Republic of South Africa

In the Western Cape High Court of South Africa, Cape Town

Before: The Hon Mr Justice Fourie
The Hon Mr Justice Binns-Ward
The Hon Mrs Justice Fortuin

Case no: A332/2012

(Case no. in court a quo 4567/2011)

In the matter between:

JEAN MICHEL COMITIS N.O. **First Appellant**

GEORGE COMITIS N.O. **Second Appellant**

LISA ANNE COMITIS N.O. **Third Appellant**

[in their capacities as trustees of the MacoTrust Fund]

GEORGE COMITIS N.O. **Fourth Appellant**

SALOMÉ COMITIS N.O. **Fifth Appellant**

[in their capacities as trustees of the Gelomi Trust Fund]

and

FAIRBRIDGE MALL (PTY) LTD **Respondent**

JUDGMENT DELIVERED ON 5 FEBRUARY 2013

BINNS-WARD J:

[1] With leave obtained from the Supreme Court of Appeal, the appellants have appealed against the judgment of van Staden AJ at first instance refusing their application for the

winding up of the respondent company on just and equitable grounds in terms of s 344(h) of the Companies Act 61 of 1973. The application was 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 (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'.[1]

[2] During his argument on appeal counsel for the appellants readily acknowledged that if it had not been established on the evidence that the respondent company qualified as one that was amenable to the application of the deadlock principle, the appeal did not get out of the starting blocks. The acknowledgement was correctly made.

[3] The expression 'quasi partnership' is a well-worn one in the relevant context, notwithstanding its description by the Appellate Division in *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 307I-J as a loose description sufficing where a more precise legal tag was

[1]See also See also *Moosa NO v MavjeeBhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 137; *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 366H - 367B and *Cilliers NO and Others v Duin& See (Pty) Ltd* 2012 (4) SA 203 (WCC) at para. 5, amongst others.

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[2] 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 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.
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> 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

[2]Reference had been made in the preceding paragraphs of Lord Wilberforce's speech to *Re Davis and Collett Ltd* [1935] Ch 693, [1935 All ER Rep 315, *Baird v Lees* 1924 SC 83, *Elder v Elder & Watson Ltd* 1952 SC 49, *Re Swaledale Cleaners Ltd* [1968] 3 All ER 619, *Re Fildes Bros Ltd* [1970] 1 All ER 923, *Re Leadenhall General Hardware Stores Ltd* (unreported), *Re Straw Products* [1942] VLR 222 at 223, *Re WondoflexTextiles Pty Ltd* [1951] VLR 458, at 467, *Tench v Tench Brothers Ltd* [1930] NZLR 403, *Re Modern Retreading Ltd* [1962] EA 657, *Re Sydney and Whitney Pier Bus Service Ltd* [1944] 3 DLR 468 and *Re Concrete Column Clamps Ltd* [1953] 4 DLR 60 (Quebec).

> 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.
>
> 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.

[4] The court *a quo* held that it had not been established by the appellants that the respondent company was the manifestation of a quasi-partnership. In this connection, van Staden AJ held (at para. 19 of the judgment of first instance):

> '…the Applicants' allegations in the affidavits lack averments or proof of the following:
>
> 1 A mutual understanding as to the partner-like obligations owed by each alleged member of the quasi-partnership.
>
> 2 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….
>
> 3 The existence of a breach of the agreement or understanding between the participants in the form of a lack of probity, wrongful conduct or conduct in conflict with the terms of the arrangement.
>
> 4 …..'

[5] The respondent's counsel argued that the considerations that would justify a court in winding up a company on just and equitable grounds on the basis that its members would be entitled on partnership law principles to a dissolution of the company are limited to exclusion cases. *Ebrahimi* was indeed an exclusion case; that is one in which the petitioning member

had in terms of the arrangement with his co-founding member when they had established the company been entitled to participate in its management and had subsequently, in contradiction of such arrangement, been excluded. The vast majority of cases involving the deadlock principle do involve exclusion matters. However, the current matter was not an exclusion case. On my reading of the passage from Lord Wilberforce's speechthere is no indication that the affording of just and equitable relief in terms of the English statutory equivalent to s 344(h) 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. On the contrary it is evident that the learned Law Lord was at pains not to be misunderstood todefine the circumstances in which considerations of a personal character between shareholders might make it unjust or inequitable for their mutual relationship as such to be determined strictly in terms of company law. Lord Wilberforce indeed referred to 'a considerable body of authority in favour of the use of the just and equitable provision in a wide variety of situations, including those of expulsion from office';[3] see also *Apco*at para. 16, where the impossibility of stating any general rule as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the phrase 'just and equitable' in s 344(h) was noted.

[6] That said, all of the examples postulated by Lord Wilberforce 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 *Apco*quoted at the outset of this judgment, and on which the appellants rely. One can easily understand why that should be so, because how else is a court able to find a cogent basis to waive or

[3]Underlining supplied.

ameliorate the effect of the strict application of the legal consequences of company law as between the shareholders in a company as being just and equitable?

[7] Having rehearsed the content of the principle which the appellants sought to invoke it is time to consider whether the evidence on which the appellants' case was founded sustained the grant of the relief sought by them.

[8] The respondent company was established as a private company. Its sole business is the ownership and operation of a shopping mall. The management of the mall is undertaken for the respondent by Global Assets and Investment Network (Pty) Ltd, a company in which one Ari Efstathiou is the sole shareholder.

[9] The shares in the respondent company are held between seven trusts. The rights and obligations attaching to each shareholding therefore vest in the trustees of the respective trusts acting jointly and in terms of the applicable trust instruments. The trust deeds were not put in evidence. It must be accepted, however, that the duties of the trustees are defined by the various trust instruments in terms of which they have been appointed. There is nothing in the evidence to suggest that these contain any provisions directing the trustees to act in relation to the proprietorship of the respective trust property so as to accommodate the interests of anyone but the beneficiaries.Unless the beneficiaries were privy to the alleged quasi-partnership they would expect the trustees, as shareholders, to adhere to the articles of association (to use the language applicable prior to the commencement of the 2008 Companies Act[4]) of any company in which the trust held shares. The appellants sought to dismiss the effect of the shares in the respondent being held in various trusts by averring that this was on the advice of lawyers and that had it not been for such advice the shares would have been held by the founders of the trusts in their own names. That might be so, but it still begs the question of what arrangement was in place to accommodate the creation of duties by

[4]Act 71 of 2008, which came into operation on 1 May 2011.

the respective trustees towards each other in a quasi-partnership relationship as members of the respondent company. This is especially so as the trustees comprise of persons over and above the founders. The papers do not answer that question.

[10] The applicants are trustees of the Maco Trust Fund and the Gelomi Trust Fund, which are described as being the family trusts of the brothers Jean (known as John) and George Comitis respectively. Between them these two trusts hold 40% of the shares in the respondent company. The other 60% of the shares are held as to 50% by three trusts representing three members of the Efstathiou family, as to six percent by a trust established by one Scoliades, who is married to a member of the Comitis family, and as to four per cent by one van der Merwe, who is not connected by consanguinity or affinity to either the Comitis or Efstathiou families. Ari Efstathiou is married to the sister of John and George Comitis. The trustees of the trusts that hold the 60% majority holding used their majority interest to get the respondent company to oppose the winding up application.

[11] In their founding papers the applicants founded their endeavour to apply the deadlock principle on the familial connection between the Comitis and Efstathiou families. The allegation was that the respondent company formed a component of an overarching business relationship between the members of the two families which was akin in substance to a partnership. The members of the two families are indeed involved in various combinations and in various ways in a number of companies in what has loosely been called the Cape Franchising group. Outside parties (that is parties who are not part of the families) are, however, also involved in some of these companies, as is the case in the respondent company. The ‘unbundling’ of the group has been the subject of discussion between the Comitis and the Efstathiou brothers in the past. An attorney was instructed to give advice and draft an agreement in this respect. Nothing has come of these discussions. Interest in pursuing the unbundling project seems to have waxed and waned depending on a variety of factors,

including the state of family relations. The history of discussion about an agreed unbundling does not support the concept of the existence of a quasi-partnership relationship in the respondent company. On the contrary it suggests that any partnership-like relationship that may exist between the respective Comitis and Efstathiou brothers is an overarching one concerning all the entities in which they have a common proprietary interest of some sort. This is underscored by the averment in the founding affidavit that the group is 'a family business [in which] one or more of the Comitis and/or Efstathiou brothers [will] actively [participate] in the conduct of such business'. This overarching family business relationship forms what is described in the founding affidavit as a 'pre-existing partnership'. In context it would appear that by this the deponent meant not so much that the alleged partnership no longer existed, but that its existence was the basis upon which members of the family came to hold shares together in various companies. The appropriate remedy in the context of a dissolution of that sort of relationship would not be to selectively wind-up the companies in which the partners hold shares- particularly when that would, as in the case of the respondent company,also affect the proprietary interests of parties outside of the relationship – but rather to deal with the consequences in the manner available in terms of the *actiones pro socio* or *communidividundo*; cf. *Robson v Theron* 1978 (1) SA 841 (A).

[12] There is no reason to question that the commonality of propriety interest, albeit in different ways, of the Comitis and Efstathiou brothers in the companies comprising the Cape Franchising group came about because of their family connections. It does not follow, however, that the various investments made in the constituents of the group evidenced an understanding or arrangement between them akin in substance to a partnership in respect of the companies concerned. On the contrary one gains the impression on the evidence that the various companies represent manifestations of business opportunities that arose and were

made available by one or other member of the families to other members of the family to participate in should they wish and to the extent that they were able at the time to invest.

[13] There is also no reason to doubt that when deciding to invest together in the various incorporated businesses in which they participate directly, or indirectly, as shareholders, the family members were motivated by their family connections and the considerations of mutual trust and confidence that ordinarily attend such relationships. That is not enough, however, by itself, to establish the existence of the sort of underlying agreement or relationship necessary for the successful invocation of the deadlock principle in circumstances of a subsequent alienation of affection or loss of trust or confidence. As Peter Gibson J (as he then was) is reported to have stated in *Re a Company ex p. Schwarcz (No 2)* [1989] B.C.L.C. 427 at 440:

> No doubt in almost every case of a small or private company persons coming together to form a new company would not do so without placing trust and confidence in those who are to be the directors and managers of the company. But the fact that the company is small is not enough and that mutual trust and confidence would not in itself be sufficient to make the members' association in substance a partnership with partner-like obligations owed by each member to the other in absence of proof of a mutual understanding as to those obligations.

I agree with the submission advanced in the respondent's heads of argument that '…if this were not the case, then 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.".[5]'

[14] Apart from the broadbrush reliance on familial connection already described, there is no evidence in the current matter of the required arrangement or understanding. Those allegations are insufficient to establish the existence or content of the required underpinning agreement or arrangement for a 'quasi-partnership'.

[15] A further difficulty with the notion of the application of the deadlock principle in the current case would in any event be the holding of shares in the company by a party which has no familial connection with either the Comitis or the Efstathiou families. There is no evidence that the trustees of the Fonteinskloof Trust, allegedly representing the proprietary interest of André van der Merwe, were privy to any understanding between the Comitis and the Efstathiou brothers. The appellants' counsel sought to overcome this obvious difficulty by reliance on the content of correspondence annexed to the founding papers in which Ari Efstathiou, in emails addressed to, or copied to, John and George Comitis, Scoliades and van der Merwe spoke of them as his 'partners'. In the absence of any convincing indication of a pertinent underlying agreement or arrangement the explanation given in the answering affidavit that this term was used loosely and colloquially is quite plausible. Indeed it is consistent with counsel's emphasis in another context of his address that there was in fact no actual partnership between the individuals concerned. It is also evident from the content of the emails to which counsel referred that the 'partnership' being written about is the overarching business relationship described earlier and not a relationship as members in the respondent company.

[16] The reliance on the email correspondence in argument to seek to establish that van der Merwe was party to the alleged quasi-partnership was in any event quite untenable in the

[5] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 803H (dealing with the question of when it might be appropriate to disregard the separate juristic personaility of a company and pierce or lift the corporate veil).

circumstances. The founding affidavit referred to the email correspondence to support the contention that the Comitis and Efstathiou brothers regarded their interest in the respondent company through their respective family trusts as akin to a partnership; it contained no allegation that the emails evidenced that van der Merwe was party to such an arrangement or understanding. It is trite that a party's case in motion proceedings must be set out in the body of its affidavits and, if the content of any annexure thereto is to be relied on, the nature of such reliance should be identified in the affidavits. The other parties to the litigation are not called upon to trawl through the annexures to the affidavits they are called upon to answer looking for a possible case that is not made out in body of the affidavits to which they are required to respond.[6]

[17] In my judgment the learned judgeat first instance cannot be faulted in concluding that that an underpinning agreement or arrangement of the nature required to invoke the operation of the deadlock principle had not been established. The court *a quo* therefore correctly dismissed the application, and the appeal consequently must fail.

[18] It should perhaps be mentioned that even had the appellants succeeded in establishing a proper basis for the application of the deadlock principle, a winding-up order would not follow automatically. The court would still have to have regard to all the circumstances, including the impact of a winding-up order on those not directly party to the discord between John Comitis and Ari Efstathiou, and weigh up whether it was just and equitable in the light thereof that the company should be liquidated. The value of the company's asset far exceeds that of its liabilities. Itsbusiness is being operated profitably. There is nothing in the discord that evidently exists between John Comitis and Ari Efstathiou that adversely affects the operation of the company; indeed much of the discord appears to be founded in matters unrelated to the affairs of the respondent, most particularly a payment received by John

[6]Cf. e.g. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), at para. 47 (per Harms DP) approving the observation to that effect by Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) 324F – G.

Comitis in his capacity as a director of the Premier Football League – a position he had obtained by virtue of his directorship of Ajax Cape Town, a company in which the Comitis and Efstathiou families held an indirect interest through their holding in Cape Town Stars. There is nothing to indicate that if the appellants were to wish to dispose of their shares in the company they could not do so. A majority of the members of the company are opposed to it being placed in liquidation. In view of the finding to which I have come it is unnecessary to go into these questions to undertake the weighing up that would have been necessary to determine whether it would be just and equitable to wind up the company had a basis for the application of the deadlock principle been established. It bears mention in this respect, however, that on policy grounds there isconsiderable cogency in the observationby Patten LJ in *Fulham Football Club (1987) Ltd v Richards &Anor* [2011] EWCA Civ 855, [2012] 1 All ER 414 (CA), at paras. 55-58, that intractable dispute between some of the shareholders in a solvent companywhen the majority of the members wish the company to continue in being should usually be resolved by means of a buy out order or other alternative remedy so that a winding-up on just and equitable grounds would be 'a last resort'. Compulsory liquidation is a destroyer of wealth and frequently impacts adversely on wider interests such as the job security of employees. It is therefore something in which there is a public interest that it be avoided when possible; cf*Koen and Another v Wedgewood Village Golf Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC), at paras. 13-14.

[19] It remains only to deal with an application by the appellants to introduce additional evidence at the appeal. The application was opposed by the respondent. We heard argument on the application together with the argument on the appeal. The evidence which it was sought to introduce consisted of allegations of conduct by Ari Efstathiou subsequent to the hearing in the court of first instance which it was contended supported the loss of confidence

and trust in him and his directorship of the respondent company by the Comitis brothers. We need to deal with the application only because of its costs implications.

[20] Applications of this nature are rarely successful; the court's power under s 22 of the Supreme Court Act 59 of 1959 is exercised sparingly. The proper approach is summarised in the following dicta of E.M. Grosskopf JA in *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A), at 507C-F:

> It has often been laid down that, in general, this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. See *Goodrich v Botha and Others* 1954 (2) SA 540 (A) at 546A; *S v Immelman* 1978 (3) SA 726 (A) at 730H; *S v V en 'n Ander* 1989 (1) SA 532 (A) at 544I-545C; and *S v Nofomela*[1992 (1) SA 740 (A)].
>
> In principle, therefore, evidence of events subsequent to the judgment under appeal should not be admitted in order to decide the appeal. Whether there may be exceptions to this rule (the possibility of which was not excluded by Schreiner JA in *Goodrich*'s case supra at 546C) need not now be decided because there are in my view no exceptional circumstances in the present case which would render it desirable to hear such evidence. The new evidence sought to be adduced in effect amounts to instances of further infringements of the interdict allegedly committed after the judgment was given in the present case. As such they might have formed the subject of new contempt proceedings before an appropriate Court of first instance. There does not seem to me to be any ground of principle or convenience why we should, in effect, perform the functions of such a Court.

In *Van Eeden v Van Eeden*1999 (2) SA 448 (C), at 454D-E, this Court (per Comrie J, Griesel J concurring) held that evidence of events subsequent to the judgment under appeal could well be received in principle, but added the *caveat* that'the circumstances in which a Court would exercise its discretion in favour of such a re-opening would have to be very special'. In my judgment the requirements for the introduction of the evidence were not satisfied. Apart from the fact that some of the evidence was contentious, there were, in my assessment, no exceptional circumstances justifying its admission. If subsequent events justify an order on a case not made out before the court of first instance, the proper course will, in general, be for the party placing reliance thereon to commence proceedings based on

the new facts afresh; not to expect the appellate court to deal with the case as if at first instance. The application therefore fell to be dismissed with costs.

[21] In the result the following orders are made:

1. The application to introduce further evidence on appeal is dismissed with costs.
2. The appeal is dismissed with costs.
3. The costs in each instance shall include the costs of two counsel.

A.G BINNS-WARD
Judge of the High Court

We concur:

P.B. FOURIE
Judge of the High Court

C.M.J FORTUIN
Judge of the High Court