

Revisiting some aspects of the decisions in *FMBN V NDIC* (1999) 2 NWLR

1 Introduction

It is common cause that insolvency law consists of laws that regulate debtors who are unable to pay their debts (Duns *Insolvency Law and Policy* (2002) 1). It provides the procedures for distributing the assets or proceeds of the assets of a debtor who is unable to pay his debts in favour of his creditors. Unlike other debt collection laws, insolvency law is

designed to ensure that the inadequate assets of the debtor are fairly distributed amongst his creditors, hence the saying that insolvency law involves a contest among creditors all of whom are staking claims to an inadequate pie, rather than a contest between debtors and creditors (see *Duns supra* at 1).

A critical aspect of insolvency law is the protection of creditors' interests as a group, thus individual interests cannot override the interest of creditors as a group. One creditor, through the process of execution, cannot receive full payment of his claim at the cost of the claims of other creditors, and as correctly stated in the South African case of *Walker v Syfret* (1911 AD 141 par 166) the sequestration order crystallises the insolvent's position – the hand of the law is laid upon the estate and at once, the rights of the general body of creditors have to be taken into consideration (see generally Bertelsmann *et al The law of insolvency in South Africa* (2008) 2-3). Thereafter, no transaction can be entered into with regard to the estate matters by a single creditor to the prejudice of the general body.

The above background explains the rationale behind certain provisions in modern insolvency laws to ensure that creditors are fairly treated and that all assets of the debtor are brought under the control of the trustee or liquidator, as the case may be, for the benefit of the general creditors. One such provision can be found in section 417 of the Companies and Allied Matters Act (Cap C20 LFN 2004) ("CAMA") which prohibits action or proceedings against a company in liquidator except with the leave of the court.

In *FMBN v NDIC*, the Supreme Court of Nigeria had the opportunity to interpret section 417 of CAMA. This paper seeks to consider the interpretation of section 417 by both the Court of Appeal and the Supreme Court in the context of the above principles of insolvency law.

2 *Federal Mortgage Bank of Nigeria v Nigeria Deposit Insurance Corporation (Liquidator of United Commercial Bank Limited) in Liquidation*

2 1 Overview of Facts

The appellant ("FMBN" or the "Creditor") placed the sum of N5 000 000 (five million Naira) on a short-term deposit with the United Commercial Bank on 8 December 1992 at an interest rate of 40 % per annum. There were roll-overs and the deposit eventually matured on 6 March 1994. United Commercial Bank (the "Bank" or "Debtor") defaulted in paying the deposit and the appellant sued the Bank claiming the deposited sum as well as interest rates and got judgment in the sum of N6 252 245.13 (six million, two hundred and fifty-two thousand, two hundred and forty-five Naira, thirteen kobo) on 12 July 1994 upon failure of the Bank to enter appearance or file defence. The Bank did not appeal against the judgment; the appellant then levied execution and attached its movable

assets on 5 September 1994. The assets were attached within the Bank's premises by the deputy sheriff. On 9 September 1994 – that is, four days after execution – the Central Bank of Nigeria (“CBN”) revoked the banking licence of the Bank and appointed the Nigeria Deposit Insurance Corporation (“NDIC”) as liquidator of the Bank. Upon his appointment, the liquidator (the respondent in this case) removed the attached assets and put them in his control, thus preventing the deputy sheriff from affecting a sale. As a result of this development, the appellant applied, on 15 September 1994, to the High Court seeking an order to compel the liquidator to produce the attached assets of the Bank and to direct the deputy sheriff to sell same. Ruling on the application was reserved until 14 October 1994. Prior to the date for of the ruling, the respondent filed an application to arrest the ruling of 14 October 1994 and to stay proceedings pending an appeal on the ground that the High Court had no jurisdiction to adjudicate on the matter. The application was predicated on an appeal filed by the respondent on 4 October 1994 against the judgment of 12 July 1994 which appeal was not pursued by the respondent. The respondent's application to arrest the ruling and stay proceedings was heard and dismissed and the High Court delivered its ruling on the appellant's application and granted the prayers, thus compelling the liquidator to produce the attached goods. Dissatisfied with the ruling, the respondent/liquidator appealed to the Court of Appeal. The Court of Appeal set aside the judgment of 12 July 1994 and the ruling of 14 October 1994. In summary, the Court of Appeal, *inter alia*, held that by virtue of section 38(3) of the Banks and Other Financial Institutions Decree 1991 (“BOFID”; now Banks and Other Financial Institution Act Cap B3 LFN 2004), the NDIC may be appointed by the Governor of the CBN as the official receiver or as a provisional liquidator of a company. Where so appointed, the NDIC shall have the powers conferred under the CAMA and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for that purpose. The Court held that a provisional liquidator can exercise the power of a liquidator unless limited or restricted by the court. The Court of Appeal was of the view that based on the various provisions of CAMA, the deputy sheriff, who had notice of the appointment of a provisional liquidator, was bound to deliver the goods attached to the liquidator and that the liquidator was entitled to take custody of same.

On the provision of section 417 of CAMA, which is the focus of this paper, the Court of Appeal held that the true position is that once a provisional liquidator is appointed for a company, no action or proceedings shall be proceeded with, or commenced against, the company except with leave of the court – given on such terms as the court may impose. The Court was of the view that the term “court” referred to under section 417 is the Federal High Court of Nigeria (“FHC”). Consequently, where such an action is intended to be proceeded with or commenced against the company in any other court, it cannot be done without obtaining the leave of the FHC.

The appellant/creditor then appealed to the Supreme Court and the respondent, being dissatisfied with certain parts of the judgment, cross-appealed. The Supreme Court considered, amongst other provisions, sections 500(2) and 501(1) of CAMA and correctly held that the respondent/liquidator was in lawful possession of the goods seized by the deputy sheriff, as the Bank's liquidator, because section 501(1) of CAMA enjoined the deputy sheriff in the circumstances of the case to deliver the seized goods to the respondent/liquidator. Consequently, the Supreme Court dismissed the appeal notwithstanding that certain issues were resolved in favour of the appellant.

In considering section 417, the Supreme Court held that what is prohibited by section 417, except with the leave of court, is an action or proceeding pending or instituted in the FHC because that is the meaning of "court" as used in section 650 of CAMA. The Supreme Court was of the view that the appellant's application cannot be described as an action or proceeding proceeded with or commenced, and the Court of Appeal, therefore, was in error when it held that leave was required before the appellant could file its application which sought an order to compel the respondent/liquidator to produce the attached goods and chattels of the Bank in liquidator and to direct the deputy sheriff to sell same.

The Supreme Court, however, affirmed the Court of Appeal's decision in setting aside the High Court ruling of 14 October 1994 but declared the Court of Appeal's order in respect of the judgment of 12 July 1994 a nullity and having been made without jurisdiction. Consequently, both the main appeal and cross-appeal failed.

2 2 Area of Disagreement:

As seen from the above decisions, both the Court of Appeal and the Supreme Court arrived at the conclusion that the respondent (liquidator) was in lawful possession of the goods seized by the deputy sheriff and that the deputy sheriff, in the circumstances of the case, ought to deliver the seized goods to the respondent. One area of disagreement is the interpretation of section 417 of CAMA which provides that:

If a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of court given on such terms as the Court may impose.

Whilst the Court of Appeal held the view that the appellant's application, which sought to compel the liquidator to produce the attached goods, violated the above section for failure to obtain the leave of the FHC and that even where the action is before the High Court, leave of the FHC must be sought. The Supreme Court maintained that what is prohibited by section 417, except with the leave of court, is an action or proceeding pending or instituted in the FHC for that is the meaning of "court" as used in section 650 of CAMA. The implication is that an action before the High Court for instance may not require the leave of the FHC.

If one applies this interpretation, it follows that whilst the liquidation of a company may be on-going in the FHC, a creditor may be at liberty to institute an action against a company in liquidation before the High Court without leave.

2.3 Implications and Analysis

As noted earlier, section 417 of CAMA is one of the provisions that seek to ensure that a liquidator is given full control of the company and that the collective interest of creditors takes precedent over individual interest. It is submitted that if a winding up petition is pending before the FHC and other creditors go to the High Court to seek redress against the same company, the liquidator would have a huge challenge in terms of adequately performing his functions. In addition, the possibility that the High Court, before whom the case is pending, may give a decision that would over reach the general creditors cannot be overruled.

Another point to note is that a creditor before the High Court in such a situation is deliberately seeking to benefit or confer more assets on him or herself as an individual creditor and accordingly distort the principles of equal treatment of creditors who are similarly ranked as applicable in insolvency law. Furthermore, if the liquidator is burdened by having to defend suits in other courts – brought without leave of the bankruptcy court – the estate, as well as the creditors, will likely bear the cost and the consequences of such suits which, in turn, will depreciate the available assets. A judgment against the liquidator, whether ultimately satisfied out of the assets of the estate or out of the liquidators' pockets, may affect the administration of the estate of the company. More worrisome is the fact that bankruptcy losers may be turned into bankruptcy winners by exploring another forum against the liquidator or the company.

It is submitted that the above consequences could not have been the intention of section 417 of CAMA. The term "court", as defined under CAMA and the Bankruptcy Act of 1979 as amended in 1992, is the FHC and, therefore, the FHC can be regarded as the bankruptcy court for all intents and purposes. Indeed, under section 251 of the Constitution of the Federal Republic of Nigeria 1999, bankruptcy and insolvency are within the exclusive jurisdiction of the FHC. Consequently, the FHC is saddled with the responsibility of ensuring that the assets of a company under liquidation are properly administered in a fair and transparent manner and, in so doing, uphold the principles of collective interest of creditors as against individual creditor's interest protection. For the FHC, which is the bankruptcy court, to be able to perform these responsibilities, it must be fully in charge of insolvency or bankruptcy proceedings. Therefore, it is logical that leave from the FHC should be required for any action or proceeding intended in any other court to ensure proper coordination of the insolvency proceedings. The author submits that at the stage of seeking leave of the court, the bankruptcy court should consider all necessary factors including the need to protect the interest of the general creditors, and the impact of the intended suit

on the estate before exercising its discretion on whether or not to grant leave.

By way of comparative analysis, section 417 of CAMA can be equated to section 130(2) of the United Kingdom Insolvency Act of 1986 (the “UK Act”) which states that:

When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of court and subject to such terms as the court may impose.

Section 251 of the UK Act defines “court” in relation to company to mean a court having jurisdiction to wind up the company.

Section 130(2) above, makes a clearer provision on the consequences of winding-up. It reaffirms the position that once a winding up order has been made, no suit or action should be commenced with or continued in any forum against the company or its property without the leave of the bankruptcy or winding up court. It is submitted that this is to ensure proper coordination of the insolvency proceedings and that no creditor obtains an unnecessary advantage to the detriment of others. Consequently, the Court of Appeal took the right approach in its decision in *FMBN V NDIC* above. It could be argued that the application dated 15 September 1994 in *FMBN V NDIC* was not an originating process and was not directed against the company to qualify under section 417 of CAMA. Interestingly, the Supreme Court analysed the said application and held the view that the application was not against the company but the liquidator, and it was brought against the liquidator on his own behalf and not as representing the defendant. Consequently, the Supreme Court held that such an application cannot be described as an action or proceeding proceeded with, or commenced against, the defendant within the contemplation of section 417 of CAMA. In evaluating this part of the decision, the paramount question that comes to mind is what is the nature of the application dated 15 September 1994? As stated earlier, the application was to compel the liquidator to give up assets which he took into his custody in discharging his responsibility as a liquidator. Thus, it was an action brought against the liquidator in his official capacity. As rightly held by the United States Court of Appeals in *Re: Vistacare Group, LLC et al* (No 11-2695 3rd Cir 2012-05-04), a party must first obtain leave of the bankruptcy court before it brings an action in another forum against a bankruptcy trustee for acts done in the trustee’s official capacity. The court in that case acknowledged the principle in *Barton v Barbour* (104 US 126 (1881)) that before a suit is brought against a receiver, leave of the court by which he was appointed must be obtained.

In *FMBN V NDIC*, the or application in question sought to compel the liquidator to surrender assets which he had secured for the interest of all creditors in favour of one creditor. It is submitted that a judgment in favour of the applicant/creditor would mean taking the property of the

insolvent company from the hands of the liquidator and applying it first to the payment of the applicant's claim, even at the expense of other creditors who ordinarily would rank ahead of such applicant in terms of insolvency law. To this extent, even though the application was not directed against the company, so long as the order granted would impact significantly on the assets of the company in liquidation, leave of the bankruptcy court must be obtained. This is more so where the application is brought against the liquidator in his or her official capacity; bearing in mind that any judgment obtained against the liquidator in that regard will be satisfied out of the assets of the company in liquidation.

3 Recommendations and Conclusion

The pronouncement of the Supreme Court on section 417 of CAMA has far reaching effects on the Nigerian insolvency system as analysed above. Section 417 is included in the law for a purpose and primarily to ensure equitable and consistent administration of a company's property. Consequently, any interpretation which deviates from the intention of the law would pose a big challenge to the liquidator and general creditors. It is submitted that the Supreme Court's decision has clearly created an avenue for particularly disadvantaged creditors, in terms of winding up rankings, to approach the High Court by craftily couching claims to bring them within the jurisdiction of the High Court.

Being a decision of the apex court, it is binding on all the lower courts in Nigeria based on the doctrine of *stare decisis*. Consequently, it is only the Supreme Court that can salvage the situation. One expects that in the near future the Supreme Court would have another opportunity to further pronounce on section 417 and, in such a case, adopt an interpretation that is consistent with the intention of the law.

Prior to such a time, the way forward remains for an appointed liquidator to continue to defend the assets of the company in the overall interest of the creditors. A liquidator faced with similar situation must put up adequate representation and defence at the applicable court to disarm mischievous creditors who will capitalise on this decision to create havoc. The High Courts have a paramount role to play in this regard by discouraging parties from bringing suits against a company undergoing liquidation without obtaining the required leave from the court that appointed the liquidator. It is further submitted that it is not proper to seek leave before a High Court who is not seized of the insolvency proceedings and has no jurisdiction over bankruptcy or insolvency matters.

Clearly, the Supreme Court's decision in *FMBN V NDIC* points to the need to amend section 417 to clearly stipulate as follows:

If a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced *in any court of law or forum* against the company or *its property* except by leave of court *as defined under this Act* given on such terms as the Court may impose (own emphasis).

The above suggested amendment will clear all ambiguities and lay the extent and scope of section 417 of CAMA to rest.

On a positive note, both the Court of Appeal and the Supreme Court arrived at the end result that the liquidator (respondent) was in lawful possession of the defendant's goods which could no longer be sold by the deputy sheriff. This is desirable for Nigerian insolvency law and clearly provides a strong platform for a liquidator to take charge of assets of the debtors whether under execution, attachment with the aid of sections 500 and 501 of CAMA, as well as other relevant provisions in CAMA. Finally, it is submitted that a total overhaul of the insolvency laws and procedures in Nigeria will be required in order to address some of the uncertainties that are prevalent in current Nigerian insolvency laws.

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