MR. DAVID PYUNG IL KIM
versus
SENSATIONELL (ZIMBABWE) PVT LTD
(for its winding up)

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 May 2016 and 17 August 2016

Opposed Application

D. Tivadar, for the applicant
M. Mbuyisa, for the respondent

CHIGUMBA J: This is an application in which the relief sought is a provisional order for liquidation in terms of the *Insolvency Act [Chapter 6:04]*, that the respondent company be wound up. The application is brought in terms of s 206 (g) of the *Companies Act [Chapter 24:03]*, on the basis that it is just and equitable that the respondent company be wound up. The words 'just and equitable' in the context of the Companies Act, have been held to be a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. The provision does not, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way'[1]. In other words, in considering whether to grant this

[1] Comitis v Faribridge Mall Pty Ltd A167-2011

application, we must consider whether it is fair in these circumstances, to allow the applicant to cause the respondent company to be wound up.

The applicant, in his founding affidavit, avers that he formed the respondent company together with Jeong Hyun Park (Park) in 2002, as a business of general traders, with a share capital of Z$20 000-00 divided into 20 000 shares of Z$1-00 each. The respondent company manufactures and distributes synthetic hair products. The applicant and his wife hold 50% of the respondent company's shares, while Park holds the other 50%. Applicant avers that he is a 'contributory' for purposes of s 207 of the Companies Act, and that, as such, he has the requisite capacity to seek the winding up of the respondent company.

It is common cause that; - the applicant and his wife, and Park and his wife, are directors of the respondent company. Park and his wife reside in Zimbabwe and are responsible for the day to day operations of the respondent company. Park has set up a company in Zambia which is in the same line of business as the respondent company, without the knowledge or consent of the applicant. The Zambian company owes the respondent company one million United States dollars. Park registered another company here in Zimbabwe in 2007 which is selling the same products as the respondent company. Parks did not inform the respondent company board of directors of his intention to set up these other two companies, which is contrary to the respondent company's memorandum and articles of association. Parks bought and registered in his name an immovable property known as stand 200 Borrowdale Township 14 of Borrowdale Township 10 of lot 10 Borrowdale Estate. The property is valued at USD$500 000-00. The applicant and Parks have had a falling out because of suspicions that Park has dissipated the assets of the respondent company and the fear that he will continue to do so to the applicant's detriment and irreparable prejudice.

Park opposed the granting of the provisional order for winding up, on the basis that he is the majority shareholder, with 50% shareholding, and that, there is nothing in the founding affidavit which can justify a finding by the court that it is just and equitable that the respondent company be wound up. He averred that the applicant only holds 30% of the shares in the respondent company. His wife, who is Park's sister holds the last 20% of the shares. He pointed out that his sister, Jane Ju Hyun Park, is not a party to these proceedings, and that Park, as

minority shareholder, cannot, at law, apply for the winding up of the respondent company. He averred further, that a company carrying on similar business to the respondent company was first set up in the ivory Coast by Park senior, his uncle, and that the parties all worked there prior to the setting up of the respondent company in Zimbabwe. Park stated that the applicant only inherited his 30% shareholding in the respondent company when he married his sister. He denied that he failed to perform his fiduciary duties or to inform the board of directors of the respondent company, of anything relevant to their business, as alleged.

Parks reiterated that the averments in the founding affidavit are bald and unsubstantiated, even on a *prima facie* basis. He averred that the applicant has an alternative remedy in s 208 (2), s 196, s197 of the Companies Act. In his answering affidavit, applicant denied that the averments in Parks' opposing affidavit were true or correct. He denied that his wife was Park's sister, and averred that he controlled his wife's 20% shareholding. He denied that there was a regular exchange of information pertaining to the respondent company between the parties, and insisted that parks had kept him in the dark about company operations. He denied that he was informed or that he consented to the setting up of the Zambian company, or of the Zimbabwean company. He insisted that he and parks no longer trusted each other. He attached what purported to be an 'answering affidavit by Jane Ju Hyun Park'. The affidavit was deposed to by applicant's wife, who averred that she and Parks are distant cousins. She confirmed that her 20% shareholding is controlled by the applicant, and corroborated applicant's claims that Parks did not communicate with them regularly on the business of the respondent company.

At the hearing of the matter, a preliminary point was raised on behalf of the applicant, about the admissibility of the 'answering 'affidavit by applicant's wife. Order 32 rr2 34 (1)[2] provides that;-

> ***"234. Answering affidavit***
> (1) Subject to sub rules (3) and (4) of rule 236, where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the registrar, which may be accompanied by supporting affidavits.
> Provided that no answering affidavit may be filed less than ten days before the hearing of the application.

[2] High Court Rules 1971

(2) …."

The affidavit of Park's wife is labelled 'answering' affidavit. It is not a supporting affidavit as provided for by the rules of this court. Its deponent does not aver that it is a supporting affidavit. Its title puts paid to any doubt as to what it is. The leave of the court was not sought as provided for by Order 32 r 235. No oral leave was sought at the hearing of the matter to have that affidavit admitted as a supporting affidavit. The court is left with no option but to find that this affidavit is not properly before it.

The rules of this court do not provide for the filing of two answering affidavits, or for the filing of any other affidavit, except with the leave of the court, which in this court was not sought. The affidavit of Jane Ju Hyun Park is accordingly found to be improperly before the court. The court will not rely on it, for that reason. There is no doubt in my mind that the contents of this affidavit are prejudicial to the applicant because it seeks to corroborate the contents of a founding affidavit at a stage in the proceedings where the applicant cannot refute its contents by filing another sworn statement. The applicant could have filed this affidavit in support of his application when he filed the founding affidavit. He chose not to do so. He could have filed it as a supporting affidavit to his answering affidavit. He chose not to do so. He made his bed. He must lie on it. His application will stand, or fall on the averments made in his founding affidavit. See *Muchini v Adams*[3], *Milrite Farming Private Limited v Porusingazi & Ors* [4] For purposes of this application, we find that Parks is a 30% shareholder in the respondent company, and that his wife holds 20% in the respondent company.

The Supreme Court had occasion to consider whether there had been any misdirection on the part of this court in a matter where one of the parties had applied for leave to file a supplementary affidavit as provided for by Order 32 r 235. It was held that, in considering the merits of such an application, the court ought to consider whether the other litigants would be prejudiced by the contents of the supplementary affidavit which was proposed to be filed. The guidance given was that we should be loath to admit any further affidavits especially where they

[3] 2013 (1) ZLR 67(S) @p70

[4] HH 82-10 @p3

seek to introduce new evidence which would be prejudicial to the other party, where the prejudice could not be alleviated by an appropriate order as to costs. See *United Refineries Limited* v *The Mining Industry Pension Fund & 3 Ors***.**[5]

The application before the court is brought in terms of s 206 (g) of the Companies Act which provides that;-

> **"206 Circumstances in which company may be wound up by court**
> A company may be wound up by the court—
> (*a*) if the company has by special resolution resolved that the company be wound up by the court;
> (*b*) if default is made in lodging the statutory report or in holding the statutory meeting;
> (*c*) if the company does not commence its business within a year from its incorporation or suspends itsbusiness for a whole year;
> (*d*) if the company ceases to have any members;
> (*e*) if seventy-five *per centum* of the paid-up share capital of the company has been lost or has become useless for the business of the company;
> (*f*) if the company is unable to pay its debts;
> (*g*) if the court is of opinion that it is just and equitable that the company should be wound up."

The applicant submitted that s206 of the Companies Act is meant to be widely interpreted and referred the court to the case of *Moosa v Mavji Bhawan* [6], as authority for this proposition. It was further submitted that where a company was formed on the basis of a personal relationship, which involves mutual confidence, it can be wound up on the 'just and equitable' principle if the parties' trust and confidence has been eroded and members cease to act honestly and reasonably towards each other or to cooperate in the affairs of the company. See *Ebrahim v Westbourne Galleries Ltd, Peta C* [7] *v Buwu & Cristed Private Limited*[8].

The meaning of the words 'just and equitable' in the context of an appeal against the refusal to wind up a company on the basis that it was just and equitable to do so in terms of s344 (h) of the Companies Act number 61 of 1973, which is similar to our s 206 (g) was discussed exhaustively in the South African case of *Jean Michel Comitis N.). & 2 Ors(in their capacity as trustees of the Maco Trust), and George Comitis & Anor (in their capacity as Trustees of the*

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[5] SC63-14

[6] 1967 (3) SA 131 (T)

[7] 1972 2 All ER 492 (HL)

[8] HH297-13

Gelomi Trust Fund) v *Fairbridge Mall Pty Ltd*[9]. "The application had been founded on the allegation that the respondent was a closely held company in which the relationship between the members was akin to a partnership that is a so-called 'quasi-partnership'. The appellants alleged that there had been an irretrievable breakdown in trust and confidence between the members of a nature that entitled them, on the basis of the deadlock principle, as expressed in *In re Yenidje Tobacco Co Ltd* **[1916] 2 Ch 426** (CA), to the winding up of the company.

As observed in *Apco Africa (Pty) Ltd and Another* v *Apco Worldwide Inc* **[2008] ZASCA 64**; **2008 (5) SA 615** (SCA) ([2008] **4 All SA 1)**, at para. 19,

> "The deadlock principle 'is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up".

It has not been averred by the applicant in his papers the respondent company qualifies as one that was amenable to the application of the deadlock principle. Nor has been averred by the applicant that the parties were in a' quasi partnership', as described in *Hulett and Others* v *Hulett* [10] as a loose description sufficing where a more precise legal tag was not needed, and by the English Court of Appeal as a not always helpful label (*Strahan* v *Wilcock* **[2006] EWCA Civ 13** at para. 18, per Arden LJ). The expression was most famously adopted in the speech of Lord Wilberforce in*Ebrahimi* v *Westbourne Galleries Ltd* **[1973] AC 360**, at 379-380, in the following oft-cited passage (which in itself contains a caveat that the expression may be 'confusing'):

> "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there

[9] A332-2012

[10] 1992 ZASCA 111; 1992 (4) SA 291 (A) @ 307I-J

> are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
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> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

It is my view that the applicant has not established that the respondent company was the manifestation of a quasi-partnership. The founding affidavit lacks the averments or proof of a mutual understanding as to the partner-like obligations owed by each alleged member of the quasi-partnership, an indication that the special personal relationship between the participants of the quasi-partnership relates to the conduct and management of the company's affairs. We are only told that the parties are closely related by marriage. There is no evidence that there was a

quasi- partnership agreement which was breached by Parks, no evidence of wrongful conduct, lack of probity, or conduct in conflict with the parties' arrangement. There is no indication that the affording of just and equitable relief in terms of the English statutory equivalent to s 206(g) of the Companies Act on the basis of an approach analogous to that applicable in the involuntary winding up of partnerships would be that limited. The English law authorities were predicated on the existence of some form of prior relationship or arrangement between the members that had affected the original membership in the company. That consideration also informed the description of the deadlock principle by the Supreme Court of Appeal in South Africa.

The evidence in the founding affidavit is not enough to sustain the relief sought by the applicant. There is no evidence of a 'quasi partnership', or of a 'special arrangement 'between the parties. There is no evidence that the parties agreed to place such confidence and trust in each other, over and above that which is ordinarily placed in the directors of a company, or that they agreed to impose 'partner-like' rights and obligations on each other.The evidence of a 'deadlock' which sought to be introduced via various 'e-mail' was insufficient and inadequate to support a finding of 'quasi partnership'. The Supreme Court of South Africa said that;-

> "not …every company that happens to have … members who like and trust one another or who have a friendly relationship, or even who are related, could be seen and treated as a quasi-partnership, regardless of the corporate form that they had chosen to conduct their commercial activities, regardless of whether they had in fact entered into some arrangement to that effect, and regardless of whether the content of any specific obligations had been identified by the "partners". Such an approach would have a significant impact on commercial activities and relationships. It would undermine the general "*salutary*" principle "*that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it*."

We accept the submission made on behalf of the respondent company that the applicant, a 30% shareholder in the respondent company, does not fit the definition of 'contributory' for purposes of s 207 (1) of the Companies Act, which provides that;-

> "…a contributory shall not be entitled to present a petition for the winding up of a company unless the shares in which he is a contributory, or some of them, were originally allotted to him or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up or to have devolved upon him through the death of a former holder".

Clearly, the applicant does not, and has never held the 20% shares that belong to his wife in his own name, let alone for six of the eighteen months preceding thus petition. He is, and always has been, a minority shareholder who is not entitled to bring this petition as a contributory.

We accept further, the submission made on behalf of the respondent, that there are other remedies in the Companies Act which are at the applicant's disposal whose existence makes it unjust, and inequitable, that the respondent company be wound up. It is trite that s 206 (g) 'confers upon the court a very wide discretionary power, the only limitation being that it has to be exercised judicially with due regard to justice and equity of the competing interests of all concerned". See *Sultan* v *Fryfern Enterprises private limited & Anor*[11]. It would not be just, or equitable, to wind up the respondent company at the instance of the applicant, a 30% shareholder, in the absence of cogent evidence of wrongdoing on the part of the majority shareholder, and in the face of other remedies at the applicant's disposal in terms of the Companies Act. For this reason, and other reasons enumerated above, the court accedes to the submission that costs be awarded on a higher scale for it to register its displeasure at the filing of this application which is entirely devoid of merit, both on the facts, and in terms of the applicable law which the applicant sought to rely on.

In the result, this application be and is hereby dismissed with costs on a legal practitioner and client scale.

Gill, Godlonton & Gerrans, applicants' legal practitioners
Mtetwa & Nyambirai, respondents' legal practitioners

[11] 2000(1) ZLR 188 (H) @p192B