TOWNAP TEXTILES ZAMBIA LTD AND CHHAGANLAL DISTRIBUTORS LTD v TATA ZAMBIA LTD (1988 - 1989) Z.R. 93 (S.C.)

SUPREME COURT
SILUNGWE, C.J., CHOMBA AND GARDNER, JJ.S.
11TH, 12TH , 14TH MAY 1987AND 21TH APRIL 1988
(S.C.Z. JUDGMENT NO. 17 OF 1988)

Flynote

Company law - Deadlock - Provision in articles for arbitration - Whether company should be wound up.
Company law - Winding-up by court - When just and equitable - Deadlock.

Headnote

To allow the respondent to take part in industrial activities in Zambia the second appellant and the respondent acquired the shares in the first appellant company. Four directors were appointed, two directors from each of the second appellant and respondent. Subsequently, a director representing the respondent company resigned and thereafter the respondent's representation in the company was reduced to one director. From then on the relationship between the directors representing their respective companies deteriorated. The respondent's director wanted parity of directors, the second appellant's director wanted a majority in their favour. A petition was then presented to a Court for a winding up order. At the hearing the original director of the respondent who had resigned gave evidence that parity of directors between

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the parties was never intended. At one stage he was invited by a director of the second appellant company to rejoin the Board of Directors but this was objected to by a director of the respondent company. Three directors were then proposed by the director of the respondent company but these were rejected by a director of the second appellant. Therefore, no director of the respondent attended further directors' meetings. The respondent presented a petition to wind up. The petition, *inter alia*, alleged that the respondent's sole director was wrongly removed, that the first appellant company failed to maintain proper accounts and records, that the first appellant company had not obtained title to the land on which its factory stands and that the company had sold goods at discount prices to a company in which the directors of the first appellant company had interests. It was also alleged that the petitioner was prevented from taking part in the management of the first appellant company. In reply the first appellant company averred that the respondent made no contribution under a management agreement and gave no financial and management support so that the first appellant company was in a financial crisis. The Court was urged, under a clause in the articles to make an order to allow arbitration. The trial Judge found that the respondent had been completely removed from management, there was a complete breakdown of trust and confidence and total deadlock between the parties. He ordered the company be wound up. The appellant appealed.

Held:

(i) Where a petitioner is effectively prevented from taking part in the management of the affairs of a company through representation on the board of directors and this was contrary to the spirit of the joint ventures between the parties which had been completely destroyed, arbitration proceedings can serve no useful purpose.

(ii) Where the circumstances exist in (1), and there is no other order which it is desirable or competent for the Court to make, a winding-up order is appropriate.

Cases referred to:

(1) Ebrahim v Westbourne Gallaries and Others [1972] 2 All E.R. 492
(2) Lusaka Meat Supplies Ltd and Others v Szeftel (1974) Z.R. 28
(3) Re Yenidge Tobacco Company Limited [1916] All E.R. 1050
(4) Zinotty Properties Limited [1984] 3 All E.R. 754

For the appellant: A. B. Munyama, Nkwazi Chambers.
For the respondent: J. H. Jeary, D. H. Kemp & Company.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against a judgment of the High Court ordering the winding up of Townap Textiles Zambia Limited. In this judgment we will refer to Tata Zambia Limited as the petitioner and Chhanganlal Distributors Limited as the respondent, as they were in the Court below.

The history of this case is set out in detail in the judgment of the learned High Court and for the purpose of this appeal it will be sufficient to recite that the petitioner, whose parent company is in India, was incorporated in Zambia in 1977 and B.Nerhu was appointed the director in charge. In order that the petitioner could take part in industrial activities in Zambia, an approach was made to M.C. Patel who at the time had no shareholding with the respondent but who was the managing director of the whole Chhanganlal group of companies. As a result of such meeting it was arranged that both the petitioner and the respondent should have shares

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in Townap Textiles Zambia Limited, to which we will refer hereinafter as the company. These shares were acquired as to 147 245 shares by the petitioner and 153 255 shares by the respondent. In addition a further 6 010 shares were held by P.S. Chiumya, a partner in the accountancy firm Peat Marwick Mitchell and Company, as to 3 005 shares on behalf of the petitioner and as to 3 005 shares on behalf of the respondent. According to the minutes of the meeting of the Board of Directors of 19th November 1981, there were four directors on the company's Board. They were B.Nerhu and Sushi Kapoor representing the petitioner and M.C.Patel and Mrs M.C.Patel representing the respondent. The above minutes indicate that M.C. Patel was appointed the managing director and B.*Nerhu* was appointed the chairman of the company. There was evidence before the High Court that the reason for the appointment of P.S. Chiumya to hold shares in equal proportions as nominee for the petitioner and the respondent was for the purpose of the Exchange Control Regulations so that the majority shareholding was by Zambians.

There was a further increase of share capital and allocations of shares so that on 22nd November

1982, the petitioner held 490 000 shares and the respondent 510 000 shares. The shares previously held by P.S. Chiumya were apparently allocated to the respondent. At that date the Board of Directors was as before. In June 1983, R. Dhawan was appointed general manager of the petitioner in Zambia, replacing Sushi Kapoor. On 19th July 1983, B.Nerhu went on leave and tendered his resignation from the Tata Group and from the company as director and chairman with effect from 31st August 1983. On 23rd December 1983, at a directors' meeting, R.Dhawan was appointed as alternate director to Sushi Kapoor. After August 1983, the petitioner's representation in the company was reduced to only one director, that is, Sushi Kapoor or his alternate, R.Dhawan, while the respondent was still represented on the Board by M.C. Patel as managing director and Mrs M.C. Patel.

After the resignation of B.Nerhu, the relationship between M.C.Patel and R Dhawan began to deteriorate. Dhawan wanted parity of the number of directors representing each party and M.C. Patel wanted a majority in his favour.

After the hearing of the petition, B Nerhu gave evidence to the effect that it had never been intended that there should be parity of directors between the parties and that a consultancy agreement had been entered into appointing a company favourable to the petitioner to act as management consultants and to safeguard the petitioner's participation in the company. In the course of his evidence, B *Nerhu* said that he had resigned from Tata group because he disagreed with the new chairman of the Tata Overseas Development Company Limited, Mr Palkivala. In this connection B.Nerhu said that his parting with the Tata group was not a happy one because of his disagreement with Palkhivala.

It was common ground that B.Nerhu was invited by M.C.Patel to rejoin the Board of Directors of the company. This was objected to by R.Dhawan on behalf of the petitioner. The difficulties between the parties culminated in an extraordinary general meeting of the members of the company held on 16th July 1984, where Dhawan proposed on behalf of the petitioner three names of persons suggested for appointment as directors

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of the company, all of which were rejected by M.C. Patel. Thereafter no director on behalf of the petitioner attended any further directors' meeting.

On 19th September 1984, the petitioner petitioned the High Court for a winding up order. The petition alleged that at all material times before 23rd November 1982, the parties were equal shareholders in the company and that the company was in essence a partnership between the two parties. There was a further allegation that, although the petitioner had objected to the reappointment of B.Nerhu as a director representing the interests of the respondent and such proposal was temporarily withdrawn, B.Nerhu was in fact later appointed as director on 18th August 1983. Paragraph 11 of the petition reads as follows:

> " At an extra-ordinary general meeting of the members of the company held on 16th July 1984, Mr M.K.C. Patel and his wife Mrs M.M.Patel were re-elected as directors of the company by the majorioty vote of Chhanganlal while your petitioner's sole remaining

representative on the Board, Mr S. Kapoor, was removed as director. Your petitioner's representative at the said meeting unsuccessfully proposed several persons to be appointed as directors to represent your petitioner but each nomination was rejected by the said Mr M.K.C. Patel . . . "

Paragraph 12 of the petition reads as follows:

"12. The auditing of the company's accounts for the financial year ended 31st March 1983 was finally completed after considerable delays by the obstructive attitude of Mr M.K.C. Patel in June 1984 and the company's auditors, 25 Messrs Peat Marwick Mitchell & Company, wrote a letter dated 15th June to Mr M.K.C. Patel in his capacity as managing director of the company drawing his attention, inter alia, to:

(i) The lack of proper accounts and records maintained by the company;
(ii) The inadequacy of the stock control records and procedures;
(iii) The fact that the company has not yet obtained title from a company in the Chhanganlal Group to the plot on which its factory whose book value is over K1,000,000 stands;
(iv) The fact that contractors had been engaged by the company for extension work to the factory at a cost of K750,000.00 without there being adequate specifications, a building contract or architectural supervision;
(v) The fact that the company had without the approval of its Board sold cloth at discount prices and shared common expenses at arbitrary rates with other companies in which Mr and Mrs M.K.C. Patel are interested . . . "

Paragraph 13 to 15 of the petition read as follows:

" 13. The said Mr M.K.C. Patel has also extended to companies in which he and his wife are interested free credit terms not available to all customers of the company without the approval of the Board of Directors.
14. At the said extra-ordinary general meeting of 16th July 1984, the said Mr M.K.C. Patel refused to permit discussion of the accounts and the same were adopted on Chhanganlal's majority vote. Your petitioner has since attempted without success to obtain further information on the matters referred to in paragraph 12 and 13 hereof, in particular, in regard to the extension to the factory and the sale to associated companies.
15. By reason of the matter aforesaid your petitioners have been excluded from taking part in the management of the company and have completely lost confidence in the persons who are now the directors of the company."

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In reply to the petition, the respondent alleged that, although the petitioner had insisted on equal participation in the company, this was not accepted by Mr M.K.C. Patel. It was further alleged that, although there was a Management Service and Technical Consultancy Agreement with an associated company of the petitioner, the petitioner made no contribution to the management under the agreement apart from some contribution in the selection and purchase of the plant and equipment and selection of some expatriate personnel. The reply set out the resignation of B *Nerhu*

from the Tata group and alleged that under the chairmanship of Mr Palkivala the Tata group were oblivious of the aspirations and conditions and values of Zambia, no assistance was given by the Tata company in the way of financial and management support and as a result the company faced a major financial crisis. It was in this context that B Nerhu was approached to join the Board of the company as a director, which suggestion was opposed by Mr Palkivala.

In paragraph 15 of the reply, the respondent stated that the Management Consultancy Agreement was terminated by letter from the respondent dated 19th December 1983. Paragraph 16 of the reply reads as follows:

> " 16. From the time the said letter was written the attitude of Tata Zambia representatives became obstructive, co-operative and unbusiness-like. This is evidenced from the minutes of the meetings of the Board of Directors held after 19th December 1983. Copies of the Board minutes from the time of acquisition of shares by Tata in the company are attached hereto and marked 'B'. The minutes of the said Board meeting will without doubt show that the attitude of the Tata officials became hostile, unco-operative and most unbecoming from the time the company terminated the Management Agreement with TODCO . . . "

In paragraph 20 of the reply, the respondent gave answers to the criticisms raised in the auditor's letter referred to in paragraph 12 of the petition, and in paragraph 21 of the reply the respondent repeated the allegations concerning the obstructive, unco-operative and hostile attitude of the representatives of the petitioner and maintained that all information that was required by those representatives was provided to them but they continued to harass the respresentatives of the respondent to the extent that it made it impossible to conduct the matters of the company in a rational and business-like manner. In the paragraph, the respondent stated that the names proposed as directors by the petitioner were not accepted as they could not help the growth and development of the company.

Finally, the respondent asked the High Court to order that the petitioner's shareholding be sold to the majority shareholder and that the petition should be dismissed.

In his judgment, the learned trial Judge found that B. Nerhu had not been impartial in the giving of his evidence. He accepted the petitioner's claim that the company was a form of partnership between the parties with both parties having parity on the Board of Directors.

The learned trial Judge also found that at the time of the presentation of the petition the representation of the petitioner had been totally removed from the company's Board and from the company's management, there had been a complete breakdown of material trust and confidence between the parties, and there was a complete deadlock between them. He found

that in the absence of evidence from M.C. Patel he could only conclude that the respondent, using its majority, abused the powers vested in the majority shareholder and it clearly breached the partner's confidence and trust by the removal of its representation totally from the company's Board

and management. For these reasons, the learned trial Judge found that it was just and equitable to order that the company be wound up.

The appellants appealed against the order for winding up on the grounds that the learned trial Judge had erred both in law and in fact in coming to the conclusion that it was just and equitable to make a winding up order.

Mr *Munyama*, on behalf of the respondent, put forward a number of detailed arguments in criticism of the learned trial Judge's findings of fact. These criticisms related to the findings that the relationship between the parties was in the nature of a partnership, that the petitioner was entitled to any representation on the Board of Directors, that R. Dhawan was not instrumental in bringing about the circumstances upon which the petition was based, that there was lack of probity on the part of M.C. Patel, that there was an abuse of power by M.C. Patel, and that B. Nehru was not impartial in his evidence. Mr *Munyama* further argued that the petitioner was still represented on the Board of Directors by S. Kapoor (with R.Dhawan as his alternate director) and that this was evidenced by the fact that his name still appeared in the company's registry as a director.

It was argued that the petitioner was trying to kill the company and the behaviour of the petitioner indicated an intention to force the respondent into a position where the petitioner would be able to buy up the company. As evidence of this intention it was pointed out that R. Dhawan had continually picked quarrels with M.C. Patel.

Mr *Munyama*, criticised the learned trial Judge for finding that, although R. Dhawan was a little more vehement and obstinate in protecting the interests of the petitioner, he was not instrumental in the resultant abuse of power and breach of faith by M.C. Patel. It was pointed out that the evidence showed that, although R. Dhawan had been given an answer to his question concerning the accounts, he still continued to press the matter of the accounts. There was further criticism of the learned trial Judge's finding that the agreement between the petitioner and the respondent was clearly that each should have equal shareholding, and it was argued that he should have accepted the evidence of B. *Nerhu* who said in his evidence that it was agreed that the respondent should have a right to a majority shareholding. It was further argued that B. *Nerhu* should have been believed when he said that there had been no discussion as to the number of directors representing each party. It was pointed out to Mr *Munyama* that M. C. Patel had written a letter, dated 6th August 1983, to B. Nerhu in which it was stated that the respondent had the right to appoint three directors whilst the petitioner could have two directors on the Board. Mr *Munyama* said that this was not actual proof of any such an agreement and, although B. Nerhu's evidence that there had never been a discussion as to the number of directors was untrue, that should not have affected the acceptance of his evidence as a whole. In connection with the learned trial Judge's finding that there was an agreement between the parties that they should have equality in shareholding and in representation

on the board, it was argued that this was overstating the position. We see from the record that in the course of his judgment the learned trial Judge said:

> " On the question of parity of representation on the company's Board the only evidence as to

> what was agreed at the time of the petitioner's joint participation in the company is that B. *Nerhu* . . . There was nothing in writing. M.C. Patel for the respondent has given no evidence and therefore has been of no assistance to this Court."

It appears that although the letter dated 6th August 1983 was contained in the agreed bundle of documents, either it was not drawn to the learned Judge's attention or he overlooked it. The letter, having been written by M.C. Patel, cannot be used in support of any argument by the respondent that there should be three representatives of the respondent and two of the petitioner; but it can be used by the petitioner to contradict any evidence on behalf of the respondent that there was no agreement at all that the petitioner was entitled to be represented on the Board. The existence of the letter does, however, indicate that the learned trial Judge was wrong when he said that there was no evidence other than that of B. *Nerhu*.

It was also pointed out on behalf of the respondent that the petitioner's interests were safeguarded by a management agreement which gave the petitioner some control of the management of the undertaking. Additionally, it was argued that it was wrong for the learned trial Judge to have found that there was no representation on the Board to safeguard the interests of the petitioner because of the continued presence of S. Kapoor's name in the register of directors. Mr *Munyama* argued that M.C. Patel's statement at the extra-ordinary general meeting on 27th April 1984, that he would not allow S. Kapoor to continue as a director, was a remark made in anger which should be ignored because it was never implemented.

Mr *Munyama's* final submission on the question of fact was that the learned trial Judge's findings were not supported by the evidence, that there had been no breach of confidence or trust by the respondent and that the breakdown in relations between the parties had been caused solely by the petitioner and the behaviour of R. Dhawan in particular.

As to the law, Mr *Munyama* cited the case of *Ebrahim v Westbourne Galleries and Others* (1), in which Lord Wilberforce said that in considering the priority of making an order for the winding-up of a company the Courts were enabled to subject the exercise of legal rights to equitable considerations. In this respect Mr *Munyama* argued that in order to succeed the petitioner must come to the Court with clean hands, and, whilst not suggesting that the petitioner had done wrong, it was suggested that the conduct of the petitioner in the person of R. Dhawan had caused difficulties which had brought about the ill feeling between the parties. A number of cases were cited by Mr *Munyama* in support of his arguments that to justify the making of a winding up order there must be some evidence that shows the Court that a company should not be allowed to continue or that an injustice would be done to the petitioner which could not be remedied in any other way, and that mere bad feelings is not in itself justification for an order for winding up. In particular there was the case of *Lusaka Meat Supplies Ltd and Szeftel* (2),

in which this Court held that, despite the fact that the petitioner had been prevented by the other directors from taking part in the day to day affairs of the company, there was in fact no deadlock and it was not just and equitable to order a winding up of the company.

Finally, Mr Munyama argued that this was not an appropriate case for the making of a winding up order because there were other remedies available. He suggested that, in order to save the company, this Court should order that there should be an extra-ordinary general meeting of the shareholders at which new directors should be elected by such shareholders. Alternatively, he suggested that there was provision in the articles of the company of arbitration in the case of any differences arising between the directors and the members, and that this course should be implemented in this case. In this connection, Mr *Munyama* drew our attention to the judgment of the learned trial Judge where he dealt with these suggestions including the suggestion that one of the parties should be ordered to sell its shares, and found that none of these courses was suitable.

Mr *Jearey*, for the petitioner, replied to the points raised by Mr *Munyama* and argued that the winding up of the company was the only reasonable order that the learned trial Judge could have made. He argued that the application for a winding up was not evidence of an intention to kill the business of the company because such business could continue to be carried on by whosoever purchased it. As to the respondent's argument that the learned trial Judge had misdirected himself as to the facts on the evidence as to whether there was a quasi-partnership between the parties, Mr *Jearey* argued that the evidence of B. *Nerhu* himself, as the one who conducted negotiations for the entering of the petitioner into the agreement with the respondent, was that between them there was to be a joint venture, and he had specifically said that the management co-operation between the two parties was envisaged. From this, it was argued that a form of partnership between the parties was envisaged and it was envisaged and it was therefore quite clear that it was intended that the petitioner should share in the management of the company by being represented by directors on the Board.

We have examined the evidence which was before the learned trial Judge, and have considered the specific instances put forward by Mr *Munyama* in his argument that the learned trial Judge misdirected himself as to the facts when he came to the conclusion that there was a quasi-partnership agreement and that the petitioner had a right to be represented on the Board of Directors. We have also considered the complaint by Mr Munyama that the learned trial Judge was unfair to B. Nerhu by finding him to be a not impartial witness whose evidence concerning the relationship between the parties was suspect. Mr Munyama set himself an onerous task in attempting to show that the learned trial Judge, who had the evidence of seeing and hearing the witness, was wrong in his assessment of the facts when he considered the credibility of such witness. We note that B. *Nerhu* himself said that he was not on good terms with Mr Palkivala, the chairman of the Tata group. In this Court it transpired that although B. *Nerhu* had said in his evidence that there had never been any discussion as to the representation of the parties on the Board of Directors, M.C. Patel in fact wrote a letter dated 6th August 1983, in which he stated

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that the respondent had a right to have three directors whilst the petitioner had a right to have two directors on the Board. As we have said, this letter is not evidence in support of the truth of its contents but it does contradict B. Nerhu's evidence on the oath that there was no agreement at all. The learned trial Judge gave reasons for accepting that the original agreement between the parties was that there should be a form of partnership between them - for instance, that they did in fact have equal shareholding in the beginning and the slight change in shareholding giving the

respondent a majority was occasional only because of the necessity for having a majority of Zambians for the purpose of obtaining finance from the bank. Despite Mr *Munyama's* persuasive arguments in this respect, we can find no indication that the learned trial Judge misdirected himself as to the facts and certainly not to such an extent that his secondary findings from these should be interfered with. It follows, therefore, that we agree that there was a quasi-partnership between the parties and that the petitioner was entitled to representation on the Board of Directors. In view of what we intend to say later, there is no need for us to consider the extent of that representation.

As to the present situation with regard to the appointment of directors representing the petitioner, Mr *Jearey* argued that, despite the fact that s Kapoor's name still remained on the list of directors in the registry of companies, there was no doubt that at the extra-ordinary general meeting on 16th July 1984, M.C. Patel said that he would not allow S. Kapoor to continue as a director. It was pointed out furthermore that R Dhawan, as alternate to S. Kapoor, received no notice of any further meetings of directors, and subsequent meetings of directors were held without the presence of any representat.ive of the petitioner. Mr *Jearey* also drew our attention to the evidence of K. Ramachandran, the financial controller of the respondent group of companies, to the effect that M.C. Patel and Mrs Patel were elected as directors at the extra-ordinary general meeting on 15th July 1984, and that they were the only directors of the company until B. Nerhu's appointment as director in August, 1984. Mr Jearey argued that despite what was shown on the list of directors in the registry of companies, such list did not necessarily show the true state of affairs, and the true situation could be ascertained from the evidence. One further point was made by Mr *Jearey* and that was that, although the petition had stated in paragraph 11 that at the meeting on 16th July 1984, S. Kapoor was removed as director, this averment was not challenged in the respondent's reply, and as the petition and reply are in the nature of pleadings, the parties may not depart from the allegations contained therein.

We will deal with this latter point first. We agree with Mr *Munyama* that when the question of S. Kapoor's position on the Board was raised before the learned trial Judge no objection was taken at this stage. However, the matter was not put to the learned trial Judge as an issue upon which he had to make a finding. It appears that the learned trial Judge accepted the fact as stated in the petition that S. Kapoor had been removed as director, and, although questions were asked as to the present state of the list of directors in the registry, which elicited answers to the effect that S .Kapoor's name was still on the list, it was not suggested in the submissions to the learned trial Judge that his removal as director, as alleged in

the petition, did not take place. In our view, regardless of the contents of the pleadings and the continued presence of S. Kapoor's name on the list of directors at the registry of companies, the evidence of what occurred at the meeting on 16th July 1984 makes it clear that it was assumed that all the directors needed to be elected, and, according to the evidence of K Ramachandrian, the respondent's witness, M.C. Patel and Mrs M. C. Patel were elected. M.C. Patel said that he would not allow S. Kapoor to continue as a director and therefore M .C .Patel and Mrs Patel were the only directors of the company until the appointment of B. Nerhu in August 1984.

We are therefore satisfied that on the facts, the learned trial Judge correctly decided this case on the

basis that after the meeting of 16 July 1984, no representative of the petitioner was allowed to be director of the company.

With regard to the safeguard in the petition referred to by Mr *Munyama*, namely that there was a chief accountant to look after the interest of the petitioner and a management agreement entitling the petitioner to take part in management, Mr *Jearey* pointed out that the chief accountant, who was presumably looking after the interest of the petitioner had his services terminated in early 1984, and his place was taken by K. Ramachandran as a representative of the respondent. With regard to the management agreement, Mr *Jearey* pointed out that in paragraph 12 of the respondent's reply to the petition it was stated that, apart from some contribution in the selection and purchase of plant and equipment and selection of some expatriate personnel, the petitioner did not provide any material, technical and management services to the company which could justify the payment of exorbitant management fees in foreign exchange. It was stated that the agreement was kept alive on the understanding that if and when the specific services were required they could be made available. It was argued by Mr *Jearey* that this indicated that the continuing of the agreement was regarded as being at the discretion of the respondent and it therefore could not be a safeguard for the petitioner.

With regard to this issue we do not consider that the agreement for appointment of personnel and technical management was the type of safeguard which is required in the event of there being a quasi-partnership in which the parties seek to have a say in the running of the company by being elected to the Board of Directors. The existence of the management agreement in no way detracted from the learned trial Judge's finding that the petitioner was entitled to be represented on the Board of Directors and that the refusal of such representation constituted a reason for making a winding-up order.

With regard to Mr *Munyama's* argument that R. Dhawan had unreasonably continued to ask questions about the account when he had admitted that he had received replies, Mr *Jearey* pointed out that although R. Dhawan when cross-examined had said that he had received the details of queries raised as stated in the minutes of 6th July 1984, he specifically stated at the meeting on 16th July 1984, that he had received no reply to some of the queries that he had raised, and the minutes of the meeting do not disclose that any further replies to enquiries were given.

Mr *Munyama's* argument about this matter was that it was R. Dhawan's

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insistence on receiving details of accounts when he had already in fact received details that annoyed M. C. Patel so much so that it culminated in the parties being unable to agree about the appointment of directors, and consequently the ill feeling which brought about the application by the petitioner for the winding-up order. The blame was therefore put on the petitioner for causing the ill feeling in the first place and we agree that if this were so it might well be appropriate to take note of the case of *Re Yenidje Tobacco Company Limited* (3) in which, at page 1051, Lord Cozens-Hardy, M.R., cited with approval a passage from *Lindley on Partnership* 6th ed. at 657 as follows:

> "All that is necessary is to satisfy the Court that it is impossible for the partners to place the confidence in each other which each has right to expect and that such impossibility has not

been caused by the person seeking to take advantage of it."

In that case, the learned Master of the Rolls was dealing with a company which was found to be in effect a partnership between two directors, and we agree that if, as is alleged by Mr *Munyama*, the situation between the parties in this case was brought about by the conduct of the petitioner, the petitioner would not be entitled to relief. The learned trial Judge dealt with this matter by saying that R. Dhawan was 'a little more vehement and obstinate in protecting the interests of the petitioner' and followed this immediately by saying that he did not agree that R. Dhawan was in any way instrumental in the resultant abuse of power and breach of faith by M. C. Patel, and that M. C. Patel had given no evidence before the Court to justify the removal of the petitioner from the company's Board and the company's management. It is quite clear that the learned trial Judge based his decision in making the order on the fact that M. C. Patel adamantly refused to approve any of the names put forward on behalf of the petitioner for representation on the Board of Directors, thus depriving the petitioner of any such representation. Mr *Munyama's* argument is that the angry conduct of M. C. Patel was brought about by the difficult attitude of R. Dhawan in demanding answers to queries concerning the accounts which answers he had already received. Mr *Munyama* argued that the answers given by R. Dhawan in cross-examination that he agreed that the details of queries raised as stated in the minutes of the meeting of 6th July 1984 were provided to the petitioner, was evidence that he had received answers to all his queries. Mr *Jearey* argued that this did not detract from the witness's answer, immediately before, when he said, 'I would say that we were not given all the information we had asked for.

We have examined the evidence of the cross-examination of R. Dhawan, and the minutes of the meeting on 16th July 1984, and from the latter we note that after R. Dhawan had stated that he had received no reply to a number of queries he had raised before, K .Ramachandran replied to earlier complaints by R. Dhawan concerning the matters raised in the auditor's letter but did not claim that all the queries raised by R. Dhawan had been answered, and, thereupon this particular item on the agenda was closed as follows:

> ". . . Mr M .C.Patel gave the ruling that the resolution to adopt the accounts be passed otherwise he would demand a poll.
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> Mr Jeary once again requested that the accounts be discussed in detail before adoption.
> The chairman at this point declared item 2 on the agenda closed. No further discussion on the accounts would be allowed although there was an objection from Mr Dhawan who said he would seek legal opinion . . . "

From this we would agree that Mr *Munyama* is right in saying that R. Dhawan was continuing to say that he had not received answers to his queries. However, we do not read the record of the Court's examination of R .Dhawan as indicating that he had agreed therein that he had in fact received all the answers he required. As we have said, at one stage he said that he had not received all the information he had asked for, and, although he agreed that he had received details of queries raised in the minutes of the meeting of 6th July 1984, this cannot be read as stating that he was now satisfied that all the information he had asked for had been given. In the circumstances therefore,

on the facts, we cannot agree with Mr *Munyama* that R. Dhawan's continuing to ask for the answers to his queries was unreasonable. We also cannot agree, in default of evidence to that effect, that such insistence by R. Dhawan was the cause of the lack of confidence which arose between the parties.

Mr *Jeary* argued that the evidence disclosed that there was no bad feeling between the parties at all until the petitioner received notice of a meeting in October 1983, at which it was proposed to appoint B. Nerhu as a director. Mr Jeary pointed out that this proposal was made with the full knowledge that there was bad feeling between B. Nerhu and Mr *Palkivala*, the chairman of the Tata group of companies, and that such an appointment would be directly contrary to the wishes of the petitioner. Mr Jeary likened the behaviour of the respondent in this respect to a declaration of war.

One other point, which was dealt with by Mr Jeary and had been raised by Mr *Munyama*, was in relation to the effect of the appointment made by the directors and the validity of any votes cast by those present at the various meetings. Mr Munyama has suggested that in order to vote at any of the meetings referred to in the proceedings, R. Dhawan should have had a proxy. Mr Jeary, pointed out that that was not a point which was taken in the Court below and that if R. Dhawan did not have a proxy then neither did Mr M.C Patel.

We agree with Mr Jeary that the matter was not raised in the petition, the reply to the proceedings in the Court below, and we would comment that there was no evidence either way as to whether any of the people who attended the meetings had proxies, assuming that such were required. In view of the fact that the matter was not raised in argument in the Court below nor was there any evidence towards the situation, we consider this matter to be irrelevant to the issues before us.

Mr Jeary put before this Court a number of cases, some of them common to both sides, indicating the circumstances where it was deemed just and equitable for a winding-up order to be made. He also cited the case of *Zinotty Properties Limited* (4), to confirm that people who conducted their affairs through companies can establish another company in which trust and confidence was the basis of their relationship. He cited this example of a case where, although the shareholders were companies,

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the trust and confidence of the personalities involved was the foundation of the working arrangements between the parties. In this particular case he argued that the partnership was initiated between B. Nerhu and M.C. Patel personally, and, from the evidence of B. Nerhu, there were definite qualities on each side which were desirable between the parties to the contract to join the company together. With regard to the case of *Lusaka Meat Supplies Limited and Szeftel* (2), Mr *Jeary* argued that this was distinguishable as a case which was decided on affidavit evidence, and that in any event it was a case where the Court found that the petitioner for a winding-up order had himself been responsible for any troubles which had arisen in the company, and the respondents were able to carry on the business of the company, so that it was not appropriate to make a winding-up order.

In reply to Mr *Jeary's* submission, Mr *Munyama* maintained that there was no evidence of

justifiable lack of confidence between the parties, and raised one further new argument that even the election of B. *Nerhu* as a director on 18th August 1984 was not valid because it did not comply with the provisions of the articles of association. Consequently, he said, the election of B. *Nerhu* could not be used as a reason for saying that the respondent had acted contrary to the specific wishes of the petitioner resulting in lack of confidence.

As to the latter point we confirm what we have already said when discussing the question of proxies. The validity of the election of B. Nerhu as a director was not a question remarked upon in the Court below, and, in any event, again as we have indicated it is immaterial whether the decisions and proposals of M.C. Patel were effectively put into operation. In our view, the stated intentions of M.C. Patel were sufficient to give rise to a breakdown in the confidence between the parties.

We agree with Mr *Jeary* that the case of *Lusaka Meat Supplies Limited and Szeftel* (2) is distinguishable from this case. The facts of that case, which related to a family business, were such that, for his own good, it was better that the rest of the family should continue the business for the benefit of themselves and of the petitioner. The consideration as to the benefit of the petitioner took into account allegations concerning his mental condition and advantage to him of the continuing of the business. No such considerations apply in this case in which there are no family considerations and both parties are competent to manage the business. The difficulty in the present case is that the petitioner, although competent, has not been allowed to continue to take part in the management.

We are satisfied that the question of confidence and good faith can arise, and did arise, between the parties in this case, even though they were acting as members of companies and through such companies. We have no hesitation in saying that the type of partnership referred to by the learned trial Judge could exist between the companies involved and did in fact exist in this case.

We have considered paragraphs 12 to 13 of the petition which relate to some criticisms contained in a letter from the company's auditors and suggestions that the respondents had wrongfully granted favourable terms to other companies in which M.C. Patel was interested. We have

also considered Mr *Munyama's* arguments concerning these points and their lack of validity. In our view the learned trial Judge did not rely on any points raised in paragraph 12 and 13 of the petition as constituting any of the reasons for making a winding-up order. In the same way, we consider that if any of the points raised in those two paragraphs have any validity at all they are not indications that the relationship between the parties was such that the matter can only be dealt with by the granting of a winding-up order. We are, however, satisfied that there was some cause for complaint as indicated in the auditor's letter and we are further satisfied that the behaviour of M. C. Patel generally, and in particular at the meeting on 16th July 1984, when he refused to accept any names put forward as possible directors to represent the petitioner, amounted to conduct that destroyed the confidence and good faith between the parties, and made it impossible for the company to continue as it was with the two parties as shareholders.

We now come to the question of whether or not a winding-up order should have been made and

whether there were any preferable alternatives available.

Mr Jeary said that there was now no right to arbitration because the respondent had taken no steps to have the action stayed in the Court. He further argued that an arbitration clause in itself was no bar to a petition for winding-up on the just and equitable principle. Again Mr Jeary argued that the point about arbitration had not been taken in the reply to the petition. In his final reply, Mr *Munyama* commented on this that he was only suggesting that an arbitration would be preferable to killing the company by a winding-up order.

The learned trial Judge considered the alternatives suggested on behalf of the respondent and ruled out the possibility of ordering one party to buy the shares of the other. On the question of arbitration the learned trial Judge considered that in the light of the evidence which had been adduced before the Court this was not a matter more appropriately dealt with by arbitration. Thereafter it is quite clear that the learned trial Judge considered very carefully any alternatives to the making of a winding-up order, because, when he did make an order it is plain, from the words which he used, that he did so with reluctance.

In any case where there is a going concern which might suffer by the making of a winding-up order, Courts will be reluctant to make such an order. However, when circumstances are such that there is no other alternative, the order must be made, and it is for that very reason that statutory provision is made for such an order. In this particular case we find that the learned trial Judge did not misdirect himself either on the facts or on the law in preferring the evidence which he did, and in deciding that the petitioner had been effectively prevented from taking part in the management of the affairs of the company through representation on the Board of Directors, and that this was contrary to the spirit of the joint venture between the parties which he found to be completely destroyed and non-existent. We agree that, having regard to the fact that this matter has already been through a full High Court hearing and an appeal before this Court, arbitration proceedings can serve no useful purpose, and there is no other order which it was desirable or competent

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for the Court below or for this Court to make. This was an appropriate case for a winding-up order to be made and accordingly the appeal against the making of the winding-up order is dismissed.

As to the appointment of a liquidator we agree that the appointment made by the learned trial Judge was inappropriate. We set aside that appointment and substitute the appointment of the provisional liquidator, John Maitland Cruickshank, subject to the acceptance in writing of such appointment within thirty days by both parties and Mr Cruickshank. In default of such acceptance we appoint a member of the firm of Cooper Brothers and Lybrand as the liquidator.

Costs of this appeal to be paid by the respondent to the petitioner.
Appeal dismissed.
