorporation up till and including the date of completion of his assignment as liquidator.*

4. *That the liquidator shall have the power to assign or delegate any person or persons to undertake any special duties, bearing in mind that he assumes full responsibility for anything done in respect of the assignment.*

5. *That the parties shall make themselves available as and when called upon by the liquidator or his agent.*

6. *That both counsel, Mr. J. C. Okonkwo for the petitioner and Dr. B Ibik for the respondents agree to the above terms which become part and parcel of the court's order in respect of appointment of provisional liquidator in accordance with the provisions of Rule 21 el sequel of the Companies winding-up Rules, 1983.*

7. *That the liquidator is given up to and inclusive of 5th December, 1988 to complete his assignment and file his findings in court in 10 copies which must be sworn to.*

8. *That the bill which must be reasonable shall be borne by the 1st respondent which is the Company to be wound-up.*

9. *That each party should endeavour to offer his or her cooperation to the liquidator to enable him emerge with a fair and reasonable result. Each counsel should endeavour to impress on his client the necessity for prudence, patience and truth.*

10. *That copies of the liquidator's report will be made available to counsel after filing.*

11. *That the liquidator may ask for and collect from the Registrar, a copy of inventory of Tapp Industry Limited made by order of court on 16/4/88 when the Judge, both counsel and the parties visited the locus in quo.*

12. *That the case stands adjourned to the 18th day of January, 1989."*

At a stage early in the proceedings, the learned trial Judge moved the court to the site of the 1st respondent at Abagana and the adjacent compound of the 7th respondent. The parties and their counsel were present and in their presence an inventory of the items at the site and at the 7th respondent's compound was taken. The clerk of court who was also in attendance later swore to an affidavit in which he listed items on the inventory and claims made by the petitioner and the 7th respondent.

On 12/12/88, the Provisional Liquidator (who is now the appellant before us) moved the trial court ex parte for the following orders:-

(i) An order pursuant to the Court's inherent jurisdiction, directing the Liquidator of the above-named company to dismantle, remove and take control and possession of all Tapp Industries Ltd. Property listed in the affidavit in support of this motion, presently lying at Tapp Industries site Abagana now referred to as Aga Tapp Industries Ltd., Abagana or any other place and to keep same in a safe place where security could be assured.

(ii) AND for such further and/or other orders as this Honourable Court may

deem fit to make in the circumstances.” The motion was supported by an affidavit sworn to by the Special Assistant to the Liquidator, one Emmanuel Obiesie Ofodile, Legal Practitioner. In the affidavit the deponent deposed, inter alia, as follows:-

“3. *The liquidator is making all haste to see that the liquidation exercise is completed.*

B 4. *In view of allegations and counter allegations from members of the company under liquidation a few facts have to be resolved by the court and embodied in a court order.*

5. *Unless this is done the liquidation exercise would be further delayed.*

C 6. *I am informed by Eugene Chinedum Onyekwere of the Federal High Court and I verily believe him that items listed in his affidavit of inventory dated 18th day of April, 1988 are the property of Tapp Industries Limited.*

7. *These items include the following:-*

(a) *One Complete Timber Impregnation Plant as per proforma invoice No. XAJWN/1577 dated 15/10/17.*

D (b) *One Hiab Lorry (Steyr 586) with Registration No. BD 1403 BB.*

(c) *One Peugeot 404 Pick Up Van with Registration No. AN 3525 EB.*

(d) *One Peugeot 505 Saloon Car with Registration No. AN 4694 ED.*

(e) *On Lister Diesel Air Cooled Standby Generating Plant of 34 KVA Power No. 275 HR 4A28.*

E (f) *One 300 KVA Nepa Transformer.*

(g) *58 Drums of Chemical (Bottling K 33).*

8. *These items would be found at the premises of Tapp Industries Limited Abagana now being referred to as Agatapp Industries Limited Abagana.*

F 9. *Unless the liquidator is armed with a court order it would be difficult if not impossible to take control and possession of these items and move them to a neutral site where the liquidator can assure security,”*

After hearing the motion, the learned trial Judge made the following order:-

“Upon hearing E.O. Ofodile (of counsel) on behalf of the Liquidator Tapp Industries Limited Chike Ofodile, S.A.N. on a motion ex parte under the

G Courts Inherent Jurisdiction.

IT IS HEREBY ORDERED AS FOLLOWS

1. *That the following items lying at the site of Tapp Industries Limited, Abagana now being referred to as Agatapp Industries Limited Abagana are the property of Tapp Industries Limited.*

H They are:-

(a) *One Complete Timber Impregnation Plant as per proforma invoice No. XAWN/1577 dated 15/10/77.*

(b) *One Hiab Lorry (Steyr 586) with Registration No. BD 1403 BB.*

(c) *One Peugeot 404 Pick Up Van with Registration No. AN 3525 EB.*

- (d) *One Peugeot 505 Saloon Car with Registration No. AN 4694 ED.*
- (e) *One Lister Diesel Air Cooled Standby Generating Plant of 34 KVA Power No. 275 HR 4A28.*
- (f) *One 300 KVA Nepa Transformer.*
- (g) *58 Drums of Chemical (Bottling K 33).*

2. *That the liquidator dismantle, remove and take control and possession of the above properties and all Tapp Industries Limited properties now lying at the said site or any other place and to keep same in a safe place where security is assured."* B

Earlier, on 5/12/88, the provisional liquidator had moved the court ex parte for an extension of time within which to complete his assignment. In consequence the trial Judge ordered as follows:- C

"Upon reading the motion ex parte dated and filed in court on 5th of December, 1988, and upon reading the affidavit of Mr. Chike Ofodile, S.A.N.; provisional liquidator of Tapp Industries Limited, Abagana; and after hearing Mr. E.O. Ofodile of counsel to the provisional liquidator move in terms of his motion paper; D

IT IS HEREBY ORDERED AS FOLLOWS:-

1. *That any harassment, disturbance, non-disclosure of relevant facts, materials and suppression of material facts and information will be deemed a contempt of the original court order.*

2. *That the liquidator has the power to go into the land inhabiting Tapp Industries Limited - now being referred to as Agatapp and seal off if necessary any item he considers fit so to do or remove for safe keeping within his custody any item he deems necessary.* E

3. *That all the parties should co-operate and avoid anything that would invite contempt of court order which this court will view deeply.*

4. *That the time within which to complete the winding up is extended for a period of three months with effect from the 5th day of December, 1988."* F

By a motion on notice dated 16th December, 1988, the 2nd-8th respondents moved the trial court for:-

"1. For an order to set aside and discharge an Ex parte order dated 5th December, 1988 purportedly made in the above proceedings at the instance of Mr. Chike Ofodile, S.A.N. provisional liquidator of Tapp Industries Limited, on the ground that the said Ex parte Order is unconstitutional, incompetent, null and void and constitutes a violation of the fundamental right of fair hearing, contrary to S. 33(1) of the Constitution of the Federal Republic of Nigeria, 1979. G

2. For an order to set aside and discharge an Ex parte order dated 12th December, 1988 purportedly made in the above proceedings at the instance of Mr. Chike Ofodile, S.A.N., provisional liquidator of Tapp Industries Limited, on the ground that the said Ex parte Order is unconstitutional, H

incompetent, null and void and constitutes a violation of the fundamental right of fair hearing contrary to S. 33(1) of the Constitution of the Federal Republic of Nigeria 1979.

B *An interim injunction to restrain the said Mr. Chike Ofodile, S.A.N., the provisional liquidator of Tapp Industries Limited by himself, his servants, agents or privies from exercising or and carrying into effect any of the powers of seizure purportedly conferred by the said Ex parte Orders or either of them pending the determination of this motion.*

AND for such further order or orders as may seem just or convenient in the circumstances.”

C By another motion on notice dated 13th January, 1989, the same respondents moved the trial court for:-

D *“(a) For an Order of Mandatory Injunction compelling the above named applicant/respondent, pending the determination of the motion on notice dated and filed on 16th December, 1988 in the above proceedings, to restore the status quo by inter alia:-*

(i) reinstalling in good working order and condition, the timber impregnation plant/cylinder complete with the accessories and fittings which was dismantled and removed from the factory premises of Agatapp Industry Limited at Abagana on or about 16th December, 1988.

E *(ii) reinstalling in good working order and condition the 300 KVA NEPA Transformer complete with the accessories and fittings, which was dismantled and removed from the said factory premises on the date and venue aforementioned;*

F *(iii) returning to the said factory premises the following items of property which were removed therefrom on the date aforementioned:-*

(a) Black and Decker ‘1/4 “ drilling machines 6 nos., etc.

(iv) repairing and re-roofing the damaged factory building, doors, windows and roof thereof together with the main entrance gate leading thereto and forming part of the said factory premises;

G *(v) restoring the damaged electrical fittings, accessories and wiring of the factory building and office block, of the said factory premises; and*

(vi) effecting repairs of, or and replacing damaged lockers, cupboards, executive desk, door keys and fastenings of doors, windows and furniture in the said factory building and office block of the said factory premises.

H *(b) AND FOR such further order or orders as this Honourable Court may seem just or appropriate in the circumstances.”*

Both motions were supported by affidavits sworn to by the 7th respondent. The two motions were heard together and in a reserved ruling delivered on 9/10/89, the learned trial Judge dismissed them.

In his ruling the learned Judge observed:-

“I have myself gone through the counter affidavit and further counter affidavit and I have my impressions of the attitude of the 7th respondents/applicants towards legitimate court orders. I have endeavoured, in spite of a legion of documents filed as motions, marathon affidavits and series of attachments, to deal with this matter solely on points of law. In this regard I am guided by Order 33, Rules 7-11 of the Federal High Court Civil Procedure Rules, the authority of Kotoye v. C.B.N. (1989) 1 NWLR (Pt. 98) 419 and the relevant sections in the Companies Decree 1688. The granting of an order ex parte is one which should be made where the circumstances of the case do not affect any of the parties adversely, albeit, where there is real urgency as in a matter of this nature. Where a liquidator has been appointed, it is necessary that a liquidator should be allowed to carry out his job without let or hindrance subject to law and equity. Where the court has appointed a provisional liquidator he (the provisional liquidator) shall take into his custody and or in his control all the property and chose in action to which the company is or appears to be entitled. See the case of Blustom and Bramley Ltd. v. Leigh (1950) 2 K.B. 54:”

After referring to a number of authorities and sections of the Companies Act 1968, the learned Judge held:-

“It is therefore my view that once a liquidator or provisional liquidator is appointed his duties are principally directed to the court subject to the judicious use of his discretion.”

On the issue of fair hearing raised by the 2nd-8th respondents the learned Judge observed:-

“Learned counsel for the respondents/applicants has in his submission urged me to declare the orders made in court as void and set them aside in that they were made in contravention of the principle of fair hearing. In the context of the case before the court the order made on 12/5/88 is merely confirmatory of the statutory powers and discretions vested in the liquidator. The same applied to the order made on 5/12/88, the order is merely confirmatory of the powers granted to the provisional liquidator in his instrument of appointment dated 20/9/88. In effect, the provisional liquidator was seeking an order in each case to enable him effectively manage the affairs of the company and none of the orders was directed against any other parties.

The 2nd-8th respondents were dissatisfied with the decision of the learned trial Judge and appealed to the Court of Appeal (coram: Oguntade, Uwaiwo and Chigbue, JJ CA.) which allowed their appeal and set aside the orders of Ofili, J made on 5/12/88 and 12/12/88 and one of the orders made on 9/10/89 to the effect that a letter of apology be written by the 4th and 7th respondents to the provisional liquidator. The court also ordered that “the parties be restored to the same status as prevailed in relation to possession of properties before the order of 5/12/88 and 12/12/88 well made”. In his lead judgment Oguntade, J.C.A. observed:-

“I think that a good part of the confusion in the application before the lower

court arose because the court failed to appreciate that the provisional liquidator could not except as the Companies Act otherwise provides fully exercise the powers of a liquidator as set out in the Companies Act. This is because the order of the court appointing the provisional liquidator had set out the powers to be exercised by him."

B Reiterating the same view later in his judgment the learned Justice of Appeal again observed: -

"The powers of the provisional liquidator in this case were restricted by the lower court. The provisional liquidator did not therefore fall into the position of a liquidator (without unqualified powers) as generally given in the Companies Act, 1968:"

C After setting out the order appointing the provisional liquidator, the learned Justice continued:-

"Now, having regard to the fact that the powers of the provisional liquidator were specifically restricted by above appointing order of the court the argument that provisional liquidator could exercise the powers under Section 224 of the Companies Act, 1968 must be rejected.

D *I have earlier in this judgment set out in full the orders made by the court on 5/12/88 and 12/12/88. Did they fall under the purview of the powers granted to the provisional liquidator by the order appointing him? Firstly, I must be fair to the provisional liquidator; in his application filed on 2/12/88, the provisional liquidator had merely asked for:-*

E *'1. Extension of time within which to complete the winding up of the said company.*

2. And for such further and/or other orders as this Honourable Court may deem fit to make in the circumstances.'

It was the lower court which gratuitously donated to the provisional liquidator what he never asked for when the court said:'

F *The liquidator has the powers to go into the land inhabiting Tapp Industries - Now being referred to as Agatapp and seal off if necessary and items he considers fit so to do or remove for safe keeping within his custody any items he deems necessary:*

G *It is a great error on the part of the trial Judge to have made the above order without hearing the parties. When the order appointing the provisional liquidator was made, parties made suggestions as to what powers he should wield which the court then incorporated in its order. The order made on 5/12/88 went far beyond the scope of the powers granted the provisional liquidator on 20/9/88. Secondly, the powers granted on 5/12/88 were not asked for by anybody and more importantly the orders were clearly prejudicial to the 7th and 8th respondents.*

H *Indeed, I have a feeling that if the provisional liquidator had closely studied the order appointing him, the problems with which everybody is*

On fair hearing as applicable to the case, the learned Justice opined:-

“The question is not whether or not the court would have made the same orders even if the 2nd to 8th respondents had been granted a hearing or whether the said orders were prejudicial to the 2nd to 8th respondents. The issue is as pointed out in Kotoye v. C.B.N. (supra) is whether the 2nd to 8th respondents were entitled to a hearing before the orders were made. It is my firm view that they were entitled to a hearing. The orders made on 5/12/88 and 12/12/88 must be set aside. They are unconstitutional, null and void.”

It is against this decision of the court below that the provisional liquidator has now appealed to this court. The parties filed and exchanged their respective Briefs of Argument; the appellant filed an Amended Brief. In his amended Brief the Liquidator has set out the following four questions as calling for determination in this appeal, that is to say:-

“1. Whether the learned Justices of the Court of Appeal were right when they held that the 2nd-8th respondents were entitled to a hearing before the orders of 5/12/88 and 12/12/88 respectively were made.

2. Were the learned Justices of the Court of Appeal right in holding that the powers conferred on the provisional liquidator in this case were specifically restricted by his instrument of appointment and as such he cannot exercise the powers conferred on a liquidator by Section 224 of the Companies Act 1968.

If the answer is in the affirmative, to what extent were the powers of the provisional liquidator curtailed?

3. Were the learned Justices of the Court of Appeal right in rejecting the affidavit of inventory sworn to by Eugene Onyekwere on the ground that it was worthless when the worthlessness of the said document was not one of the issues canvassed before them?

4. Whether the Court of Appeal was right to base its judgment on an issue not properly before the court.”

Except for one issue not included, the issues as set out in the brief of the 2nd-8th respondents as well as in the petitioner/respondent's brief are not too dissimilar. I must observe at this stage that the courts below went beyond the scope of the case put forward by the 2nd-8th respondents in their application dated 16th December, 1988. That motion sought to set aside the Orders made ex parte on 5/12/88 and 12/12/88 on the ground that they were “unconstitutional, incompetent, null and void” in that they constitute “a violation of the fundamental right of fair hearing, contrary to Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979”. The prayer sought in the motion did not question the correctness of those orders. The second motion dated 13th January, 1989 was predicated on the 1st motion and, indeed, only sought for an interim mandatory injunction pending the determination of the 1st motion. As the two motions were taken together, the 2nd motion became irrelevant. Having regard to this background therefore, it is my respectful view that the only

1108 Prov. Liqui. of Tapp Ind. Ltd v. Onyekwelu (1995) 5 KLR Ogundare JSC question we have to determine is whether those orders made on the ex parte applications of the provisional liquidator were made in violation of Section 33(1) of the Constitution. This is the question raised in appellant's issue (1), 2nd-8th respondents' issue (c) and petitioner/respondent's issue (2) As the extent of the powers of the provisional liquidator/appellant is relevant to the determination of that question, appellant's issue (2), 2nd-8th respondents' issue (a) and petitioner's issue (1) will be considered along.

B It is not in dispute that the appellant was, by consent of all the parties, appointed by the court a provisional liquidator of the 1st respondent. What are his powers as such liquidator? Section 223(2) of the Companies Act No. 51 of 1968 (applicable at the time of the proceedings leading to this appeal), provided for the appointment of a provisional liquidator. It stated:-

C *"At anytime after the presentation of a petition and before the making of a winding-up order, the appointment shall be provisional; and the court making the appointment may limit and restrict the powers of the liquidator by the order appointing him."*

D The appellant contends in his brief:-
"It is respectfully submitted that having regard to the facts and circumstances of this case, the learned Justices of the Court of Appeal were in error in holding that the powers of the provisional liquidator were restricted to collecting from the parties items and documents belonging to the 1st respondent/respondent"

E *Apart from this, the instrument appointing the provisional liquidator empowered him to employ the services of an accountant to assist him in his duties. It is respectfully submitted that if the power of the provisional liquidator was restricted to merely collecting items and documents from the parties, there would have been no need for the order directing him to appoint an accountant of his choice. Surely the services*
F *of an accountant is not necessary only for the purpose of collecting items and documents from the parties."*

G The contention of the 2nd-8th respondents, both in this court and in the courts below, is that the powers of the appellant are limited as in the order appointing him. This order has been reproduced earlier in this judgment. It is argued in their brief as follows:-

"The question that arises, therefore, is whether the appointing order expressly or by necessary implication did limit and restrict the powers of the said appointee. In answering this question, the Court of Appeal in its judgment at pages 155 to 158 of the record reproduced in full the record of proceedings culminating in the said
H *appointment. The crucially relevant portions of the said appointment show as follows:-*

(i) that the provisional liquidator should be vested with power to appoint any chartered accountant of his choice within Anambra State except those listed therein;

(ii) that the parties shall surrender to the provisional liquidator all documents and properties of the 1st respondent as from date of incorporation of the company until the date of completion of the function assigned to provisional liquidator;

(iii) that the provisional liquidator has the power to sub delegate any special authorities vested in him to any person or persons;

(iv) that the provisional liquidator has the power to summon the parties or their agents before him on any inquiry or investigation he may deem fit; and

(v) that the provisional liquidator should submit to the court a sworn report of his findings at the end of his assignment, duly filed in 10 copies for service on the parties or their counsel.

Having perused the said appointing order, the Court of Appeal decided, and it is submitted rightly, on a fair construction of the terms thereof, that the powers, duties and functions of the provisional liquidator were limited and restricted to those set out therein. This attitude of the Court of Appeal accords with the canons of construction applicable to a document such as the appointing order under consideration."

It is further argued in the brief:-

"The scope of the powers of the provisional liquidator with regard to taking possession of the properties of the 1st respondent is, in the face of the terms of the appointing order, confined to such properties as the parties are willing to yield up (or surrender) to the provisional liquidator. Where the provisional liquidator discovers concealment by the parties, or forms an opinion as to ownership of property divergent from that of any of the parties, it was well within his power to incorporate such finding in his report a, prescribed in the appointing order. It is finally submitted on this issue that the Court of Appeal is perfectly justified in holding that S. 224 of the Companies Act 1968 did not apply per se."

It is submitted in the petitioner's brief as follows:-

"It is submitted with respect that, except as to the choice and appointment of an accountant, the instrument of appointment did not curtail or limit the statutory power of the provisional liquidator to take possession and control of all the property and chooses in action which belong or appear to belong to the 1st respondent company. He was to be guided in this task by the affidavit of inventory of 1st company's property made by the clerk of court. It is further submitted that the terms of the instrument of appointment were, in the main, an amplification of the statutory duties of the provisional liquidator. As part and parcel of the orders of appointment, the terms could not have been comprehensive, and thereby restrictive of the usual or ordinary powers. Unless expressly restricted, the provisional liquidator has the authority of a liquidator vis-à-vis securing the safety of the properties of a company being wound-up."

The principal purpose of appointing a provisional liquidator is to preserve the company's assets and prevent the directors from dissipating them before a winding up order can be made. It follows, therefore, that his first duty (as of liquidators

generally) is to preserve the company's assets before a winding up order is made. This power was expressly provided for in Section 224 of the Companies Act, 1968 (hereinafter referred to as the Act). It reads:-

"224. In a winding up by the court the liquidator shall take into his custody, or under his control, all the property and choses in action to which the company is or appears to be entitled."

B Is there anything in the order appointing the appellant provisional liquidator that can be said to have taken away this power? I can find no such limitation. If anything, paragraph 3 of the Order which enjoins the parties to *"surrender to the provisional liquidator such documents and items belonging to Tapp Industry Ltd"* not only tacitly confirms the power of the liquidator under Section 224 but goes further to

C call for the cooperation of the parties in this regard.

It would appear that the order appointing the appellant does not restrict his powers except as to the choice of an accountant. As it would appear that the appellant's powers are not restricted as required by Section 223, he has, in my respectful view, the ordinary powers of a liquidator. The *"provisional"* by which he is described only

D relates to the period of his appointment and not the powers conferred on him by the Act. A provisional liquidator is in the same position as a receiver pendente lite - see *Re General international Agency Co. (1865) Bear 1; 55 E.R. 1056*. He is not, however, entitled to appear on a winding up petition even though served as he is not a party. He is appointed only to preserve the property of the company pending the making of a winding up order or such shorter period as the court may deem fit.

E The purpose of paragraph 11 of the order is to assist the provisional liquidator in identifying the properties of the 1st respondent. The paragraph does not limit the provisional liquidator to the inventory therein mentioned in his search for the company's properties and documents with a view to his taking them into his custody.

F With respect, the learned Justices of the court below can, therefore, not be right when they held, per Oguntade, J.C.A. that:-

"Now, having regard to the fact that the powers of the provisional liquidator were specifically restricted by the above appointing order of the court the argument that the provisional Liquidator could exercise the powers under Section 224 of the Companies Act, 1968 must be rejected."

G Interestingly, the same court in a subsequent appeal involving the parties hereto held to the contrary. In *Anakwenze & Ors v. Tapp Industry Ltd. & Ors. (1992) 7 NWLR (pt.252) 142, Akintan, J.C.A. in his lead judgment (with which the other Justices that sat on the appeal agreed) observed at page 158 of the report:-*

H *"One of the issues canvassed in this appeal on behalf of the appellants was the role of a provisional liquidator. It was submitted that the powers granted to the provisional liquidator in this case should strictly be restricted to the contents of his instrument of appointment already reproduced earlier above. There is no doubt that the appointment of a provisional liquidator is not only provisional but also contingent in the sense that it operates to protect the property for an equal distribution only in the*

event of an order for winding up being made, and if no such order is made then the appointment ought not to interfere with the rights of third persons: See *Re Dry Docks Corporation of London* (1888) 39 Ch.D. 306 at 314, per Fry, LJ.; *Levy v. Napier* (1962) A.C. 468; *Halsbury's Laws of England* 4th Ed. Vol. 7, para. 1045; *Palmer's Company Law* Vol. 1, 22nd Ed. para. 81,34 on p. 905; and *Orojo Nigerian Company Law and Practice* p. 371. The appointment can therefore be made only when an effective petition is pending and before a winding up order; see *Re A Company* (1974) 1 All E.R. 256.

The necessary conditions that should exist before a provisional liquidator is appointed were available in the instant case. Similarly, since the main object of appointing a provisional liquidator is the preservation of the property of the company to be wound up, all other conditions attached to any such appointment can only go towards strengthening that main objective and not derogate from such principal objective. It is therefore erroneous to say, as it was submitted on behalf of the appellants in the instant case, that the powers granted to the provisional liquidator in this case were restricted to the exact wordings of his instrument of appointment which, by implication, excluded the primary role of protection of the company's property."

I agree entirely with the above views.

Having decided that the appellant, as provisional liquidator, has powers to take into custody, or under his control all the 1st respondent's properties and choses in action, I now turn to answer the main question in this appeal, that is, whether he properly brought the applications of 5/12/88 and 12/12/88, ex parte. The argument of the Appellant (supported by the petitioner) is to the effect that he could. The 2nd -8th respondents argued to the contrary. They contend that not having been put on notice there was a violation of their constitutional right to fair hearing as enshrined in Section 33(1) of the 1979 Constitution.

Section 33(1) of the Constitution provides:-

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality." (Italics is mine)

Did the appellant's motions of 5/12/88 and 12/12/88 affect the civil rights and obligations of the 2nd-8th respondents? The two motions sought:-

1. an extension of time within which the appellant was to complete his assignment as provisional liquidator of the 1st respondent.
2. an order of court to enable him take into custody certain properties which appeared to him that the 1st respondent was entitled to.

As regards the 1st motion of 5/12/88 for extension of time it cannot be said that the determination of the civil rights and obligations of any of the parties, particularly the 2nd-8th respondent, was in any way involved. The winding up petition was yet to be heard and determined. In any event, with the determination of the winding-up petition the term of the provisional liquidator would terminate. In respect of the

2nd motion of 12/12/88, what the appellant was asking for was an order of court to aid him carry out his principal duty of preserving the properties of the 1st respondent. The motion did not seek to determine who, in fact, owned the said properties; it only sought to preserve them pending such determination.

B The appellant is not the agent of any of the parties but an officer of the court and as an officer of the court he is subject to the control of the court. He, therefore, has a right to apply to the court for directions as to how to perform his duties especially in the light of difficulties put in his way by some of the parties. But how is the application to the court to be made? Section
C 375(1) of the Companies Act, 1968 empowered the Chief Justice of Nigeria to make rules of court for carrying into effect the object of the Act. The Chief Justice made, pursuant to this power, the Companies (Winding Up) Rules, 1983, rule 4 of which provides:-

D *“4. Every application in court other than a petition shall be made by motion, notice of which shall be served on every person against whom an order is sought not less than five clear days before the day named in the notice for hearing the motion.”* (Italics is mine)

This rule appears to allow for ex parte applications being brought except where an order is being sought against any person in which case such person will have to be put on notice of the motion. As I have earlier observed, the appellant's motions
E of 5/12/88 and 12/12/88 did not seek for an order against any of the parties. I, therefore, hold that these motions could be brought ex parte under the Companies (Winding Up) Rules, 1983. I refer in this respect to the decision of the Court of Appeal in *Anakwenze & Ors. v. Tapp Industry Ltd. & Ors.* (supra)
F Akintan, J.C.A. in this lead judgment said at page 157 of the report:-

*“In the instant appeal, the prayers in the ex parte motion are in two forms. The first was for yet another on extension of time to enable the liquidator complete his assignment while the second was for release of funds from the company's bank account to the liquidator to enable him settle outstanding tax owed by the company to be wound-
G up to the Federal Board of Inland Revenue and to meet part of his own expenses.*

*As already shown from the provisions of Rule 4 of the Companies Winding-Up Rules, 1983, quoted above, the proper way by which the liquidator could make the application it made was by motion. That rule pre-
H scribes that notice of such motion ‘shall be served on every person against whom an order is sought not less than five clear days before the day named in the notice for hearing the motion. In other words only those ‘against whom an order is sought’ need to be served with the notice of the motion. The liquidator's prayer for an extension of time to complete his assignment cannot, with respect, be said to be an order sought against the appellants in this case. They are therefore not entitled to be put on notice under that rule.*

The second prayer in the motion is made up of two legs. The request for release of fund to liquidate tax debt; and demand for reimbursement for expenses incurred in the course of his assignment. As can be seen from the provisions of Section 223(6) of the Companies Act 1968, already quoted above, the provisional liquidator is required to be paid for his service such amount 'as the court may direct. Similarly, his instrument of appointment, already reproduced above, also envisaged that he should be paid for his assignment. It was provided there that the bill, which must be reasonable, is to be borne by the 1st respondent - which is the company to be wound-up.

Again the order sought for release of fund to liquidate tax arrears of the company to be wound up cannot be said to be an order to be made against any of the 2nd-6th respondents/appellants thereby entitling them to be put on notice as required under Rule 4 of the Companies Winding Up Rules, 1983. The same is the request for release of funds to meet the expenses incurred so far by the liquidator."

In his concurring judgment, Uwaifo, J.C.A. observed at page 159:-

"In the present case, no order was sought to be made and none was made against any of the appellants. Their interest as contributories in Tapp Industries Limited is in law being taken care of by the provisional liquidator. In law the provisional liquidator, although under the control of the court, stands, generally within its restricted powers, in the place of the board of directors of Tapp Industries Ltd. See Re Mawcon Ltd. (1969) 1 All E.R. 188 at 192. It is however recognised that the board may still exercise some residual powers such as instructing solicitors or counsel to oppose the winding up or to contest certain actions of the provisional liquidator. See Re Union Accident Insurance Co. Ltd. (1972) 1 All E.R. 1105 at 1113. Also as a matter of strict law, a provisional liquidator does not need to seek the court's order in a situation like this to meet the financial obligations necessary in carrying out his mandate. Being a provisional liquidator he must of course keep within the limit of the powers given him by the court."

I agree with these views.

Order XXXIII rule 7 of the Federal High Court (Civil Procedure) Rules, L.N. 34 of 1976, Cap. 134 of the Federation of Nigeria, 1990 which reads:-

"Motions may be made either ex parte or after notice to the parties to be affected thereby."

permits of motions being brought ex parte. Reference has been made to the decision of this court in Kotoye v. C.B.N. & Ors. (1989) 1 NWLR (pt.98)419. This case dealt with injunctions - interim and interlocutory. The case before us now has nothing to do with the grant of injunctions. To that extent, therefore, the rationes decidendi of that case would not be of any help in resolving the issue before us in this appeal. It would appear, however, from the report that the question of the constitutionality of granting ex parte motions was raised in argument. Karibi Whyte, J.S.C. in

his judgment at pages 464-465 of the report opined:-

B *“But Order XXXIII provides generally for interlocutory applications and contemplate such applications as under Order XX. Particular mention of Order XXXIII rule 7 provides that interlocutory applications may be made ex parte or after notice to the parties affected thereby is necessary. Similarly, Order XXXIII rules 8 and 10 which deal with ex parte applications are important as laying down the orders which the court can make on interlocutory applications. Rule 8 provides that on a motion ex parte, the applicant shall ask for:-*

C *(i) an immediate absolute order of the court, in the terms of the motion paper and affidavit in support; or*

(ii) an order on the other party to appear on a certain day, to show cause why the order should not be made in terms of the motion paper.

The court may, as provided by rule 10:

- D *(a) refuse to make the order sought.*
(b) grant an order to show cause why the order should not be made.
(c) allow the motion to be made on notice to the parties to be affected thereby.

E *Thus, an ex parte application is one made and could be granted without notice to the party affected by the order sought in the application. An application for injunction made after the commencement of the suit and before judgment is undoubtedly interlocutory and comes within the purview of Order XXXIII. Such application can be made ex parte. Although an ex parte application for injunction can be made, the court may refuse to make the order sought where the interest of justice demands that the other party to be affected ought to be put on notice, or it will be contrary to the general provisions of the law or inconsistent with the interest of justice.*

F *It is important to consider the provision of rule 10 as to the orders the court may make on ex parte application made under order XXXIII rule 8. It seems to me that although rule 8 enables an application ex parte to ask for an immediate absolute order of the court in terms of the motion paper and evidence, the court may refuse the order sought or grant an order to show cause why the order should not be made, or may allow the parties to be affected to be put on notice. The court is not allowed to grant the order sought in the application ex parte e.t.c. without notice to the parties to be affected.*
 G *It cannot grant an order sought in absolute terms because rule 10 clearly limits the orders it can make to those prescribed therein. The express mention of the refusal to grant the order sought in absolute terms excludes the possibility of a grant. This is strengthened by the orders which can be made. The rule is therefore consistent with the provisions of Section 33(1) of the Constitution 1979 which prohibits the making of a*
 H *determination affecting the civil rights and obligations of a person without hearing him.”*

I agree entirely with the views expressed above. It is my considered view that where, as in this case, the civil rights and obligations of any person do not come for determination, I can see no infringement of Section 33(1) of the Constitution in an ex

Prov. Liqui. of Tapp Ind. Ltd v. Onyekwelu (1995) 5 KLR Ogundare JSC 1115
parte application. I need refer also to a recent decision of this court in 7Up Bottling
Company Ltd. & Ors. v. Abiola & Sons Nigeria Ltd. (1995) 3 NWLR (Pt.383) 257.
This court, per Adio, J.S.C. observed at page 276F thereof:-

“An interlocutory injunction cannot generally be granted without giving prior notice of the application to a respondent and the order cannot be made behind the respondent in view of the fact that the court has to decide many things before it can properly come to a conclusion on the question of whether to grant or refuse it. Further, and this is very important, a grant of an application for an interlocutory injunction without notice to the respondent or behind the respondent is void by virtue of the provision of section 33(1) of the Constitution. An order of interim injunction is one granted to preserve the status quo and to last until a named date or definite date or further order or pending the hearing and determination of a motion on notice. It is for a situation of a real emergency to preserve and protect the rights of the parties, before the court from destruction by either of the parties. Kotoye’s case supra. It merely leaves mailers in statuo quo and the court does not, at that stage, have to decide any contentious issues before granting it. It is the extent to which a court can go, if at all, in the determination of contentious issues in the case when an application for an order of interim injunction or for an order of interlocutory injunction comes before it that constitutes one of the significant or decisive factors in the determination of whether all or any of them can be granted without hearing the other party or parties to the case in accordance with the provision of Section 33(1) of the Constitution.”
(Italics is mine)

In my respectful view, the application brought by the appellant on 5/12/88 for extension of time within which to complete his assignment and on 12/12/88 for an order to take into control and possession certain properties that appeared to him to belong to the 1st respondent did not raise any contentious issues that would affect the civil rights and obligations of the parties to the winding up proceedings.

The conclusion I reach is that as the two motions under consideration did not involve a determination of the civil right and obligations of any party to the petition proceedings, they were rightly moved ex parte and no breach of the constitutional rights of the 2nd-8th respondent to fair hearing under Section 33(1) of the Constitution was involved. The court below was, therefore, in error to have held the contrary. The remedy open to the 2nd-8th respondents was to move the trial court by motion on notice to vary or discharge the orders made on the motions pursuant to rule 11 of Order XXXIII of the Federal High Court (Civil Procedure) Rules.

For the above reasons I allow this appeal and set aside the judgment of the court below. In its stead, I make an order restoring the decision of the learned trial Judge given on 9/10/89. As the propriety of the order for apology is not a question raised before us I say nothing on it.

I award N1,000.00 cost to the appellant against the 2nd to 8th respondents.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I entirely agree. I too will allow the appeal and set aside the decision of the Court of Appeal. The decision of the trial court is hereby restored. I abide by the orders as contained in the said judgment.

WALI JSC

I have the privilege of a preview of the advance copy of the lead judgment of my learned brother, Ogundare, J.S.C. which has just been delivered. I agree with the reasoning and conclusion contained therein.

As elaborately stated in the lead judgment, the order of the learned trial Judge appointing the provisional liquidator does not save as to the choice of an accountant, curtail his statutory powers under Section 224 of the Companies Act, 1968 applicable to the case in hand.

As to the contention of the respondents that the ex parte order made by the learned trial Judge as a result of the appellant's applications of 15th December, 1988 and 12th December, 1988, was in violation of Section 33(1) of the 1979 Constitution, suffice it to say that there was no such violation. All that was prayed for in the two motions was extension of time within which to complete the assignment given to him by the court. The learned trial Judge in my view, after hearing the ex parte motions, correctly and judiciously used his discretionary powers and granted the prayers. Order 23 rule 7 of the Federal High Court Rules Cap. 134, Laws of the Federation of Nigeria, 1990 allows parties to move the court ex parte. Where a party is not pleased with the order made ex parte, provisions are provided in the Rules to apply for a variation or discharge of the order made. An ex parte order properly made is always provisional and for a limited period and does not decide the civil rights of the parties involved in the litigation. See *7-Up Bottling Co. Ltd. & Ors. v. Abiola & Sons Nigeria Ltd.* (1995) 3 NWLR (Pt.383) 257.

It is for these and the more elaborate reasons contained in the lead judgment of my learned brother, Ogundare, J.S.C., that I too hereby allow this appeal, set aside the judgment of the Court of Appeal and restore the decision and orders of the learned trial Judge with N1,000.00 cost to the appellant.

MOHAMMED JSC

I have had the advantage of reading in draft the judgment written by my learned brother, Ogundare, J.S.C. I entirely agree with him that this appeal has merit and should succeed. It is plain from the facts of this case that the

interlocutory order, in this matter did not touch the rights of the parties in respect of the properties in dispute. A party not satisfied with an order made through an ex parte application can apply to the court which has given the order to vacate it.

I am of firm view that the provisional liquidator was justified to take into his custody for safe keeping the properties of Tapp Industry Limited pending the determination of the dispute between the parties in the suit before the Federal High Court, the liquidator has no power to determine the ownership of the properties in dispute which only the trial court can do after calling evidence.

This appeal is allowed. I abide by all the consequential orders made in the lead judgment.

IGUHJSC

My learned brother, Ogundare, J.S.C. has in his lead judgment set out the facts and the applicable law in this appeal. I do not consider it necessary to repeat them. I agree entirely with his reasoning and conclusions.

Section 223(2) of the Companies Act No. 51 of 1968 provides for the appointment of a provisional liquidator as follows:-

“At any time after the presentation of a petition and before the making of a winding up order, the appointment shall be provisional, and the court making the appointment may limit and restrict the powers of the liquidator by the order appointing him.”

The court may therefore by the order appointing a liquidator, provisional or otherwise, limit or restrict his powers, otherwise he shall have the full powers of any liquidator as provided for under the law. See *Re Union Accident Insurance Company Ltd.* (1972) 1 All E.R. 105.

It cannot be disputed that the primary purpose for the appointment of a liquidator, whether provisional or otherwise, is to preserve the company's assets before a winding up order is made by the court. Section 224 of the Companies Act provides thus:-

“In a winding up by the court, the liquidator shall take into his custody or under his control, all the property and chose in action to which the company is or appears to be entitled.” (Italics supplied for emphasis)

Where, therefore, the court has appointed a provisional liquidator, he shall be entitled to take into his custody or under his control all the property and chose in action to which the company is or appears to be entitled pending the making of a winding up order by the court See *Bluston and Brawley Ltd. v. Leigh* (1950) 2 K.B. 548 and *Halsbury's Laws of England*, 3rd Edition, Vol. 6 at page 559.

Following the appointment of the appellant as provisional liquidator in the present case, he sought for and obtained two ex parte orders on the 5th December and the 12th December, 1988 respectively under circumstances which are fully explained in the lead judgment. The first vital question for determination in this appeal would seem to be whether these orders made on the ex parte applications of the provisional liquidator were in violation of Section 33(1) of the 1979 Constitution.

B There can be no doubt that the right to fair hearing prescribed under Section 33(1) of the Constitution is synonymous with the common law rules of natural justice. The rules of court, however, have made provisions for ex parte applications in respect of which there is certainly nothing unconstitutional. See Mohammed v. Kano NA. (1968) 1 All NLR 424; Dedawa v. Okorodudu (1976) NMLR 236; Oyeyipo v. Oyinloye C (1987) 1 NWLR (Pt.50) 356; Woluchem v. Wokoma (1974) 3 S.C. 153 and 7-Up Bottling Company Ltd. & others v. Abiola and Sons Nigeria Ltd. (1995) 3 NWLR (Pt.383) 257. It is my view that the act of obtaining the said two orders by the provisional liquidator in respect of his general and statutory powers to take into his custody or under his control, all properties to which the 1st respondent is or appears D to be entitled does not constitute a violation of Section 33(1) of the Constitution, there being no determination of the civil rights and obligations of the parties at that stage over the properties in issue.

It ought to be emphasized at all events that the ex parte orders in question would appear to have been obtained ex abundanti cautela as, strictly speaking, they may rightly be described as surplusage. This is because the liquidator, by virtue of the E powers conferred on him under Section 224 of the Companies Act, had the relevant powers covered by the orders in issue. I agree with the learned counsel for the petitioner/respondent, Dr. Ilochi Okaror, that under Sections 224, 225 and 226(3) of the Companies Act, 1968, the 2nd - 8th respondents were not in the circumstances of this case entitled to be heard in the applications exparte or the 5th and the 12th December, F 1988. It seems to me that their remedy lay in an application on notice to vary or discharge the orders in issue. It is therefore my view that the ex parte orders of the trial court made on the 5th and 12th December, 1988 were properly and validly made and that they did not violate the right of the 2nd - 8th respondents to fair hearing as enshrined in Section 33(1) or the 1979 Constitution.

G On the question of whether the orders of the trial court made on the 5th and the 12th December, 1988 were outside the scope of the powers of the provisional liquidator, it ought to be stressed that the instrument of his appointment enjoined the parties inter alia to surrender all documents and items belonging to the 1st respondent to the provisional liquidator. The instrument appointing the provisional liquidator should not be construed so as to curtail his powers under the law unless they are expressly H curtailed in his instrument of appointment. A provisional liquidator is gen

erally appointed where the assets of the company are in jeopardy and the primary object of his appointment is to prevent the directors of the company from dissipating such assets of the company. Unless expressly restricted,

Prov. Liqui. of Tapp Ind. Ltd v. Onyekwelu (1995) 5 KLR Iguh JSC 1119
therefore, the provisional liquidator has the authority of any liquidator vis-a-vis securing the safety of the properties that would appear to belong to the company being wound up.

Dealing with the powers of a provisional liquidator, the learned authors of Palmer's Company Precedents (part 2) 17th Edition pages 102-103 observed as follows:-

"The provisional liquidator is now under a statutory duty to take into his custody all the property of the company. Subject to this, the duties of an interim Provisional Liquidator, that is to say, of a provisional liquidator appointed after the presentation of the petition, but before a Winding Up order, depend, as the above Forms or Orders shown on the terms of the order appointing him. Most commonly his powers are restricted to taking possession of and protecting the assets of the company. Whatever his powers under the order appointing him, the interim provisional liquidator should be careful to keep within them. Thus, if these powers are restricted to carrying on the business, he should carry on the business, and must not think that he has a discretion to stop the business; but he can, of course, apply to the court for directions if he finds that it is expedient to stop. So, where his power is restricted to taking possession and protecting the assets, it becomes his duty to take possession of and protect the assets accordingly, he should therefore at once take possession by himself or his agents and do all that is necessary to protect them; e.g. he should give notice of appointment and should take steps to stop executions and the removal of any goods or the commission of any trespasses. The provisional liquidator should also see to the insurance of the property of the company. He should of course, take special care to secure the books of the company and he should communicate with the bankers of the company. If the interim provisional liquidator finds that his power are not sufficiently wide, e.g. if he is appointed merely to take possession of and protect the assets, and he finds that there is a going business which could be sold to advantage if continued, or which would suffer irreparable damage if discontinued at once, he can apply to the court for liberty to carry it on with consequential directions, and so in regard to other matters. He can, moreover, there can be no doubt, appoint a solicitor, and within the scope of the order take all necessary legal proceedings to protect the assets, and his proper legal expenses so incurred will be allowed. It can rarely, if ever, be necessary for a provisional liquidator to obtain the protection of an injunction to restrain execution and similar proceedings where he has taken possession of the assets, since he is an officer of the court, and any interference with his possession would be a contempt of court."

(Italics supplied for emphasis)

With profound respect, I am in total agreement with the above observations and fully endorse them.

Upon a close study of the terms of the instrument of appointment of the provisional liquidator in the present case, it seems to me clear that except as to the choice and appointment of an accountant, it did not curtail or limit his statutory powers to take possession and control of all the property and choses in action to

which the 1st respondent company is or appears to be entitled. In my view, the said court orders of the 5th and 12th December, 1988 did not go beyond the scope of the powers granted to the provisional liquidator but were mainly declaratory of his statutory powers and the powers conferred on him under the instrument of his appointment.

B There is finally the last issue in respect of which the question posed is whether the Court of Appeal was right in rejecting the affidavit of inventory sworn to by one Eugene Onyekwere as “worthless” when the worthlessness of the document was not an issue canvassed before that court

C It cannot be over emphasized that the Court of Appeal has no business whatsoever to deal with any issue that is not placed before it. See Florence Olusanya v. Olufemi Olusanya (1983)1 SCNLR 134; (1983) 3 S.C. 41 at 56; Overseas Construction Ltd. v. Creek Ent. Ltd. (1985) 3 NWLR (Pt. 13) 407 at 410; Osafire v. Odi (1990) 3 NWLR (Pt.137) 130; Chief Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5NWLR(pt.39) 1 at 34. Where, however, the Court of Appeal in the interest of justice decides to raise a point suo motu, it must D invite the parties, particularly the party that may be adversely affected as a result of the point raised suo motu, to address it on such a point before basing its decision thereupon. See Kuji v. Balogun (1978) 1 S.C. 53; Ugo v. Obikwe (1989) 1 NWLR (Pt.99) 566 at 581; Oje v. Babalola (1991) 4 NWLR (Pt.185) 267 at 280 etc. etc.

E In the present case the issue of the worthlessness of the said affidavit of inventory was raised for the first time by the Court of Appeal suo motu. It was neither canvassed by the parties in the trial court nor before the court below. With profound respect, the court below was in gross error by failing to give the parties an opportunity to address it on the status of the document before arriving at its decision on the F worthlessness or otherwise of the said affidavit of inventory. See Chukwuma Okwudili Ugo v. Amanchukwu Obiekwe and Another (1989) 1 NWLR (Pt.99) 566; Kuti v. Balogun (1978) 1 S.C. 53 at 60-61; AP. Limited v. Owodunni (1991) 8 NWLR (Pt.210) 391 at 423.

G It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Ogundare, J.S.C. that I, too, allow this appeal. I abide by the consequential orders in the lead judgment including the order as to costs therein contained.

H