LUSAKA MEAT SUPPLIES LTD AND OTHERS v SZEFTEL (1974) ZR 28 (SC)

SUPREME COURT
DOYLE CJ, GARDNER AND HUGHES JJS
6th NOVEMBER 1973 and 11th JANUARY 1974
(Appeal No. 4 of 1973)

Flynote

Company Law - Winding up by court - When just and equitable - Deadlock - Companies Act, s. 137 (f).

Headnote

Lusaka Meat Supplies Ltd (the company) had originally been formed by the respondent to enable him to carry on through a body corporate for the benefit of himself, his wife and his children the business formerly carried on by him personally. In the early stages only two shares were issued, one to the respondent and the other to his wife, one of the appellants. In 1965 a further 7 998 shares were issued and allotted, the holdings becoming 1 000 shares each by the respondent and his wife and 2 000 shares by each of their children, the other appellants. Thereafter serious family differences arose and the appellants decided it was necessary to prevent the respondent from taking any part in the running of the business or the handling of the company's affairs or funds. It was found as a fact that the affairs of the company were being carried on effectively.

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Held:

Since the company could continue and was continuing to carry on its affairs, this was not a case of deadlock and it would not be just and equitable for the company to be wound up.

Legislation referred to:

Companies Act, Cap. 686, s. 137 (f)

A W W Cobbett - Tribe, Peter Cobbett - Tribe and Company, for the appellants.

G Care, S C, Martin, Wasserberger and Company, for the respondent.

Judgment

Doyle CJ: This is an appeal against the decision of the learned trial judge in the High Court ordering the winding - up of the appellant company (hereinafter called the company) under paragraph (f) of section 137 of the Companies Act, which provides that such an order may be made where the court is of the opinion that it is just and equitable to do so. It is common ground that the matter be treated on the analogy of a partnership.

The decision of the learned judge was given on the 2nd August, 1973, the reasons being reserved for a later date. On the 19th September, the learned judge purported to give these reasons. In his judgment he stated, as was the fact, that the parties relied on affidavit evidence entirely. He referred to the submissions made by counsel on both sides, named the cases cited by both sides and ended up with the following four line sentence:

"I have studied all the relevant passages from these authorities and it is after perusal of them and adopting the *ratio decidendi* that I come to the conclusion that the Lusaka Meat Supplies Limited be wound up."

I cannot refrain from stating that that is a totally inadequate judgment. It gives no proper reasons. It does not determine the facts nor does it state the learned Judge's view of the law applicable to these facts. Ordinarily such a judgment could only result in either a retrial or the return of the case to the trial judge, to make the necessary findings of fact. In the event as the evidence is entirely by affidavit this court is in the same position as the learned trial judge and can determine the facts and so deal with the case. It seems to me however in these circumstances that to describe the proceedings in this court as appellate is somewhat of a misnomer. I wish to emphasise, though such should scarcely be necessary, that it is the function and duty of a trial judge to find the facts if these have not been agreed, and to the best of his ability to state the principles of law which he considers applicable.

The relevant parts of the petition are as follows -

"The purpose for which the Company was formed was to enable the business aforesaid formerly carried on by Your Petitioner to be carried on through the medium of a body corporate under the management and control of Your Petitioner for the benefit

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of himself and his wife and children. Your Petitioner will rely upon the following among other facts: -

(1) At the date of incorporation of the Company, Your Petitioner was happily married and he, his wife and children formed a happy and united family.

(2) The Company was incorporated under the advice of Mr Richard Sampson, Your Petitioner's Accountant.

(3) Upon the incorporation of the Company, two shares only were issued and the same were duly allotted to Your Petitioner or at his discretion in consideration for the acquisition by the Company of his business as aforesaid. By the direction of Your Petitioner, one of the said shares was registered in his name and the other in the name of his Wife the Respondent Ethel Szeftel as nominee for him.

(4) From the incorporation of the Company and until the alteration or purported alteration thereof hereinafter mentioned, the Articles of Association of the Company provided (*inter alia*) that the first Directors of the Company should be Your Petitioner and his wife the Respondent Ethel Szeftel who should both be Life Directors; and that a Life Director should hold office until his death or resignation from office.

(5) From the incorporation of the Company until the events hereinafter mentioned, Your Petitioner was the Chairman and he and his wife the Respondent Ethel Szeftel were the only Directors of the Company, and the day to day affairs and the management of the business of the Company were under the sole control of Your Petitioner. In view of the purpose for which the Company was formed and the beneficial ownership of the share capital therein: -

(i) Your Petitioner permitted the Company to carry on its business from trade premises, and to graze cattle upon farm lands, belonging to Your Petitioner and paying therefor in each case substantially less than full market rents or fees;

(ii) in or about the year 1961 Your Petitioner merged the bank account of the Company (which was over drawn) with his own private bank account, and thenceforth intermingled his own private moneys with those of the Company.

(6) On the 15th May, 1965, the issued share capital of the Company was increased from K4 (then £2) to K16,000 (then £8,000) by the capitalisation of reserves and the

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issue by way of b*onus* of 7 998 further shares of K2 (then £1) each. By the direction of Your Petitioner the same were allotted as follows: -

To Your Petitioner	999 shares
To Your Petitioner's wife (the Respondent Ethel Szeftel)	999 shares
To Your Petitioner's elder son (the Respondent Israel Morris Szeftel 'Morris')	2 000 shares
To Your Petitioner's daughter (the Respondent Gladys Sarah Szeftel) .. .. 2 000 shares	
To Your Petitioner's younger son (the Respondent Leslie Szeftel ('Leslie')	2 000 shares

At the time of the allotments as aforesaid, Your Petitioner was still happily married and, he, his wife and children were a happy and united family Gladys and Leslie were still minors.

(7) After the said allotments and until the events hereinafter mentioned, Your Petitioner remained the Chairman and he and his Wife remained the only Directors of the Company; and the day to day affairs and the management of the business of the Company remained under the sole control of Your Petitioner.

Since the events aforesaid, circumstances have arisen which were not in the contemplation of Your Petitioner or his wife and family when the Company was formed, which rendered it impossible or impracticable for the purposes for which the Company was formed to be carried into effect, and which render it just and equitable that the Company be wound up. Your Petitioner will rely upon the following, among other facts:

(1) Unhappy differences have arisen between Your Petitioner and his wife and children, and they no longer form a happy or united family. In or about January, 1972 Your Petitioner and his wife separated.

(2) On or about the 15th March, 1972, at the instigation of his Wife and Leslie or one of them, Your Petitioner was without cause temporarily detained in Chainama Hills Mental Hospital. Your Petitioner was able to secure his release only by prompt and effective recourse to law, and the Order detaining him was set aside.

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(3) On the 19th May, 1972, (after Your Petitioner's release as aforesaid) the individual Respondents procured:

(i) the appointment of Leslie, Morris's Wife Judith Luise Szeftel and Morris as additional Directors of the Company. Morris was and is permanently resident outside Zambia; and

(ii) the appointment of Leslie as Chairman of the Company in place of Your Petitioner.

(4) Since the 15th March, 1972, Your Petitioner's Wife and Leslie have assumed sole control of the affairs of the Company and have excluded Your Petitioner from all participation in the day to day management of the business of the Company.

(5) On or about the 23rd June, 1972, Your Petitioner's wife and Leslie procured the Company to institute legal proceedings against Your Petitioner with a view to restraining him by injunction from taking part in the management of the Company's affairs.

(6) On the 6th July, 1972, the individual Respondents secured or purported to secure the passing of a Special Resolution to amend the Articles of Association of the Company so that they should provide for the power to remove a Life Director from office.. The individual Respondents' purpose was to secure the removal from office of Your Petitioner, but they have been restrained from implementing that purpose by an Interlocutory Order of the High Court of Zambia.

(7) In or about the year 1968, with the knowledge and consent of Your Petitioner, his Wife formed a new Company under the name of Capital Meat Supplies Limited, the shares which were held by herself or herself and Leslie, for the purpose of acquiring from the Company and carrying on part of the Company's former business from premises in Cha Cha Cha Road, Lusaka. Without Your Petitioner's knowledge or consent, and wrongfully, and in breach of trust, Your Petitioner's Wife and Leslie thereupon caused that part of the Company's business to be transferred to the said new Company without any or any sufficient consideration therefor payable to the Company.

By reason of the matters aforesaid, there no longer exists that relationship founded upon mutual good faith and common family purpose which formed the basis upon which the Company was established."

The Respondent verified the petition by an affidavit which provides further details. His intention when forming the company was not to give his wife a beneficial interest but merely to comply with the Companies

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Act. His action in mingling the accounts of the company with his personal account was intended to benefit the company, which had no real estate, to secure an overdraft. After the children had been allotted shares in the company he had remained in full control. It was only in 1968 that his marriage began to deteriorate and finally broke down in 1972. Until the 15th March, 1972, he had been virtually in sole control of the company but the action of his wife and children since that date had excluded him from all participation. His detention in Chainama was unnecessary. His purpose in setting up the new company, Capital Meat Supplies Limited, had been to make provision for his wife in the likely event of the break - up of the marriage. He had not, however, intended that either the stock or the goodwill of the Company should be transferred to the new Company without full consideration. No payment had been made for this. The only payments made by the Capital Meat Supplies Limited had been for further supplies of stock from time to time and payment for this had been at cost.

An affidavit made by Mr Cobbett - Tribe set out his valuation for the various properties referred to and his estimate that an economic grazing fee should have been K12 a head per year up to the beginning of 1968, and thereafter should have been K24 per head.

In reply a number of affidavits were filed on behalf of the present appellants. Mr Leslie Szeftel, a son of the respondent and one of the appellants, stated he began active participation in the company in 1967. In 1968 Capital Meat Supplies Limited had been formed as a retail outlet for the company with the full knowledge and consent of the other shareholders of the company. At no time did the shareholders of Capital Meat Supplies Ltd commit any breach of trust in relation to the shareholders of the company.
At the time of the formation of the company the respondent's marriage had not been a happy one. There had already been numerous and violent quarrels between the respondent and his wife. In fact, the respondent himself in an earlier affidavit in other proceedings had said that the marriage had broken down since 1942 and had been unhappy for several years even prior to this. He alleged that the respondent had exceeded his director's drawings, had intermingled his funds with those of the company and had appropriated over K100,000 to his personal use without the knowledge or consent of the other shareholders. To facilitate this he had provided the company's bankers with a false minute of the company's proceedings.
Since 1968 the respondent had been attending a psychiatric clinic under various doctors. His condition had steadily become worse and he had made unfounded accusations of dishonesty against the deponent and had used threats and abuses to his wife and to the respondent's wife as well. The action taken in relation to the respondent's mental condition had been *bona fide* and had only been taken on the recommendation of various doctors. Annexed to his affidavit were reports from several doctors.

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Ita Szeftel, also an appellant, filed an affidavit in which she referred to abuse of herself by the respondent in the business premises in the presence of herself and customers. This had occurred on several occasions. She referred to the accounts and stated that the respondent owed the company the sum of K123,513. She averred that all the shareholders and directors were willing that the respondent should participate in the affairs of the company, if he did not hinder them, and in the management of the company. Mrs Szeftel also referred to an existing grazing agreement with a Mr John Roberts for which the charge was K12 per head per year.
Mr Morris Szeftel, another of the appellants and a son of the respondent, stated in an affidavit that the respondent, from 1966 to 1968, had on numerous occasions quarrelled with his wife, had abused her and his brother Leslie and that the respondent had on occasions assaulted his wife and had interfered with the business of the company to its detriment.
An affidavit by the company's auditor and accountant showed that in August, 1970, the respondent had been in credit with the company in the sum of K25,571. In 1971 this had become a debit of K30,786 and in August, 1972, had become a debit of K123,513.
No further affidavit was filed by the respondent in answer to the matters raised in the affidavits on behalf of the appellants.
It is common cause that the shareholders of the company are, in substance, partners. Counsel for the appellants has urged that any exclusion of the respondent from the company's affairs had been for the benefit of the company and that it had been due to the behaviour of the respondent, which behaviour had been aggravated by his mental condition. The company was a profitable one and the differences between the parties had not prevented the conduct of its everyday affairs. The fault lay with the respondent and he could not, being at fault, successfully claim in equity for a winding - up against the wishes of the other shareholder partners.
Counsel for the respondent submitted that the respondent was not at fault. He had made the company and counsel disputed the accounts, which he submitted had not been ratified by the company for the years 1970 and 1971. It was proper to go behind the auditor and accountant's affidavit because the source of his information was before the court. Certain items, such as Mrs I. Szeftel's salary and accounts for Maurice Szeftel's education and a motor car for Maurice Szeftel, could not properly be debited against the respondent. The

respondent had been excluded from participation in the company's affairs and the basis for the partnership had been destroyed.
I am satisfied that the company has been formed from the respondent's assets and that when it was created it was intended that it should be the respondent's company. From the beginning he con -

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trolled the company and even after he became a minority shareholder he continued to control the company and deal with its day - to - day affairs. It is common ground that the respondent intermingled his money with that of the company. It is suggested by the appellants that this was done with an improper motive, and by a subterfuge. I do not consider this to be so. At the time that this was done in 1961 the respondent and the company were, in effect, one. However unwise the action was, I think that the respondent took it in what he considered to be the interest of the company. It was, however, to have unfortunate consequences.
It is also beyond doubt that the other shareholders excluded the respondent from participation in the company.
The real question of fact which arises is whether their action in so doing was necessitated by misconduct on the part of the respondent. As between the versions of the facts given by the opposing parties I prefer on the probabilities, that of the appellants. The respondent maintains that the company had been manipulated to favour Capital Meat Supplies Ltd. This has been denied in Mr Leslie Szeftel's affidavit. It is a little difficult to understand what provision was being made by the respondent for his wife, if she had had to pay for the stock and goodwill of the company which was to become Capital Meat Supplies Ltd. Furthermore, the respondent was himself in control of the company at the time. I do not consider that it has been proved that Capital Meat Supplies Limited did not pay market price for the cattle they bought from the company in subsequent years but even if this was a fact, this occurred at a time when the respondent controlled the company and dealt with its day - to - day affairs.
There is a dispute as to the value of the grazing which the respondent provided for the company. Again, on the probabilities, it seems to me that the respondent's claim to have supplied it at an undervaluation is not proved. The fact that it is possible in 1972 or 1973 to contract for grazing at K12 per head throws some doubt on the validity of Mr Cobbett - Tribe's valuation of K24 per head for the year 1968 and onwards. However, even if it is a fact that the respondent did favour the company by giving it cheap grazing and cheap rentals, this does not impose on the company any legal liability.
I do not wish to dwell on the marital discord but in so far as it has interfered with the running of the company the fault, on the affidavits, plainly rests with the respondent.
As the accounts go, I do not consider the matters referred to by counsel for the respondent throw any real doubt on their general validity. The respondent's director's drawing account does show a debit in 1970 for a motor car for Morris Szeftel. But it also shows a credit for that amount when it was paid in 1971. The debit of the costs of education of a son, albeit a grown - up son, when paid by the company is not unusually debited to the father. The debit of Mrs Szeftel's director's salary is somewhat more

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difficult to follow, but the possible explanation is the relationship of husband and wife. In any event, the accuracy of the accounts has not been disputed by any evidence from the respondent. There is a withdrawal in March, 1972, of a sum of K92,952.99. The accounts show that the defendant has transformed a credit balance in August, 1970, of K25,571.31 to a debit balance in August, 1972, of K123,513.32.
Except for two matters I accept the averments made on behalf of the appellants. I do not accept the suggestion that the respondent's action in mingling his moneys with those of the company had any sinister motive, neither do I believe the averment by Mrs Szeftel that the respondent of his own volition desisted from participation in the management of the

company. I have no doubt that it was the action of the appellants which has caused him to desist.
The clear fact which seems to me to emerge is that the respondent has never appreciated that, when he became a minority shareholder, he no longer could treat the company as if it were his own. While the company and he were in effect one, it hardly mattered that the company's moneys were mixed with his. It equally was of little concern, except possibly for income tax purposes, whether the company made a greater profit by being given cheap concessions by the respondent or whether the respondent himself made a greater profit by selling to the company at the correct price. That state of affairs changed completely when the shares were allotted to his wife, sons and daughter. At that stage the respondent should have put matters on a businesslike basis. He should have separated the accounts and, if he wished to do so, should have charged the company the full value for rents and grazing. Instead, he continued in the old way. As a result of the differences which have now arisen, he appears to be trying to recoup himself for his past benevolence or fancied benevolence. The other shareholders have been faced with a situation where large sums of money have been taken from the company's funds by the respondent. If there were a debt from the company to the respondent, it would have to be properly proved. It would not be proper practice for the respondent unilaterally to determine the debt and recoup himself.
I have no doubt that the respondent's general behaviour and his action in relation to the company's funds did strike at the confidence which should exist in a partnership and has been the cause of the action which the appellants have taken to remove the respondent from active participation in the company. I do not consider that the appellants were required to sit idly by while the respondent by drawings increased his indebtedness to the company and so damaged theirs and the company's interests. Their action in preventing the respondent taking part in the day - to - day affairs of the company was justifiable and indeed necessary. Whether it is necessary to go to the length of removing the respondent from his life directorship is perhaps more questionable. However, that step has not yet been taken and as it may be questioned in other proceedings I do not wish to say more.

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Upon the view of the facts which I take the law is clear. This is not a case of deadlock. The company can continue and is continuing to carry on its affairs. The respondent has been solely responsible for the situation which has arisen. In these circumstances he cannot successfully claim to have a winding - up under the "just and equitable" provision.
I would allow this appeal with costs to the appellants both here and below.

Judgment

Gardner JS: I concur.

Judgment

Hughes JS: I concur.

Appeal allowed