

SUPREME COURT OF NIGERIA
16TH APRIL, 2004. SC. 222/2000
CORAM:- I.L. KUTIGI, A.I. KATSINA-ALU, S.O. UWAIFO,
A.O. EJIWUNMI D. MUSDAPHER, JJSC

GENERAL & AVIATION SERVICES LTD. APPELLANT
AND
CAPTAIN PAUL M. THAHAL RESPONDENT

COMPANY LAW - Provisional liquidator - Appointment of - When to appoint depends on the facts - But why, is that he will preserve the company's assets - Pending the outcome of the winding-up petition (H1)

EVIDENCE - Affidavits - Averments - That are conclusions of the deponent - Should not be relied upon by courts - In disregard to facts - Presented in the other party's affidavit (H2)

EVIDENCE - Affidavits - Contents of - Should be only statements of facts - Not conclusions and arguments - Which belong to court and counsel (H3)

EVIDENCE - Affidavits - Form of - If merely in form of conclusion, argument or objection - It raises no fact which needs be controverted (H4)

COMPANY LAW - Provisional liquidator - Is not automatically appointed - Merely because a petition has been filed - Petitioner should particularize his allegations - Or respondent won't have any facts to respond to (H5)

COMPANY LAW - Provisional liquidator - Court's appointment of - Should be with circumspection - On clear facts that a winding-up petition - Is likely to succeed (H6)

COURTS - Discretion - Appeals - Equity - Judicial and judicious exercise of discretion - Cannot be based on suppressed facts - But in conformity with the ordinary principles - Otherwise appellate court will interfere (H7)

COURTS - Discretion - Exercise of - Evidence - Need for court to give reasons - In justification of exercise of discretion - Which will be based on available facts (H8)

COMPANY LAW - Provisional liquidator - Procedure for appointment of - Is clear under the law - Injunctive and preservation orders - Not based on facts - Are wrong in law (H9)

JUDGMENTS - Nullity of - Court's failure to come to a considered judgment - Or failure to exercise a discretion properly - Will not make the entire judgment a nullity (H10)

FACTS

This is a company matter in which the respondent brought a petition for the winding-up of the appellant company. Respondent is a shareholder. The ground for the petition is "oppression." Respondent alleged inter alia, that since 1988, Mr. Sunday Olubadewo, Chairman/Managing Director, has been running the company in a manner that has completely excluded the interest of the respondent. That as a result of the adverse conducts complained of, trust has been destroyed as the atmosphere is one of continuous deceit, dishonesty, hostility and greed. Pursuant to the petition, respondent filed a motion on notice asking for the appointment of a provisional liquidator and some orders including that the Managing Director surrenders all properties, cheques, books, etc., relating to the company's bank accounts to the liquidator or Receiver/Manager.

The depositions in the affidavit in support of the motion are almost in the same tone as the allegations made in the petition. They were mainly in the form of conclusion, and inference. The trial court granted the motion and said, "that an order is hereby made appointing a fit person as

provisional liquidator with the assistance of the parties.” The court ignored factual depositions in the Managing Director’s affidavit. The appellant’s appeal to the court of Appeal failed. Being aggrieved, the appellant company has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the ruling of the trial court which was affirmed by the Court of Appeal is a nullity.

2. Whether the learned Justices of the Court of Appeal were right when they held that there was a competent petition before the court upon which the Injunctive and Preservative orders were premised.

Whether a proper occasion had been disclosed to warrant appointing a provisional liquidator and granting the interlocutory injunctions sought in this case.

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

Provisional liquidator - Appointment of - When and why

1. A distinction must be made between when, i.e., the proper occasion to appoint a provisional liquidator and why, i.e., the purpose of appointing one. When will depend on the facts necessitating and justifying placing the affairs of the company in the hands of a provisional liquidator. As will be seen in r. 21 of the Companies Winding-up Rules, 1983, which I shall reproduce later in this judgment, this is a procedural requirement. But why is a consequence of having appointed one, which is so that he will preserve the assets of the company and do such other duties as he may be directed by the court pending the outcome of the winding-up petition. It does not appear to me, with due respect, that the two courts below quite appreciated the nuances of the procedure which are crucial and relevant to the proper resolution of these matters. That is what has made all the difference in this case. (p. 912 G)

Affidavits - Averments - That are conclusions of the deponent

2. Instances of these accusations were not furnished in the said affidavit evidence. The petitioner presumably had facts, which led him to come to

these conclusions or frame of mind. What are those facts? These facts must be discussed and it will be for the court to draw conclusions from them. But none was disclosed. I think it must be said that it was improper for the two courts below to rely on conclusions arrived at in the affidavit of the petitioner and ignore specific facts disclosed by Mr. Olubadewo. (pp. 913 F & 914 A)

Affidavits - Contents of

C 3. In any affidavit used in court, it is required that it shall contain only a statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true. This is provided in sections 86 and 87 of the Evidence Act. The test for knowing facts and circumstances is to examine each of the paragraphs D deposited to in the affidavit. If it is such that a witness may be entitled to adduce them in his testimony on oath and are legally admissible as evidence to prove or disprove a fact in issue or dispute, then they qualify as statements of fact or of circumstances. This means that affidavit evidence, like oral evidence, must as a general rule deal with facts and avoid E matters of inference or conclusion which fall within the province of the court; or objection, prayer or legal argument which must be left to counsel. (p. 914 B)

F ***Affidavits - Form of***

4. If, therefore, affidavit evidence is in the form of conclusion, inference, legal argument, prayer or objection, it raises no fact which needs to be controverted but is simply regarded as extraneous to the determination of factual disputes: See Governor of Lagos State v. Ojukwu [1986] 1 N.W.L.R. (pt 18) 621; Josien Holdings Ltd. V. Lornamead Ltd. [1995] 1 N.W.L.R. (pt. 371) 254 at 265. (p. 914 E)

H ***Provisional liquidator - Is not automatically appointed***

5. The court below did no more than affirm what the trial court concluded upon the sweeping allegations made by the petitioner. Those allegations were not particularized. They were simply general, inferential

and vague. In the present case, the petitioner who was anxious to have a provisional liquidator appointed and interim injunctions ordered removing the Chairman/Managing Director Mr. Olubadewo from office and a mandatory injunction for him to surrender all books etc of the company ought to have particularized his allegations by condescending to the facts of the allegations. Without doing that the respondent (now appellant) had no obligation in law to respond to allegations of which he had no clear idea of the facts: see Dangote (supra) at pages 161-162 per Karibi-Whyte, J.S.C. B

In a case like this, the appointment of a provisional liquidator is not automatic simply because a petition had been filed. That is not the intendment of section 422(2) of CAMA. (pp. 915 D & 917 D) C

Provisional liquidator - Court's appointment of D

6. It must be recognized that in practice, where the atmosphere is such that a provisional liquidator does not feel bound to act in the best interest of the company, the consequences may be irredeemable. I think in order to avoid making a decision that is likely to paralyse the affairs of a company by the appointment of a provisional liquidator, or to create uncertainty or panic as regards the viability of the company, the court should act with circumspection and on clear facts that a winding-up petition is likely to succeed or at any rate, contains momentous factual allegations. Such facts ought to be evidence when reliance is placed on affidavit disclosure in support of the appointment of a provisional liquidator. F (p. 918 D)

COURTS - Discretion - Appeals G

7. It cannot be over-emphasized that it is upon known, or at times undisputed facts, or facts as found, and in all cases fully disclosed facts, that a judge seeking to do what is just and equitable may exercise his discretion. No discretion can be regarded as judicially and judiciously exercised upon no factual disclosure or upon partial disclosure, or upon misrepresented or suppressed facts: It is a rule of equity that where the exercise of discretion plays a part it is expected that the court will act in confor- H

mity with the ordinary principles upon which judicial discretion is exercised, otherwise an appellate court will interfere with the discretion. (p. 918 G & H)

B Discretion - Exercise of - Evidence

8. There is always the need for a court exercising a discretion to give reasons in justification of the exercise: see *Solanke v. Ajibola* [1968] 1 All N.L.R. 46 at 54. There can hardly be any justifiable reasons for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case: see *Birkett v. James* [1978] AC. 297 at 317 D. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated. I answer issue 3 in the negative. (p. 919 B)

E

Provisional liquidator - Procedure for appointment of

9. The court may either make the official receiver a provisional liquidator or be satisfied of a particular fit person to be so made by it at the time the order is made. There is a deliberate procedure to be followed and this is provided in rule 21 of the Companies Winding up Rules, 1983 (Cap 59) Laws of the Federation of Nigeria, 1990. As already indicated proof by affidavit must depend on facts and circumstances. The so-called appointment couched thus, “*That an order is hereby made appointing a fit person as a provisional liquidator with the assistance of the parties,*” by the trial court and affirmed by the Court of Appeal is completely erroneous and cannot be allowed to stand. The injunctive and preservation orders were also made upon no facts and are accordingly wrong in law. Issue 2 does not depend on the question whether those orders were made upon a competent petition. I consider this issue irrelevant and strike it out. (pp. 919 G & 920 E)

JUDGMENTS - Nullity of

10. I cannot accept that failure on the part of a trial court to come to a considered judgment or to exercise discretion properly will make the decision a nullity. A judgment may be declared a nullity due to some fundamental vice such as lack of statutory jurisdiction to hear the case, B or failure to fulfill a necessary condition precedent: See *Madukolu v. Nkemdilim* [1962] 1 All N.L.R. 557. A distinction must be drawn between an order or a judgment which a court is not competent to make and a judgment which, even though erroneous in law and in fact, is C within the court's competence; see *Timitimi v. Amabebe* [1953] 14 W.A.C.A. 374 at 377; *Awoyegbe v. Ogbeide* [1988] 1 N.W.L.R. (pt. 73) 695 at 715. The ruling of the trial court in the present case was not a nullity. It was based on perverse findings and was wrongly decided. That D made the decision of the court below which affirmed it perverse and also erroneous. The result of resolution of issue 1 does not affect the merit of this appeal.

In the circumstances, I find merit in this appeal and allow it.
(p. 921 B)

REPRESENTATION

M. D. BELGORE, S.A.N., WITH HIM PAULUME (MISS) FOR THE APPELLANT

O. A. OGUNLESI FOR THE RESPONDENT.

CASES REFERRED TO

Tapp v. Tapp Industries [1995] 5 N.W.L.R. (pt. 363) 9
Governor of Lagos State v. Ojukwu [1986] 1 N.W.L.R. (pt 18) 621 G
Josien Holdings Ltd. V. Lornamead Ltd. [1995] 1 N.W.L.R. (pt. 371) 254 at 265
Nigeria LNG Ltd. V. African Development Insurance Co. Lt. [1995] 8 N.W.L.R. (pt. 416) 677 at 698-702 H
Bamaiyi v. The State [2001] 8 N.W.L.R. (pt. 715) 270 at 286-291.
Dangote v. Civil Service Commission, Plateau State [2001] 9 N.W.L.R. (pt. 717) 132

Menakaya v. Menakaya [2001] 16 N.W.L.R. (pt. 738) 203 at 253

Okere v. Nkem [1992] 4 N.W.L.R. (pt. 234) 132 at 149

Oyeyemi v. Irewole Local Government [1993] 1 N.W.L.R. (pt. 270) 462 at 477

B

STATUTES & RULES REFERRED TO

Companies and Allied Matters Act 1990 (the CAMA) s. 422(2) and (3)(a)

Companies Winding up Rules, 1983 (Cap 59) Laws of the Federation of Nigeria, 1990 r. 21

C

LEAD JUDGMENT BY UWAIFO JSC

This is a company matter in which a petition has been brought by a party who claims to be a shareholder and contributory, praying the court to wind-up the company, namely, the appellant. The ground for seeking a winding-up, as I understand it, is stated in the petition to be “oppression” *The following paragraphs of the petition seem to be the mainstay of the alleged oppression upon which it is claimed that it would be just and equitable to wind up the company.* “10. Since 1988, the said Mr. Sunday Olubadewo has been running the Company in a manner that has completely marginalized and excluded the interest of your Petitioner in the Company and has continued to do so till date. 11. The said Mr. Sunday Olubadewo has abused his position as Chairman and Managing Director and has managed and administered the Company as if it were his own private property. 12. The said Mr. Sunday Olubadewo has been running the Company as his family business with the members of his family, particularly Captain E. Olubadewo and Mrs. G.B. Olubadewo, who have been illegally occupying top positions in the Company to the exclusion of your Petitioner. 13. The said Mr. Sunday Olubadewo has been dealing adversely with the Company and has purportedly changed the Company’s name from General & Aviation Services Limited to GEN AIR, while still operating from the premises of the Company with the staff and assets of the Company. 14. Your petitioner has been deliberately excluded from the affairs of the Company by the said Mr. Sunday Olubadewo who has refused to give account of the operations of the

Company since 1988 in spite of repeated requests. 15. The said Mr. Sunday Olubadewo being the sole signatory to the bank accounts of the Company since 1985, has been depleting the financial resources of the Company without accounting for the same. 16. In view of the petitioner's insistence that proper account should be rendered as to the operation of the Company the said Mr. Sunday Olubadewo has now embarked upon a course designed to strip the company of all its valuable assets and leave only a mere shell. 17. The said Mr. Sunday Olubadewo abused his position as the Chairman and Managing Director of the Company by using his said position to frustrate every attempt made by the petitioner to reorganize and stabilize the operation of the Company. 18. In addition to the facts stated herein, the said Mr. Sunday Olubadewo has begun to perpetrate certain machinations in pursuit to his own manifest aim of excluding the petitioner from participating in the running of the Company and reaping from the fruits thereof. 19. As a result of the wrongful acts and adverse conducts complained of herein, the underlying trust which was the basis of the joint venture which was at the onset (sic) commenced by your petitioner and the said Mr. Sunday Olubadewo has been destroyed in the climate of continuous deceit, dishonesty, hostility and greed. 20. In these circumstances, your petitioner contends that the affairs of the Company are being conducted in a manner oppressive to him and that it would be just and equitable to wind up the Company."

Pursuant to the petition, the petitioner filed a motion on notice seeking from the court the appointment of a provisional liquidator and the following orders, "pending the hearing and determination of the petition filed herein; (1) that the official Receiver or some other fit and proper person be appointed as Provisional Liquidator (or alternatively as Receiver/Manager) of the above named Company; (2) that the Managing Director of the Company, Mr. Sunday Olubadewo, should surrender all properties, cheques books, vouchers, account books and other banking documents relating to the Company's Bank Accounts to the Liquidator or Receiver/Manager; (3) granting an interim injunction to restrain the said Mr. Sunday Olubadewo, whether by himself, agents, servants, privies or howsoever otherwise from disposing, transferring, charging, operating,

dissipating, disbursing or in any way howsoever dealing with any and all sums now or hereafter standing to (the) credit in the Company's Bank Accounts; (4) granting an interim injunction restraining the said Mr. Sunday Olubadewo from further dealing. Tampering, transferring, charging, disposing or in any way dissipating the assets and properties of the Company."

The depositions in the affidavit in support of the motion are almost in the same tone as the allegations made in the petition, which I have reproduced above. The said depositions read as follows; "4. The business and assets of the Company will be in jeopardy and the petitioner's interest will be adversely affected unless this Honourable court appoints a Provisional Liquidator or Receiver/Manager to protect the business and assets of the Company pending the hearing and determination of the petition. 5. Mr. Sunday Olubadewo has taken undue advantage of his position as the Chairman and Managing director of the Company to run the Company as his family business and in a manner that has completely marginalized and excluded my interests in the company. 6. The said Mr. Sunday Olubadewo being the sole signatory to the bank accounts of the Company has continued to deplete the financial resources of the Company without accounting for the same and has used his position as Chairman to frustrate my efforts to become a joint signatory to the said accounts. 7. The said Mr. Sunday Olubadewo has purportedly changed the Company's name from General & Aviation Services Limited to GEN. AIR, while still operating from the premises of the Company with the staff and assets of the Company and has embarked upon a course designed to strip the Company of all its valuable assets and leave only a mere shell. 8. The said Mr. Sunday Olubadewo has all along been illegally disposing off (sic) the properties and assets of the Company to his own use. 9. I verily believe that the actions taken by the said Mr. Sunday Olubadewo are intended to pre-empt any proceedings which the petitioner may be advised to take by making it difficult for the petitioner or the court to obtain information relevant to these proceedings and also rendering nugatory anything which the petitioner may obtain by pursuing his remedy in this Honourable court. 10. I fear that unless the orders in

support of which I swear to in this affidavit are made, the said Mr. Sunday Olubadewo may seize the books of account and other relevant documents or cart away goods of the Company the moment this petition is served on him.”

The Chairman/managing Director of the Company, Sunday Kayode Solomon Olubadewo, swore an affidavit denying the allegations made in support of the motion. He made efforts to offer some explanations, where desirable, as to how the company was being managed. For example, in the affidavit sworn on 10 February 1997, he said in paragraphs 10, 13, 14, 17, 18, 19, 20 and 25 as follows:

“10 The petitioner’s allegation that I run the respondent as ‘family business’ to the exclusion of the petitioner is untrue. On the convened at my instance for the purpose of appointing the petitioner a director of the respondent so that he may participate in its running. However due to the failure of the petitioner to attend the said meetings the appointment has not been made. Now produced and shown to me and marked as: a) ‘Exhibit SKS/4’ is a copy of a letter by Mrs. P.M. Thahal, the wife of the petitioner indicating that an EGM should hold on 21st August 1996; b) Exhibit SKS/5’ is a copy of a notice by the respondent dated 13th August 1996 to the petitioner convening an EGM for 21st August, 1996 the date suggested by the petitioner’s wife in Exhibit SKS/4;c) ‘Exhibit SKS/6’ is a copy of a letter dated 20th August, 1996 by the petitioner to the respondent indicating that he shall not be able to attend the EGM and suggesting that it be postponed to 15th October, 1996; d) Exhibit SKS/7 is a copy of another notice of EGM to be held on 15th October 1996, the date suggested by the petitioner in Exhibit SKS/6, and; e) Exhibit SKS/8’ is a copy of a letter dated 15TH November, 1996 by the respondent to the petitioner indicating that the EGM of 15th October 1996 could not hold because of the absence of the petitioner and suggesting a number of dates for the petitioner to indicate one that is convenient to him for holding the EGM.” 13. I did not change the name of the respondent to H GEN AIR as alleged by the petitioner GEN Air is a name that was approved and allocated to the respondent by the Federal Civil Aviation Authority (‘FCAA’) Now produced and shown to me and marked as ‘Ex-

hibit SKS/9' is a copy of a letter dated 13th April, 1994 by the FCAA on the use of the name: GEN AIR. 14. Neither the respondent nor myself have any intention of excluding the petitioner from its affairs nor does it intend to deny him any rights due to him as a shareholder. All that the
B respondent is interested in is in continuing its operations without disruption. The respondent cannot achieve this if it is being run by a court official, the provisional liquidator. 16. On a daily basis, in my capacity as the respondent's Managing Director, I have to deal with and balance the
C conflicting interests of my staff, the interests of other aviation operators and those of the regulatory authorities. These interests can only be properly managed by a person who understands the aviation business and one who the authorities and the industry know and respect. 17. I am an
D engineer by profession and I have been in the aviation business since 1953 and I have been the Managing Director of the respondent since 1973 It is largely because of my training as an engineer and all my years of experience in aviation that I have been able to direct the affairs of the respondent. 18. The business of the respondent as an aviation services
E operator is a highly sensitive and visible one. The moment the general public and other aviation operators become aware that a provisional liquidator is running the respondent's business, the confidence that people have in the respondent will vanish and this may lead to the irreparable
F collapse of its business. 19. The respondent at the moment is facing some operational and financial difficulties because since 1993 none of its planes have been flying. The respondent is however able to remain in business by the provision of certain ground handling services to other
G aviation operators. These services include: a) the provision of security for planes at the airport; b) use of the respondent premises; c) use of the respondent's staff, and; d) tarmac parking services. The following are some of the operators the respondent presently has contracts with: a) Premier Air shuttle; b) George Eder and; c) Dominion Aircraft Company.
H 20. These contracts are neither big or lucrative but they are sufficient to run the respondent's business and to pay its staff. As a matter of fact, the staff have been on half salary since 1994 because the respondent cannot afford to pay them fully. 25. In addition to all the foregoing facts herein a

disruption to the operations of the respondent's business could lead not only to loss of the little income it is earning but also: a) the revocation of its operating licence by the aviation authorities, which will cost an enormous amount of money and time to get back; b) loss of dedicated and loyal staff which if they have to be replaced will be a higher wages by reason of paragraph 20 above; c) expose the respondent to potential legal suits by business associates here in Nigeria and overseas, and; d) cost of replacing equipment and other operating assets which nowadays are prohibitive and one that the respondent cannot afford."

The learned trial judge (Bioshogun, J.) in his ruling on the motion on notice stated that the issues were (1) whether he could invoke the provisions of section 422(2) of the Companies and Allied Matters Act 1990 (the CAMA) relating to the appointment of a provisional liquidator and (2) whether in the exercise of his discretion he could grant the interim injunction asked for. He then set out some of the guiding principles upon which an application for an interlocutory injunction may be considered. It is not particularly clear how he applied those principles to this case but he did acknowledge that counsel for both parties addressed him and cited a plethora of authorities. He drew attention to one of those authorities, *Re union accident Insurance company* [1972] 1 All E.R. 1105, and extracted from the holdings therein the following:

"1. It was the duty of the provisional liquidator to protect the company's assets.

2. The power to appoint a provisional liquidator conferred on the court by section 238 of 1948 Act was not limited to the cases where such special circumstances existed."

The learned trial judge then added that there was a similar provision in the CAMA, section 422(2). With all due respect to the learned judge, nothing that he considered thus far tended to assist him to determine whether it was just and equitable, or whether there were good reasons, for him to order the appointment of a provisional liquidator and make injunctive and preservation orders.

However, the learned trial judge proceeded to consider the appointment of a provisional liquidator, placing reliance on the case of the

Provisional Liquidator Tapp v. Tapp Industries [1995] 5 N.W.L.R. (pt. 363) 9. He drew attention particularly to where it says that a provisional liquidator is generally appointed where the assets of the company are in jeopardy and that his primary object is to prevent the directors of the company from dissipating such assets of the company. It was after this that the learned trial judge said:

“When one reads the affidavit evidence before the court one will not have constraint to order the appointment of a provisional liquidator for the respondent/company in order to preserve the assets of the company. The parties are therefore enjoined to assist the court in the exercise of its power to appoint a fit person as provisional liquidator. He will act as receiver pendente lite.

Moreover, I have no difficulty in coming to the conclusion that the applicant through the affidavit evidence satisfied the guiding principles for granting interlocutory injunctions with particular emphasis on preservation of the res which is the assets of the company pending the determination of the suit.”

After making this broad observation upon the basis of the imprecise allegations in the affidavit of the petitioner, the learned trial judge consequently made orders as follows: “1. That an order of injunction is hereby granted restraining the Managing Director Mr. Sunday Olubadewo whether by himself, agent, servants or privies from disposing, transferring, operating or in any manner whatsoever dealing with any sum now or hereafter standing to the credit in the company’s bank account. 2. That an order of injunction is hereby entered restraining the said Mr. Sunday Olubadewo from further dealing, tampering, transferring or in any manner disposing the assets and properties of the company. 3. That an order is hereby entered directing the Managing Director of the Company that is Mr. Sunday Olubadewo to surrender all properties, cheques books, vouchers, account books and other banking documents relating to the company’s bank account to the said liquidator. 4. That an order is hereby made appointing a fit person as a provisional liquidator with the assistance of the parties. 5. That an order is hereby entered for an accelerated hearing of the suit. 6. That the petitioner shall give an undertaking in writing as

to damages to indemnify the respondent in the event that the court discovers that it ought not to make the order in the first instance.” It will be observed from order (4) above that no provisional liquidator was in fact appointed as required by law.

On appeal to the Court of appeal, Lagos division, the appellant raised three issues, two of which I consider relevant. They were-

(a) Whether the trial court in decreeing ‘That an order is hereby made appointing a fit person as a provisional liquidator with the assistance of the parties’ was a proper exercise of discretion in the circumstances of the case.

(b) Whether on the materials before the court, orders of interlocutory injunction should have been made.

The court below answered issue (a) above in the affirmative. It went about it by proceeding to reproduce paragraphs 4, 5, 6, 8, 9 and 10 of the affidavit in support of the motion on notice by the petitioner (now respondent). It then said: “*The above depositions, in their totality touch on alleged maladministration of the company. Faced with these depositions, a court of law has the power under section 422(2) of CAMA quoted above to appoint a provisional liquidator who will be charged with the running of the business of the company between the time of the presentation of the petition and the making of the winding-up order. That the power to so appoint exists in the court is not in doubt. It is the exercise of that power that is being questioned here – whether on the face of the facts before the court, that power was rightly exercised.*” The court below also cited Tapp Industries Ltd. (supra) as regards the purpose of appointing a provisional liquidator. It referred again to the affidavit evidence and said inter alia:

“*There is nothing in the two counter-affidavits which by any strained interpretation, can be said to counter any of paragraphs 5, 6, 8, 9 and 10 of the affidavit in support Having regard to paragraphs 5, 6, 8, 9 and 10 of the affidavit in support of the afore-mentioned application which shows that the business company was been (sic) run in secrecy, that there was mismanagement of assets of the company and impossibil-*

ity of participation by the petitioner/respondent in the affairs of the company even as to attending meetings with Chairman/Managing Directors, it would be absolutely impossible for the petitioner to prove that there would be assets for distribution upon the winding-up of the company.”

B The court below also answered issue (b) in the affirmative and dismissed the appeal.

On further appeal to this court, the appellant has raised three issues for determination. The said issues were adopted by the respondent. I will reproduce them as set down in the respondent’s brief of argument as follows:

C “1. *Whether the ruling of the trial court which was affirmed by the Court of Appeal is a nullity.*

2. *Whether the learned Justices of the Court of Appeal were right*
D *when they held that there was a competent petition before the court upon which the Injunctive and Preservative orders were premised.*

3. *Whether the learned Justices of the Court of appeal exercised their discretion judicially and judiciously when they affirmed the manner*
E *by which the learned trial judge exercised his discretion in granting the Injunction and the appointment of the Provisional Liquidator for the Appellant Company.”*

I prefer to deal with issue 3 first. The real question is whether a
F proper occasion had been disclosed to warrant appointing a provisional liquidator and granting the interlocutory injunctions sought in this case. I think it was completely beside the point to rely on any decided case, as the two courts below did, which merely enunciates the purpose of appointing a provisional liquidator as in Tapp Industries Ltd. (supra); or to
G state the guiding principles for the grant of an interlocutory injunction, without ascertaining crucial facts justifying the need to appoint such a provisional liquidator or grant such an injunction. **A distinction must be made between when, i.e., the proper occasion to appoint a provisional liquidator and why, i.e., the purpose of appointing one. When**
H **will depend on the facts necessitating and justifying placing the affairs of the company in the hands of a provisional liquidator. As will be seen in r. 21 of the Companies Winding-up Rules, 1983,**

which I shall reproduce later in this judgment, this is a procedural requirement. But why is a consequence of having appointed one, which is so that he will preserve the assets of the company and do such other duties as he may be directed by the court pending the outcome of the winding-up petition. It does not appear to me, with due respect, that the two courts below quite appreciated the nuances of the procedure which are crucial and relevant to the proper resolution of these matters. That is what has made all the difference in this case. It is true that section 422 (2) of the CAMA provides thus:

“422(2) 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”

It would appear that the trial court exercised its discretion to come to the conclusion that a provisional liquidator should be appointed and that interim injunctions should be granted upon the facts contained in the affidavit of the petitioner. Those facts have been set out earlier in this judgment. Also set out are the related facts in the petition. A close examination of the said affidavit evidence reveals that what were deposed to therein are possible conclusions at best. It is, for instance, instructive to draw attention to paragraphs 5, 6, 7 and 8 of the petitioner’s affidavit. Paragraph 5 accuses Mr. Olubadewo of running the company as a family business and marginalizing and excluding the interests of the petitioner. **Instances of these accusations were not furnished in the said affidavit evidence. The petitioner presumably had facts, which led him to come to these conclusions or frame of mind. What are those facts? These facts must be discussed and it will be for the court to draw conclusions from them. But none was disclosed.** Again, what is it that Mr. Olubadewo did to lead to his being accused that he has “continued to deplete the financial resources of the company”, or in what way did he frustrate the efforts of the petitioner to become a joint signatory to the accounts of the company? Or what are the facts that he has illegally been disposing of the properties and assets of the company to his own

use? The unsupported allegations are in those paragraphs 6 and 8. As for the accusation in paragraph 7 of the petitioner's affidavit in support of his motion, this was clearly countered in paragraph 13 of Mr. Olubadewo's affidavit. Also in paragraph 10, Mr. Olubadewo has shown efforts to get B the petitioner to attend meetings of the company. **I think it must be said that it was improper for the two courts below to rely on conclusions arrived at in the affidavit of the petitioner and ignore specific facts disclosed by Mr. Olubadewo.**

C **In any affidavit used in court, it is required that it shall contain only a statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true. This is provided in sections 86 and 87 of the Evidence Act. The test for knowing facts and circumstances is to D examine each of the paragraphs deposed to in the affidavit. If it is such that a witness may be entitled to adduce them in his testimony on oath and are legally admissible as evidence to prove or disprove a fact in issue or dispute, then they qualify as statements E of fact or of circumstances. This means that affidavit evidence, like oral evidence, must as a general rule deal with facts and avoid matters of inference or conclusion which fall within the province of the court; or objection, prayer or legal argument which must be left to counsel. F If, therefore, affidavit evidence is in the form of conclusion, inference, legal argument, prayer or objection, it raises no fact which needs to be controverted but is simply regarded as extraneous to the determination of factual disputes: See Governor of Lagos State v. Ojukwu [1986] 1 N.W.L.R. (pt 18) 621; Josien Holdings Ltd. V. Lornamead Ltd. [1995] 1 N.W.L.R. (pt. 371) 254 at 265; Nigeria LNG Ltd. V. African Development Insurance Co. Lt. [1995] 8 N.W.L.R. (pt. 416) 677 at 698-702; Bamaïyi v. the State [2001] 8 N.W.L.R. (pt. 715) 270 at 286-291.**

H In Dangote v. Civil Service Commission, Plateau State [2001] 9 N.W.L.R. (pt. 717) 132 at 161-162, Karibi-Whyte; J.S.C. said:

"Appellant who seeks the exercise of the court's discretion has the burden of presenting all the material facts necessary for the exercise of

the discretion The application of the applicant will fail where such materials are absent It is erroneous to assume that the respondent has any responsibility to supply any omission in the facts supplied by an applicant and on which the court could exercise discretion.

The burden is on the appellant/applicant who is seeking the exercise of the discretion of the court.” B

In the same way, Ogundare, JSC said in *Menakaya v. Menakaya* [2001] 16 N.W.L.R. (pt. 738) 203 at 253 that “a court does not exercise its discretion in vacuo but on legal evidence or materials placed before it by the parties. The learned trial judge dissolved the marriage between the parties without any evidence. On what then had the petitioner satisfied the learned judge as required by section 15(2) of the Act? On what then was the judge satisfied that the marriage had broken down irretrievably? None whatsoever.” C D

The court below did no more than affirm what the trial court concluded upon the sweeping allegations made by the petitioner. Those allegations were not particularized. They were simply general, inferential and vague. In *Re. W.R. Willcocks & Co. Ltd.* [1973] 2 All E.R. 93, one of the two equal shareholders of a company presented a petition to wind up the company alleging in one of the paragraphs of the petition that there was a deadlock between the two shareholders. There was an application to have the petition struck out for vagueness owing to non-particularization of the allegation. Plowman, J. made the following observation at pages 95 – 96; E F

“The principal point of counsel for Mr. Dutch was that the vague and generalized allegations in para. 7 of the petition, which are in no way particularized, are embarrassing. In the first place, it is part of the petitioner’s case on the petition that differences have arisen between her and Mr. Dutch in relation to the mode of conducting the company’s business. I say it is part of her case for two reasons. First of all, because if it were not part of her case there would be no point in alleging it, and secondly, because as a matter of the construction of para. 8 of the petition, which says ‘In the circumstances it is just and equitable that the company should be wound up’, the allegation is part of ‘the circum- G H

stances' referred to. Similarly, it is part of the petitioner's case that the petitioner, and Mr. Dutch have found it impossible to settle their differences and to agree on the future course of the company's business. Similarly, too, it is part of the petitioner's case that it has become impossible to conduct the business of the company. But these allegations, which, as I say, are part of the petitioner's case, are wholly unparticularised. Mr. Dutch is not informed of the precise nature of the case which he has to meet and he has no means of knowing what evidence he ought to file in order to meet it. For example, if he knew the precise nature of the allegations made against him, he might want to confess and avoid rather than deny the allegations. He might, for all I know, want to say that the differences to which the petitioner refers, or the fact that it is impossible to settle them, were due entirely to the petitioner's intransigence and in those circumstances it would be neither just nor equitable to make a winding-up order.

"It may well be that if the affidavit had condescended to particulars of the allegations in para. 7 of the petition, the deficiencies in that paragraph would have been made good. But before this motion was launched Mr. Dutch's solicitors were informed by the petitioner's solicitors that it was not proposed to file any further evidence. In those circumstances, in my judgment, Mr. Dutch is entitled to have this petition struck out."

Let me here refer to another case where the allegation was again that there was deadlock between the only two shareholders of a company. It is *Re Davis Investments Ltd.* [1961] 3 All E.R. 926. It was a case also decided by Plowman, J. which went on appeal to the Court of Appeal. There, the court dismissed the appeal, Danckwerts L.J. observing at page 928 as follows:

"This is not a case of a petition by a creditor for a winding-up order because of the inability of the company to pay its debts, where, once the debt is shown to be genuine debt, a winding-up order is made as a matter of course. It must depend on the provision in the Act giving power to wind-up a company where it is just and equitable, that the company should be wound-up. That is not so simple and uncomplicated a

matter as an ordinary creditor's winding-up petition. We have been referred to cases of winding-up where the persons interested in the company could not agree, and these have some analogy to the case of partners. There are an application of the provision that a company may be wound-up where that is just and equitable, but really are an extension of the ordinary practice of the court. The present case is one which is unusual rather than purely formal and the petitioner must make out his case. It is not necessary for the person opposing the winding-up to do anything, as it seems to me, unless the petitioner does make out his case.

Therefore, it may well be necessary that the petitioner should supplement the ordinary statutory affidavit by an affidavit putting in evidence and proving the facts which justify and require an order by the court, and in some cases that may obviously, as has been pointed out in the books, involve exhibiting documents on which the matter depends."

In the present case, the petitioner who was anxious to have a provisional liquidator appointed and interim injunctions ordered removing the Chairman/Managing Director Mr. Olubadewo from office and a mandatory injunction for him to surrender all books etc of the company ought to have particularized his allegations by condescending to the facts of the allegations. Without doing that the respondent (now appellant) had no obligation in law to respond to allegations of which he had no clear idea of the facts: see Dangote (supra) at pages 161-162 per Karibi-Whyte, J.S.C.

In a case like this, the appointment of a provisional liquidator is not automatic simply because a petition had been filed. That is not the intendment of section 422(2) of CAMA. In the old case of *Re Railway Finance Co. Ltd.* [1866] 35 Beav. 473; [1866] 55 E.R. 979, a petition had been presented by a creditor to wind up the company but before it had been heard, the petitioner obtained ex parte an order for the appointment of a provisional liquidator. An application was made to discharge the order. In a two-sentence judgment, Lord Romilly M.R. at H page 980 said:

"I never appoint a provisional liquidator until it appears that the company must be wound up. I must discharge the order."

In another case, *In Re London, Hamburg and Continental Exchange Bank-Emmerson's Case* – [1866] L.R. 2 Eq. 331 at 236-237, again Lord Romilly M.R. observed:

“It is perhaps convenient that I should state what my practice is with reference to the appointment of provisional liquidators. Where there is no opposition to the winding-up. I appoint a provisional liquidator as a matter of course, on the presentation of the petition. But where there is an opposition to it, I never do, because I might paralyse all the affairs of the company, and afterwards refuse to make the winding-up order at all.”

It has been held that if the court refuses to make a winding-up order on the hearing of the petition, it ought to discharge any provisional liquidator whom it has already appointed, and restore all parties to the position they would have occupied if he had never been appointed at all; see *Re Dry Docks Corporation of London* [1888] 39 Ch. D 306. **It must be recognized that in practice, where the atmosphere is such that a provisional liquidator does not feel bound to act in the best interest of the company, the consequences may be irredeemable. I think in order to avoid making a decision that is likely to paralyse the affairs of a company by the appointment of a provisional liquidator, or to create uncertainty or panic as regards the viability of the company, the court should act with circumspection and on clear facts that a winding-up petition is likely to succeed or at any rate, contains momentous factual allegations. Such facts ought to be evidence when reliance is placed on affidavit disclosure in support of the appointment of a provisional liquidator.**

It cannot be over-emphasized that it is upon known, or at times undisputed facts, or facts as found, and in all cases fully disclosed facts, that a judge seeking to do what is just and equitable may exercise his discretion. No discretion can be regarded as judicially and judiciously exercised upon no factual disclosure or upon partial disclosure, or upon misrepresented or suppressed facts: see Carron Iran Co. v. Maclaren [1855] 5 H.L. Cas. 416; Wimbledon Local Board v. Croydon Rural Sanitary Authority [1886] 32 Ch. D. 421. It is a

rule of equity that where the exercise of discretion plays a part it is expected that the court will act in conformity with the ordinary principles upon which judicial discretion is exercised, otherwise an appellate court will interfere with the discretion: see *R. v. Stafford Justices* [1940] 2 K.B. 33 at 43; *Okere v. Nkem* [1992] 4 N.W.L.R. (pt. B 234) 132 at 149; *Oyeyemi v. Irewole Local Government* [1993] 1 N.W.L.R. (pt. 270) 462 at 477. **There is always the need for a court exercising a discretion to give reasons in justification of the exercise: see *Solanke v. Ajibola* [1968] 1 AII N.L.R. 46 at 54.** There can hardly be any justifiable reasons for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case: see *Birkett v. James* [1978] AC. 297 at 317 D. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated. **I answer issue 3 in the negative.**

On the answer given to issue 3 that the two courts below did not exercise their discretion judicially and judiciously to order the appointment of a provisional liquidator, this appeal ought to succeed. I may add here that, apart from the lack of facts, the decision “That an order is hereby made appointing a fit person as provisional liquidator with the assistance of the parties” is most irregular and does not conform to section 422(3)(a) which provides that if a provisional liquidator is to be appointed before the making of a winding-up order, the official receiver or any other fit person may be so appointed. **The court may either make the official receiver a provisional liquidator or be satisfied of a particular fit person to be so made by it at the time the order is made. There is a deliberate procedure to be followed and this is provided in rule 21 of the Companies Winding up Rules, 1983 (Cap 59) Laws of the Federation of Nigeria, 1990 which reads thus:**

“21. (1) *after the advertisement of a petition for the winding-up*

of a company by the court, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the court, if it thinks fit and upon such terms as in the opinion of the court shall be
 B just and necessary, may make the appointment.

(2) *The order appointing the Provisional Liquidator shall bear the number of the petition, and shall state the nature and a short description of the property of which the provisional Liquidator has performed any*
 C *other duty prescribed by these Rules.*

(3) *The Provisional Liquidator shall pay the Official receiver such sum, if any, as the court directs.*

(4) *The order of appointment of a Provisional Liquidator shall be in Form 11 in the Appendix with such variations as circumstances may*
 D *require.” (Emphasis mine)*

It can be seen that the appointment must take into consideration
 (a) proof by affidavit of sufficient ground for the appointment of a provisional liquidator; sub-rule (a);(b) the previous experience of the provisional liquidator, the particulars of the nature and description of the property with which he had dealt being stated: sub-rule (2). **As already indicated proof by affidavit must depend on facts and circumstances. The so-called appointment couched thus, “That an order is hereby**
 E **made appointing a fit person as a provisional liquidator with the assistance of the parties,” by the trial court and affirmed by the Court of Appeal is completely erroneous and cannot be allowed to stand. The injunctive and preservation orders were also made upon no facts and are accordingly wrong in law. Issue 2 does not depend on the**
 F **question whether those orders were made upon a competent petition. I consider this issue irrelevant and strike it out.**
 G

Issue 1 is a misconception. The submission of the learned Senior Advocate on this issue as contained in the appellant’s brief of argument is
 H that because the basis for the exercise of the discretion of the learned trial judge was not clear, the judgment was a nullity. It was, therefore, further submitted that the Court of Appeal could not have rightly affirmed such a decision. Reliance was placed on the observation of Coker, J.S.C., in
 I

Ojogbue v. Nnubia [1972] 7 N.S.C.C. 478 at 482 as follows:

“[W]e cannot see the basis on which the plaintiffs’ case was dismissed nor, what is worse, the grounds on which the learned trial judge had proceeded to ‘enter judgment for the defendants.’ A judgment of the court must demonstrate in full a dispassionate consideration of the issues properly raised and heard and must reflect the results of such an exercise.”

This authority does not in any way support the learned Senior Advocate’s submission on issue 1. **I cannot accept that failure on the part of a trial court to come to a considered judgment or to exercise discretion properly will make the decision a nullity. A judgment may be declared a nullity due to some fundamental vice such as lack of statutory jurisdiction to hear the case, or failure to fulfill a necessary condition precedent: See Madukolu v. Nkemdilim [1962] 1 All N.L.R. 557. A distinction must be drawn between an order or a judgment which a court is not competent to make and a judgment which, even though erroneous in law and in fact, is within the court’s competence; see Timitimi v. Amabebe [1953] 14 W.A.C.A. 374 at 377; Awoyegbe v. Ogbeide [1988] 1 N.W.L.R. (pt. 73) 695 at 715. The ruling of the trial court in the present case was not a nullity. It was based on perverse findings and was wrongly decided. That made the decision of the court below which affirmed it perverse and also erroneous. The result of resolution of issue 1 does not affect the merit of this appeal.**

In the circumstances, I find merit in this appeal and allow it, I set aside the decisions of the two courts below together with the order for costs. I hereby dismiss the motion on notice dated 22 January, 1997 seeking the appointment of a provisional liquidator together with other prayers, and order that the parties return to the status quo ante. It is further ordered that the winding-up petition should be assigned to a Judge other than Bioshogan, J. I award the appellant N1,000.00 as costs in the trial court, N4,000.00 as costs in the court below and N10,000.00 as costs in this court.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother S.O. Uwaifo, J.S.C. I agree with his reasoning and conclusions. The petitioner's affidavit evidence which are clearly bare allegations and or conclusions are not supported by facts and or documents needed to establish them. The omission in this case are without doubt fatal to the application before the trial court.

The appeal is allowed. The decisions of the lower courts are set aside and in their places an order dismissing the Petitioner's Motion on Notice dated 22/1/97 is substituted. I endorse the consequential orders contained in the judgment.

D

KATSINA-ALU JSC

I have had the opportunity of reading in draft the judgment delivered by my learned brother, S.O. Uwaifo, J.S.C. in this appeal. I entirely agree with it and, for the reasons he has given, I also allow the appeal and set aside the decisions of the two courts below together with the order for costs. I dismiss the motion on notice and order that the parties return to the status quo ante. I further order that the winding-up petition be assigned to another judge.

F

EJIWUNMIJSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C. I agree with his conclusions in allowing this appeal and the reasons given for so deciding. The Courts below did not in my respectful view exercise their discretions judicially and judiciously in granting the prayers sought by the respondent in this appeal. The respondent commenced this action in the Federal High Court by a motion on notice wherein he prayed the court for the following reliefs:

"1 That the official receiver or some other fit and proper person be appointed as Provisional Liquidator (or alternatively as receiver/

Manager of the above named company;

2. *That the Managing Director of the Company, Mr. Sunday Olubadewo, should surrender all properties, cheques books, vouchers, account books and other banking documents relating to the company's bank Accounts to the Liquidator or Receiver/Manager;*

3. *Granting an interim injunction to restrain the said Mr. Sunday Olubadewo, whether by himself, agents, servants, privies or howsoever otherwise from disposing, transferring, charging, operating, dissipating, disturbing or in any way howsoever dealing with any and all sums now or hereafter standing to credit in the Company's Bank Accounts;*

4. *Granting an interim injunction restraining the said Mr. Sunday Olubadewo from further tampering, transferring, charging, disposing or in any way dissipating the assets and properties of the Company; and*

5. *For such further or other order(s) as this Honourable Court may deem fit to make in the circumstances."*

This motion was supported by a 12 – paragraph affidavit. It is clear from a careful reading of the motion and the affidavit filed in support that the main thrust of the petition was for an order winding up the respondent company for the various reasons given in the said affidavit filed in support of the motion. A formal petition was also filed wherein the petitioner made specific allegations against the mismanagement of the respondent company by Mr. Sunday Olubadewo its Managing Director. It would appear from this petition and the affidavit filed that the complaints of the petitioner, Capt. Paul Thahal directed against Mr. Sunday Olubadewo may be classified into about three categories. The first appear to be that the said Managing Director has been running the business of the company as his private family business. And had therefore completely shut out the petitioner from the running of the business. Secondly, in the process, Mr. Olubadewo has not kept to the agreement reached at the inception of the respondent/company that the signatories to the accounts of the company shall be the petitioner and Mr. Olubadewo. And as a result of that breach, Mr. Olubadewo had been dissipating the resources of the company, and embarked upon a course designed to strip the company of all its valuable assets, and had also gone ahead to change

unilaterally the name of the company to GEN AIR. And for the third category of the complaints of the petitioner, the total control of the company by the Managing Director and his family members who occupy the top posts in the management of the company.

B Mr. Olubadewo, responded to the various complaints against him by swearing to an affidavit. In this 29 paragraph affidavit, he denied the various allegations of statements of the conclusions adumbrated in the petition by the petitioner against him. He also added that most of what the
C petitioner said formed part of the subject matter of an earlier litigation between them in Suit No. FHC/L/54/89, Capt. P.M. Thahal & Anor v. S.K.S. Olubadewo & 4 Ors. And he further explained that though the judgment went in favour of the plaintiff, the matter at the time of the commencement of this action was pending in the Court of Appeal. He
D also deposed that after the judgment in that case, the petitioner at an extraordinary General Meeting of the respondent held on 29th May 1995, tried but failed to have him removed as the Chairman of the Company as the petitioner was unable to have in his favour the requisite votes to effect his
E (Olubadewo) removal. On the allegation that he ran the company as a family business, he deposed at para 10 of his affidavit thus:

*“10 The petitioner’s allegation that I run the respondent as “family business” to the exclusion of the petitioner is untrue. On the contrary
F Extra-Ordinary General Meetings (“EGM”) have been convened at my instance for the purpose of appointing the petitioner a director of the respondent so that he may participate in its running. However due to the failure of the petitioner to attend the said meetings the appointment has not been made. Now produced and shown to me and marked as:*

G (a) *“Exhibit SKS/4” is a copy of a letter by Mrs. P.M. Thahal, the wife of the*

petitioner indicating that an EGM should hold on 21st August 1996.

(b) *“Exhibit SKS/5” is a copy of a notice by the respondent dated
H 13th August 1996, the date suggested by the petitioner’s wife in Exhibit SKS/4;*

(c) *“Exhibit SKS/6” is a copy of a letter dated 20th August 1996, by the petitioner to the respondent indicating that he shall not be able to*

attend the EGM and suggesting that it be postponed to 15th October 1996.

(d) “Exhibit SKS/7” is a copy of another notice of EGM to be held on 15th October, 1996, the date suggested by the petitioner in Exhibit SKS/6, and

(e) “Exhibit SKS/8” is a copy of a letter dated 15th November 1996 by the respondent to the petitioner indicating that the EGM of 15th October 1996 could not hold because of the absence of the petitioner and suggesting a number of dates for the petitioner to indicate one that is convenient to him for holding the EGM.”

And in answer to the allegations made concerning the management of the respondent/company, Mr. Olubadewo deposed in paragraph 16-20 of his affidavit thus:

“16. On a daily basis, in my capacity as the respondent’s Managing Director, I have to deal with and balance the conflicting interests of my staff, the interest of other aviation operators and those of the regulatory authorities. These interests can only be properly managed by a person who understands the aviation business and one who the authorities and the industry know and respect;

17. I am an engineer by profession and I have been in the aviation business since 1963 and I have been the Managing Director of the respondent since 1973. It is largely because of my training as an engineer and all my years of experience in aviation that I have been able to direct the affairs of the respondent.

18. The business of the respondent as an aviation services operator is a highly sensitive and visible one. The moment the general public and other aviation operators became aware that a provisional liquidator is running the respondent’s business, the confidence that people have in the respondent will vanish and this may lead to the irreparable collapse of its business.

19. The respondent at the moment is facing some operational and financial difficulties since 1993 none of its planes have been flying. The respondent is however able to remain in business by the provision of certain ground handling services to other aviation operators. These ser-

vices include: -

- a. *The provision of security for planes at the airport*
 - b. *Use of the respondent premises'*
 - c. *Use of the respondent's staff, and;*
 - B d. *Tarmac parking services.*
20. *The following are some of the operators the respondent presently has contract*

with:

- C a. *Premier Air Shuttle;*
- b. *Gorg Eder, and;*
- c. *Dominion Aircraft Company.*

These contracts are neither big nor lucrative but they are sufficient to run the respondent's business and to pay its staff. As a matter of fact the staff
D *have been on half salary since 1994 because the respondent cannot afford to pay them fully."*

Concerning the future of the respondent should the company be sealed up as ordered by a person who was described as the provisional
E liquidator, Mr. Sunday Olubadewo deposed at paragraphs 22-28 of his affidavit as follows:-

22. On Thursday 7th February 1997 some persons claiming to be acting on the instructions of the provisional liquidator sealed up the of-
F fices of the respondent and since that date the offices have been guarded by security men put there not by the liquidator but by the petitioner.

23. I am informed by my counsel, Mr. M.D. Belgore and I verily believe him that the sealing up of the respondent's offices was not or-
G dered by this Honourable court and it is done without lawful authority;

24. I do verily believe that the respondent, given its precarious existence as aforesaid, cannot survive any disruption to its operations. I fear that the sealing up of the respondent's offices and ex parte orders made by this court could lead to just that if not set aside very quickly.

H 25. In addition to all the foregoing facts herein a disruption to the operations of the respondent's business could lead not only to loss of the little income it is earning but also;

- a. *The revocation of its operating licence by the aviation au-*

- thorities, which will
cost an enormous amount of money and time to get back;
- b. Loss of dedicated and loyal staff, which if they have to be replaced will be at higher wages by reason of paragraph 20 above;
 - c. Expose the respondent to potential legal suits by business associates here in Nigeria and overseas, and;
 - d. Cost of replacing equipment and other operating assets which nowadays are

Prohibitive and one that the respondent cannot afford.

26. The potential loss stated above cannot be compensated for by damages. In any event the undertaking as to damages (if any) given by the petitioner is worthless because the petitioner does not have the financial capacity of meeting any award of damages that may be made by this court in favour of the respondent as until very recently he was an employee of Nigerian Airways on an annual salary of less than N100,000.00 per annum.

27. Propose that instead of the provisional liquidator running the respondent, the court should direct that the petitioner and myself agree at an EGM or otherwise on a person mutually acceptable to both of us that will run the respondent jointly with me. This arrangement will ensure that the respondent's business is not irreparably damaged and will also preserve the confidence and goodwill the respondent has been enjoying over the years.

28. An appeal has been lodged against the said ex parte orders. Now produced and shown to me and marked as "Exhibit SKS/10" is a copy of the Notice of Appeal filed on behalf of the respondent."

After receiving addresses from learned counsel who appeared for the parties, the learned trial judge, Bioshogun J. delivered a considered ruling. In the course of that ruling, he referred to the several authorities germane to the application before him before concluding by acceding to the requests of the petitioner. He therefore ordered the appointment of a provisional liquidator for the respondent/company in order to preserve the assets of the company. This was followed by the following order:-

"The parties are therefore enjoined to assist the court in the ex-

ercise of its power to appoint a fit person as provisional liquidator. He will act as receiver pendente lite.”

Finally the trial court ordered as follows:-

B *“1. That an order of injunction is hereby granted restraining the Managing Director Mr. Sunday Olubadewo whether by himself, agent, servants or parties from disposing, transferring, operating of in any manner whatsoever dealing with any sum now or hereafter standing to the credit in the company’s bank account.*

C *2. That an order of injunction is hereby entered restraining the said Mr. Sunday Olubadewo from further dealing, tempering, transferring or in any manner disposing the assets and properties of the company.*

D *3. That an order is hereby entered directing the Managing Director of the company that is Mr. Sunday Olubadewo to surrender all properties, cheque books, vouchers, account books and other banking documents relating to the company’s bank account to the said liquidator.*

4. That an order is hereby made appointing a fit person as a Provisional Liquidator with the assistance of the parties.

E *5. That an order is hereby entered for an accelerated hearing of the suit.*

F *6. That the petitioner shall give an undertaking in writing as to damages to indemnify the respondent in the event that the court discovers that it ought not to make the order in the first instance.*

7. That this suit is hereby adjourned till the 3rd day of October, 1997 for mention.”

G Dissatisfied with the ruling and orders made thereon, the appellant appealed to the Court of Appeal, Lagos Division. As that court affirmed the ruling by its judgment dated 6th June, 2000 and dismissed the appeal, a further appeal was lodged in this court. Pursuant thereto, the appellant filed a Notice of Appeal (as amended) containing six grounds of appeal. From these grounds of appeal were distilled three issues for the H determination of the appeal. These are:-

“(a) Was there a valid decision which their Lordships of the Court of Appeal could have affirmed?

(b) Was there an effective petition upon which the orders for the

appointment of the liquidator and the grant of injunction could be based?

(c) Were the learned Justices right in affirming the manner in which the trial Court exercised its discretion to appoint a provisional liquidator and grant injunctive orders?”

After due consideration of the grounds of appeal, it is my respectful view that the key to the determination of this appeal is the question raised in issue 3 for the appellant. By this issue, the question raised being whether the Court of Appeal was right in affirming the manner in which the trial court exercised its discretion to appoint a provisional Liquidator and grant injunctive orders. It is argued for the appellant in the trial court to appoint a provisional liquidator and grant an injunction was wrong because it is contention of learned counsel for the appellant that the decision of the trial court was a nullity for lack of adjudication and therefore could not be affirmed. It is also his contention that the petition was defective and could not form the basis of any order. Appellant’s counsel then submits that this appeal should be allowed on the basis of the above submissions. However it does seem to me that for the submissions to hold, learned counsel ought to have advanced further and fuller arguments to justify his contention.

Be that as it may, learned counsel for the appellant went on to submit that the decision to appoint a provisional liquidator was a wrongful exercise of the discretion of the trial court. On this, learned counsel has argued that there was irreconcilable affidavit by the parties as to whether there were any assets of the company in jeopardy, and which was the only reason upon which the appointment could lawfully be made. He then invited attention to paragraphs 5, 6, 7, 8, 9 and 10 of the respondent’s affidavit, and paragraphs 10, 12, 14, 19, 20 and 21 of the appellant’s affidavit. Therefore, it is further argued, the decision to allow parties choose a fit person overlooked a material consideration. This being that the parties were unable to agree on any issue of substance and referred to *Okere v. Nkem* [1992] 4 N.W.L.R. (pt. 234) 132 at 149. Moreover, it is also argued for the appellant that on the basis of his argument summarized above, the order for injunction should not have been affirmed by the Court below. In support of this contention, he referred to

the following cases *Amachree v. I.C.C.* [1989] 4 N.W.L.R. (pt. 118) 686 at 698; *Sotuminu v. Ocean Steamship* [1992] 5 N.W.L.R. (pt. 239) 1.

For respondent however, it is argued that the Court of Appeal rightly affirmed the decision of the trial court and that in the process, the court below exercised its discretion properly. In support of his argument in the respondent's brief, he referred to the following cases; *Ayeni v. Sowemimo* [1982] 5 S.C. 60 at 74; *United Bank for Africa Ltd. V. Achoru* [1990] 6 N.W.L.R. (pt. 156) 254 at 273; *Provincial liquidator, Tapp Industries Ltd. V. Tapp Industries Limited* [1995] 5 N.W.L.R. (pt. 392) 9-38 to 39.

I think that the first point that must be made in this appeal is that the case at the trial Court was considered throughout on the basis of the affidavit evidence filed by the parties. I have before now referred to the affidavit evidence earlier in this judgment. And although the affidavit evidence of the respondent were only summarized, it is necessary to set some of them down for the purpose of what I need to say on them. In this regard, I refer to paragraphs 4,5,8,9 and 10.

"4. The business and assets of the company will be in jeopardy and the petitioner's interest will be adversely affected unless his honourable court appoints a provisional liquidator or a Receiver/Manager to protect the business and assets of the company pending the hearing and determination of the petition.

5. Mr. Sunday Olubadewo has taken undue advantage of his position as the Chairman and Managing Director of the company to run the company as his family business and in a manner that has completely marginalized and excluded my interest in the company.

8. The said Mr. Sunday Olubadewo has all along been illegally disposing of the properties and assets of the company to his own use.

9. I verily believe that the actions taken by the said Mr. Sunday Olubadewo are intended to pre-empt any proceedings which the petitioner may be advised to take by making it difficult for the petitioner or the court to obtain information relevant to these proceedings and also rendering nugatory (sic) anything which the petitioner may obtain by pursuing his remedy in this Honourable Court.

10. I fear that unless the orders in support of which I swear to this affidavit are made, the said Mr. Sunday Olubadewo may seize the books of accounts and other relevant documents or cart away goods of the company the moment this petition is served on him.”

In my respectful view, had the trial Court and the court below B considered carefully the above paragraphs of the affidavit, in the light of sections 86 and 87 of the evidence Act, Cap. 112 of the Laws of Nigeria 1990, it would have been resolved that these paragraphs are in breach of the provisions of the said sections of the Evidence Act which reads thus:

“Section 86. Every affidavit used in the court shall contain only a C statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information, which he believes to be true.

Section 87. An affidavit shall not contain extraneous matter, by D way of objection, or prayer, or legal argument or conclusion.”

Being of the view that the above affidavit are for the most part incompetent, in that they reveal the conclusion of the deponent without giving such facts as would lead an independent tribunal to come to its E own conclusion on the facts. The affidavit so filed should therefore have been struck out. However though the trial court failed to consider the competency of the respondent's affidavit in the light of sections 86 and 87 of the Evidence Act. (supra), the Court below fell into the same error. F That court went on to consider the merits of the appeal before it on the basis of the said affidavit. I have earlier on in this judgment referred to the relevant passages of the court below on this point and also some of the paragraphs of the affidavit deposed to by Mr. Sunday Olubadewo the appellant. It is manifest from the affidavit that the appellant denied most G of the charges leveled against him by the respondent. But it is also clear that the court below did not advert to this aspect of the case of the appellant. Again, I must observe with the utmost respect that had the court below considered carefully the affidavit evidence of the parties H before it, it would have refrained from upholding the ruling of the trial court. This is because the court below would have concluded that the evidence of the appellant sufficiently challenged the basis of the affidavit

petition. Such evidence cannot be the basis of exercising properly the discretion of the court without taking oral evidence to resolve the opposing evidence made available by their affidavits. See *Falobi v. Falobi* [1976] 9-10 S.C. 1; *Akinsete v. Akindulire* [1996] 1 AII N.L.R. (pt. 1) 147;

B *Fashanu v. Adekoya* [1974] 1 AII N.L.R. (pt. 1) 35 at 41-42.

Having regard to what I have said above, the question that I have had to ask myself is, whether the decision of the court below should be allowed to stand. This is because I must bear in mind that an appellate court should be wary of setting aside the exercise of the discretion of a lower court. In this regard, I will quote gratefully what ought to guide an appellate court in such circumstances as stated in *Charles Osentou & Co. v. Johnson* [1942] A.C. 130, p. 138.

C *"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches a clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations then the reversal of the order on appeal may be justified."*

D In the instant case, I am satisfied that if the learned justices of the Court of Appeal had considered the provisions of sections 86 and 87 of the Evidence Act with regard to the competency of the affidavit of the respondent, and also the fact that the parties had filed contradictory affidavit evidence without the benefit of oral evidence to resolve the conflict in the affidavit evidence, they would probably have exercised their discretion in the matter differently in favour of the appellant.

F It follows then that this appeal ought to succeed as I am of the view that the court below exercised its discretion wrongly in affirming H the ruling of the trial court. Therefore, the judgment of the court below is hereby set aside and also the ruling of the trial court including the order for costs for the above reasons and the fuller reasons given in the leading judgment of my learned brother, Uwaifo, J.S.C. I also abide with the

other consequential orders made in the said judgment and which include the order for costs, the reversal of the parties to the status quo ante; and the further order that the winding-up petition should be assigned to another judge of the Federal High Court.

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MUSDAPHER JSC

I have had the honour to read in advance the judgment of my Lord S.O. Uwaifo, J.S.C., just delivered with which I respectfully agree. For the same reasons so admirably and exhaustively canvassed in the aforesaid judgment, which I adopt as mine. I too, find merit in this appeal and allow it. I set aside the decisions of the Courts below together with the orders for costs. I adopt the orders for costs proposed in the aforesaid leading judgment.

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