THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case Number : 372 / 07

In the matter between

APCO AFRICA (PTY) LTD **FIRST APPELLANT**
ARCAY COMMUNICATIONS HOLDINGS (PTY) LTD **SECOND APPELLANT**

and

APCO WORLDWIDE INCORPORATED **RESPONDENT**

Coram : MPATI AP, CAMERON, VAN HEERDEN, PONNAN JJA et SNYDERS AJA

Date of hearing : 12 MAY 2008

Date of delivery : 29 MAY 2008

SUMMARY

Companies Act 61 of 1973 – s 344(*h*) - winding up of a company on the basis that it is just and equitable to do so.

Neutral citation: This judgment may be referred to as :
Apco Africa* v *Apco Worldwide
(372/2007) [2008] ZASCA 64 (29 May 2008)

PONNAN JA

[1] The question - an apparently simple one - that arises in this appeal, is whether the first appellant, Apco Africa (Pty) Ltd ('the Company'), ought to be wound up on the ground that this course is just and equitable within the meaning of s 344(*h*) of the Companies Act 61 of 1973 or, more accurately, whether such an order was properly granted by Boruchowitz J. In order to appreciate the issues involved, it is necessary to give a short history of the Company and mention the salient facts emerging from the voluminous affidavits placed before the Johannesburg High Court.

[2] The present respondent, Apco Worldwide Incorporated ('Apco'), is a company incorporated according to the laws of the State of Delaware (United States of America) with its global headquarters in Washington DC. It describes itself as part of a leading international group of companies with 24 operating entities across the globe. It has been in the business of public affairs and strategic communication for more than two decades. According to Apco, it provides its clients with high level strategic advice on how to conduct their business affairs in the world political and economic environment.

[3] The nature of Apco's business often renders it necessary for Apco to secure expertise and services in various parts of the world. In order to meet the needs of its clients who sought exposure to the African continent, Apco entered into what has been described as a joint venture-partnership type of arrangement with the second appellant, Arcay Communications Holdings (Pty) Ltd ('Arcay'), a private Johannesburg-based company. In anticipation of growing client interest in South Africa and the rest of the African continent, Apco and Arcay concluded a memorandum of understanding on 26 August 1998, the primary purpose of which was to: 'draft and implement a joint business plan for the offering and expansion of public affairs services in South Africa and the targeting of new business opportunities for both companies'; 'seek to refer business to one another'; and 'seek opportunities to jointly market the services of Apco and Arcay'. It was also agreed that the relationship between the two would be referred to ' ... as "a strategic

partnership" with each having the right to refer to itself as a "strategic partner" of the other'. Moreover, Arcay could describe itself as 'an Apco-affiliated company'.

[4] On 16 May 2000, Apco and Arcay decided to formalise their working arrangement by concluding a shareholders' agreement, thereby incorporating the Company as a private company with a share capital in accordance with the company laws applicable in South Africa. The provisions of the agreement, to the extent here relevant, are:

'2.1 Except as provided for in Clause 9, the shareholders shall collectively hold all the shares in the issued share capital of the Company.

2.1.1 The shareholders shall hold the shares in the issued share capital in the following proportion:

2.1.1.1 Arcay – 50% (fifty per centum);

2.1.1.2 APCO – 50% (fifty per centum;

. . . .

6 The object of the Company shall be to conduct business as a provider of public affairs and strategic communications and other related services, and no other business shall be conducted by the Company until such time as the shareholders unanimously resolve otherwise.

. . . .

9 No further shares in the capital of the Company shall be issued unless unanimously agreed to by the shareholders and other than by way of a pro rata rights offer to the holders of the existing class of shares at the time. . . .

. . . .

10.1 No shareholder shall be entitled to dispose of any of its shares in or claims against the Company, unless such shareholder (referred to in this clause as "the seller") first offers to sell such shares and an equivalent proportion of its claims on loan account against the Company ("claims"), if any, to the other party.

. . . .

11.1 The Company shall have not less than 2 (two) directors and not more than 4 (four) directors.

11.1.1 At all times at least one member of the board of directors of the Company shall be nominated for appointment by Arcay, which director shall fulfil the function of managing director of the Company. The managing director of the Company will be subject to approval by APCO. Robyn de Villiers shall be appointed as managing director of the Company and Frederick Botha as a director until such time that the parties unanimously agree otherwise.

11.1.2 At all times at least one member of the board of directors of the Company shall be nominated for appointment by APCO, which director shall fulfil the function of chairman of the Company. Margery Kraus shall be appointed as chairman of the Company and Brad Staples as a director until such time that the parties unanimously agree otherwise.

. . . .

11.2 The chairman of the board of directors of the Company shall not have a second or casting vote.

11.3.1 A quorum for any directors' meeting of the Company shall be constituted upon the director and/or the nominee director of each shareholder being personally present.

. . . .

11.6 The Company shall give 14 clear days notice by facsimile or prepaid registered post to all its directors of a directors' meeting of the Company at the addresses provided in Annexure 1 hereto, unless all directors waive the notice period or agree on a shorter period.

. . . .

11.9 Should a deadlock arise at any meeting of the directors of the Company, the matter in connection with which the deadlock arose shall not be proceeded with, provided that the matter shall immediately be referred to a meeting of shareholders to try and resolve in good faith and failing resolution at such meeting of shareholders or such other period of time or method of resolution as the shareholders may agree, any shareholder or group of shareholders may call upon the other to submit to a Texas Auction within 14 days of written notice. The Texas Auction shall be conducted as follows: . . .

. . . .

13.1 The unanimous consent of directors appointed by shareholders or where appropriate, the unanimous consent of shareholders in general meeting of the Company, shall be required for a resolution to be of any force or effect if the resolution provides for:

13.1.1 the Company to change the nature of or discontinue its business;

13.1.2 the company to dispose of or otherwise deal in or with the whole or any part of its assets or undertaking except in the ordinary course of business; . . . .

. . . .

18.1 The parties shall co-operate and consult with each other regarding the activities of the Company in the utmost good faith, the affairs of the Company being administered and promoted with the highest degree of integrity between the shareholders.'

[5] The Company has never had an infrastructure of its own. It does not employ staff, nor does it occupy its own offices. Instead, until fairly recently, it occupied offices in Arcay's building and relied on Arcay's staff and infrastructure to perform the services required by its clients. Since inception, all of the work performed by the Company has, save for one instance, been as a result of referrals to it by Apco and its other international entities. In practice, a client of Apco or any of its other international entities would advise Apco that it required work to be performed with an African component. That request would, in turn, be submitted to the Company. Apco's contribution to the Company was the referral of work to it, thus providing the means for the generation of its income. Clients were however billed by the Company

for the work done by it. Apco and Arcay would submit invoices to the Company for the actual time committed to projects by their respective staff members, the idea being that Apco and Arcay would share the residual profit on an equal footing. Apco complains that it came as a surprise to it to learn on 11 July 2006 that Arcay had in fact been appropriating for itself 90% of the revenue generated by the Company. Furthermore, according to Apco, it established that the remaining revenue was utilised by Ms Robyn de Villiers (De Villiers) and Mr Frikkie Botha (Botha) to cover their management fees and travel costs. Apco thus asserts that it has never been remunerated for any of its referrals to the Company as, since the commencement of the shareholders' agreement, the Company has not made a profit and, as a result, Apco has not received any return on its investment.

[6] During November 2005 Ms Thomasine Kamerling (Kamerling), a director of Apco, with extensive experience in media relations, corporate positioning and crisis communications, was seconded to the Company. It would be fair to say that Kamerling's secondment provoked resentment in De Villiers and Botha. Over time the relationship between Kamerling, on the one hand, and De Villiers and Botha, on the other, became acrimonious and there were numerous altercations between them. During June – July 2006, De Villiers and Botha informed Mr Brad Staples (Staples), head of Apco's European operations, that they wanted Kamerling to leave the Company by 15 August 2006 and return to Europe.

[7] As was to be expected, that request exacerbated the already uneasy relationship between Apco and Arcay. According to Staples, he realised then that there was a breakdown in the business relationship between Apco and Arcay and it was untenable for Kamerling to remain in the Company's offices. Kamerling however could not leave South Africa immediately as, according to Apco, the needs of the Company's clients had to be catered for. As a result, in early August 2006, Kamerling moved to an office in Sandton, whence she continued to service the clients of the Company for whom she was responsible. It was envisaged that she would continue performing her duties, including invoicing the Company's clients, until the dispute between the shareholders could be resolved.

[8] Apco contends that there has been a serious and irretrievable breakdown in the relationship between it and Arcay, in consequence of the:

(i) conflict between Kamerling and Arcay's representatives;

(ii) poor service provided by Arcay to the Company's clients;

(iii) lack of focus and interest in the business of the Company by De Villiers and Botha which prejudiced the shareholders; and

(iv) fact that Apco was referring business to the Company, but was receiving virtually no benefit from the partnership due *inter alia* to the fact that Arcay had been appropriating all the revenue of the Company for itself.

[9] On 7 August 2006, Staples held a discussion with De Villiers regarding the dissolution of the Company. He says that it was an attempt to amicably negotiate the termination of what he describes as the partnership relationship with Arcay. On 16 August 2006, Staples addressed an e-mail to De Villiers in anticipation of a scheduled meeting between them to be held in Brussels on 5 September 2006. The material portion of the e-mail reads:

'I do think that it is important that we have a clear understanding about winding-up [the Company] and how we will deal with ongoing assignments and new business activity. I do not want to jeopardise client service by Apco or Arcay colleagues either as a consequence of poor communication between us or any possible misunderstandings. Thomasine is remaining in South Africa and is presently working from a separate location. She reports directly to me and we are considering our options for establishing Apco's future operations in South Africa. . . .

We should inform all other [Company] clients of the change in circumstances in the light of our conversations on 5 September.

Again in order to avoid confusion or uncertainty regarding our present situation internally or externally, the Apco e-mail addresses for Frikkie [Botha] and you have been closed and the Apco internet access has been restricted.

I do welcome the opportunity for broader conversation on 5 September and also to confirm a simple and straightforward route to winding-up the present [Company] joint venture when we meet, providing services to current and future Apco clients, arranging for final account payments and payment of monies owed to Apco Europe and tying up other loose ends, including the mobile phone and car leasing contracts for Thomasine etc.'

[10] At the meeting on 5 September 2006, De Villiers handed Staples a letter which blamed Kamerling for the breakdown in the relationship between the shareholders and accused her of 'hi-jacking' the business of the Company. De

Villiers, who was highly emotional, refused to discuss the dissolution of the 'partnership'; instead she wanted things to return to the way that they had been before Kamerling's secondment.

[11] On 6 September 2006, a day after the Brussels meeting, Arcay launched an urgent *ex parte* application, to be heard *in camera*, for an *Anton Piller* order against Apco and Kamerling, apparently in order to secure alleged evidence that Apco had been competing unlawfully with it. That order was executed on 8 September 2006 and a number of documents and imaged copies of the computer hard drives of Kamerling and her personal assistant were seized. On 12 September 2006, Apco's attorney addressed a 'without prejudice' letter to Arcay's attorney. It proposed that:

'[Apco] and Arcay waive the requirement of a directors/shareholders meeting required in the Shareholders' Agreement on the basis that they accept that a deadlock already exists, and that any meetings going forward will inevitably end in deadlock.

[Apco] and Arcay proceed directly to submitting themselves to the Texas Auction procedure as set out in the Shareholders' Agreement.

Pending finalisation of the Texas Auction, Kamerling will continue to service two of the clients of [the Company] and will utilise two of the Arcay employees to do so. All invoicing will be done through [the Company]. This interim arrangement will be concluded in the best interests of the parties not to disrupt the services being rendered to these clients.

In the event that Arcay wins the Texas Auction [the Company] can pursue whatever damages claims it alleges it has and the documents attached in the Anton Piller application, to the extent that they fall under the parameters of the order, will remain attached.

In the event that [Apco] wins the Texas Auction, Arcay irrevocably undertakes to waive the right to pursue any further action against [Apco] and Kamerling of whatsoever nature, and [Apco] and Kamerling will have no further claims against Arcay arising out of their dealings in [the Company], and the Anton Piller application will be withdrawn and the documents released.'

[12] On 13 September 2006, Arcay's attorney rejected the offer. He asserted that the only basis upon which Arcay would be prepared to settle the matter is if:

'[Apco] is to detail in writing how it proposes to continue the relationship with [Arcay] and remedying any damage caused to [Arcay], through its unlawful conduct, whether by means of monetary compensation or in an alternative form of compensation suitable to [Arcay]; alternatively

[Apco] is to detail how it proposes "terminating" the relationship with [Arcay] and in return for such "termination", [Apco] is to compensate [Arcay] by means of paying [Arcay] for all and any damages suffered by [Arcay] at the hands of [Apco].''.

Arcay also demanded that Apco hand over the computer hard drives from its offices, return information that Kamerling had in her possession and restore Arcay's access to the Apco worldwide IT network. Arcay further threatened to apply for a deportation order for Kamerling and to secure an interdict to prevent Apco from competing unlawfully with it. Needless to say, all of Arcay's proposals were rejected by Apco.

[13] On 14 September 2006, Apco, through its attorney, despatched to Arcay's attorney a formal notice for a directors' meeting to be held at 16h00 on Friday, 29 September 2006. On 19 September 2006, Arcay launched an urgent application seeking to interdict Apco and Kamerling from competing with it. That application was opposed by Apco and Kamerling. On 27 September 2006, two days before the proposed directors' meeting, De Villiers wrote to Apco on the Company's letterhead:

'We have recently received a copy of a letter dated 14 September 2006, addressed to our attorney acting in certain litigious matters . . .. This letter contains a purported notice to convene a directors meeting with reference to an attached agenda. We draw your attention to Clause 11.6 of the shareholders agreement which reads: "The Company shall give 14 clear days notice by facsimile or prepaid registered post to all its directors of a directors' meeting of the Company .... ".

The practical purpose of the Clause is illustrated by reason of the fact that the letter of purported notice … only came to our attention some time after purported sending and receipt thereof. The effect of that is in any event short notice which we are not willing to accept.

Quite apart from that, the Company is required to give notice of such meeting, obviously with the intention of taking into account the availability of all directors as opposed to the unilateral notice by some directors of times that suit them only.

The notice is therefore defective, and we require you to comply with the agreement accurately in all its terms.'

[14] On 27 September 2006, Apco sent a second formal notice for a directors' meeting, in terms of the provisions of the shareholders' agreement. Both Botha and De Villiers were served with the notice on 29 September 2006. The notice informed them of a meeting of directors and shareholders of the Company which was scheduled for Monday, 16 October 2006. A copy of the notice was also sent by facsimile to the requisite address as required by the shareholders' agreement. It elicited the following written response from Arcay's attorney on 4 October 2006:

'Our client has handed to ourselves a purported notice to convene a directors' and shareholders' meeting of [the Company].

Such purported notice, delivered to our client on 29 September 2006 via facsimile from your client and hand delivered by yourselves, is neither in accordance with the shareholders' agreement nor in accordance with the articles of association.
Further to the above, our client has advised us that they are in any event not able to "attend" the anticipated meeting, unilaterally scheduled for 16 October 2006, as they are away on conference on that date.'

Although Apco was already of the view at that stage that deadlock had been reached and that nothing stood to be gained by holding a meeting, it nonetheless – as requested by Arcay's attorney in the letter dated 4 October 2006 - proposed three alternative dates for a meeting, namely 8, 9 and 10 November 2006. That letter however failed to elicit a response.

[15] Since 8 August 2006, Apco has ceased referring any work to the Company. It states that it is no longer prepared to refer any further work to the Company. It contends that the relationship between Arcay and it is so strained and has disintegrated to such a degree that there is no possibility of it being able to participate with Arcay in the management of the Company or in the servicing of the Company's clients. No clients are currently being serviced by the Company. The Company's source of revenue has ceased and it is no longer able to continue trading. Apco accordingly contends that the reason for the Company's existence, namely, to service its international clients, has fallen away. There is no prospect of its revenue stream being restored as, according to Apco, it will never refer any of its clients to the Company in the future and would rather withdraw its business interests from South Africa than partner Arcay again in any joint venture. Apco accordingly contends that the shareholders of the Company have reached deadlock and that the Company is no longer able to function. Moreover, according to Apco, the deadlock has resulted in the disappearance of the substratum of the Company.

[16] Section 344 of the Act provides:

'A company may be wound up by the Court if ─

. . . . .

(*h*) It appears to the Court that it is just and equitable that the company should be wound up.'

That subsection, unlike the preceding sub-paragraphs of s 344 postulates not facts, but only a broad conclusion of law, justice and equity as a ground for winding-up

(*Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H). It is well-settled that the subsection giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section (*Loch v John Blackwood* 1924 AC 783 (PC)). Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the phrase (*Davis & Co Ltd v Brunswick (Australia) Ltd* [1936] 1 All ER 299 (PC) at 309). It must also be recognised that there is no necessary limit to the generality of the words 'just and equitable'. Section 344(*h*) affords a court a wide judicial discretion in the exercise whereof, however, certain other sections of the Act must be taken account of (*Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181).

[17] The words 'just and equitable' ─

' . . . . are a recognition of the fact that a limited company is more than a mere judicial 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 … entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence ─ this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction on 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.' (Per Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL) at 500*a-h*; 1973 AC 360 (HL) at 379B-380B.)

[18] The cases show that the just and equitable provision is not to be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock. Where there is in substance a partnership, in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding-up of the company under the just and equitable provision (see *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA) at 430; see also *Marshall v Marshall (Pty) Ltd and Others* 1954 (3) SA 571 (N*); Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W)). In the present case it seems clear that Apco and Arcay came together on the basis, substantially, of a partnership between them. The Company can properly be designated a small private company. It was at the instance of the partnership that the Company was formed. In other words, outside the Company, Arcay and Apco were partners. In the Company, their shareholding was equal. Both were directors, albeit through representatives. No others were.

[19] There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Loch v John Blackwood* (at 788), is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the

directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being out-voted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director's conduct of those affairs. The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It 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 is entitled to claim that it is just and equitable that the company should be wound up. (See also *Moosa* at 137; *Emphy v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 366H-367B.)

[20] The Company was formed for a specific purpose. The internal disputes, mutual disillusionment and distrust and the consequent breakdown of the relationship between the shareholders of the Company have paralysed it. This is clear from Arcay's own affidavits and the facts in Apco's which it cannot deny. The Company is thus in a state of dormancy and, given Apco's assertion that it will no longer refer any work to the Company, that state of affairs is unlikely to change. There is thus much to be said for Apco's contention the *raison d' etre* for the Company has ceased.

[21] Actual deadlock is not an essential to the dissolution of a partnership. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other which each has a right to expect and that such impossibility has not been caused by the person seeking to take advantage of it. But, says Arcay, the impossibility that has arisen in this case has indeed been caused by the person seeking to take advantage of it, namely, Apco. Moreover, to the extent that the substratum has disappeared, that has occurred in consequence of Apco's conduct. Apco, so the argument goes, comes to court with unclean hands. And that, Arcay asserts, it should be precluded from doing.

[22] In the opposing affidavits, Apco's application to wind up the Company is variously described as 'frivolous', 'vexatious', 'an abuse', 'mala fide' and part of a 'stratagem to wipe out [Apco's] competition in an underhanded and dishonest fashion'. It was furthermore asserted that there had been a 'pre-determined', 'secret scheme to hijack and take over' the Company and that 'Kamerling through her fraudulent conduct had created a springboard to set up a business in direct competition' with the Company.

[23] The rhetoric of the affidavit that there was a 'carefully planned strategy' by Apco to destroy the Company, which culminated in the winding-up application, finds little support in the facts which Arcay cannot deny. There plainly was no bad faith in Apco seconding Kamerling to the Company. It occurred with the agreement of De Villiers and Botha and on the understanding that her salary and travelling expenses were to be paid by Apco Europe and not the Company. According to Apco, Kamerling's secondment was partially in consequence of it having received complaints from their clients, in particular about the conduct of Botha. It claims it conveyed those complaints to De Villiers.

[24] Nor, it seems to me, was Apco actuated by any ulterior purpose in seconding Kamerling to South Africa. That much emerges from the following two emails despatched by her to Staples. In the first, dated 3 March 2006 and entitled 'Africa thoughts on moving forward', she postulated four possible future scenarios: (a) maintaining the existing joint venture with Arcay; (b) phasing out the joint venture; (c) creating an independent Apco Africa; and (d) acquiring a local network/independent office. In the second, dated 19 May 2006, she recorded her observations on the issues that had arisen during the preceding 6 months. She alleged *inter alia* that: clients' deadlines were continuously missed; Arcay was charging consulting fees which were not in line with the service provided; the standard of work being delivered by the Company was not what should be expected of an Apco associate; there were various infrastructural and skills deficiencies; Botha and De Villiers had not concentrated on new business for the Company; meetings had been re-scheduled an average of five times; Botha had exhibited bullying behaviour and had threatened that 'if Apco acts like this we will just stop the joint venture'; De Villiers and Botha

had been using Apco's travel budget to cover trips for other business; and Apco was being charged cancellation fees when Botha decided at the last minute not to attend meetings.

[25] In my view those emails hardly seem like those of a saboteur bent on the destruction of the Company. Of the second email, Botha in his answering affidavit states, 'I admit the email … makes the allegations as set out … but deny that all these allegations are true'. One would have expected an unequivocal denial of all of Kamerling's allegations. Instead, the partial denial, without further elaboration, that has been advanced seriously undermines the charge levelled against Apco that it was actuated by bad faith in seconding Kamerling to the Company. The conclusion on the acceptable evidence is thus inescapable that, in seconding Kamerling to the Company, Apco was motivated by genuine concern for its own business interests and had a legitimate basis for doing so. The rather bold proposition that there was a carefully planned strategy, in which Kamerling played a pivotal role, to destroy the Company finds no support in the evidence and is, in truth, unsustainable.

[26] Arcay contends that in the light of Apco's breach of the shareholders agreement, it has a claim for specific performance against Apco which it will in due course seek to assert. It accordingly argues that the corporate form of the Company should be preserved for that purpose. The relief envisaged by Arcay would be something in the nature of an order compelling Apco to continue referring its clients to Arcay in terms of the shareholders' agreement. Apco's response is that a referral of that kind would, ordinarily at any rate, constitute a recommendation by it. That it cannot do as it has lost all faith in Arcay. Moreover, according to Apco, an order of the kind envisaged by Arcay can hardly be enforced against its clients who may, in spite of Apco's referral, be unwilling to do business with the Company. These assertions cannot be gainsayed. They render the remedy of specific performance illusory. Arcay, it bears noting, is not entirely remediless. It would, were it in due course to prove the breach complained off, have a claim for damages against Apco. Such a remedy would, in my view, afford Arcay with more than adequate relief should it in the fullness of time succeed in establishing the alleged breach. There thus does not appear to be any ineluctable advantage in preserving the corporate form of the Company.

[27] Ultimately though, the parties envisaged the possibility of a deadlock in their future dealings with each other and sought to regulate their relationship by stipulating a deadlock-breaking mechanism in their agreement. Despite Arcay's belief that Staples' decisions to terminate its network access and to wind up the Company ─ which, it complained, had been presented to it as a *fait accompli* ─ were unlawful, the Arcay directors were not entitled to simply refuse to attend the meetings (or tender patently flimsy excuses for such refusal). For, in the final analysis, it is really that refusal that has brought about the deadlock which cannot be resolved in the manner prescribed by the very agreement to which they had bound themselves. As Boruchowitz J stated in the court below:

'I am in agreement with the submission made by counsel for [Apco] that the inference to be drawn is that [Arcay], De Villiers and Botha had no intention of attending such meeting, and they have frustrated [Apco's] attempts to convene the necessary directors' meeting to discuss the continuance of their relationship. . . . In circumstances such as the present, where the directors refuse to attend a board meeting, clearly designed and called for by the other director or shareholder, it is clear that such company cannot be managed in accordance with the provisions of the shareholders' agreement. The obstructionist behaviour adopted by [Arcay] in regard to the calling of the directors' meeting has had the effect that [Apco] has been excluded from participating in the management of the Company. Having regard to the circumstances that I have described, I am satisfied that there is a literal deadlock which cannot be resolved. The events that I have described, and which are common cause or not in dispute, relate to [Apco's] failed attempts to engage [Arcay] [and] are not affected in any way by the clean hands principle upon which [Arcay relies]. If anything at all it is they who have adopted an obstructionist attitude.'

In that the learned Judge was undoubtedly correct.

[28] The true factual position, however that may have arisen, is that there is deadlock and a complete breakdown in relationship which makes the Company unable to function in its current configuration. If there were a reasonable hope of tiding over the period of deep depression and of the Company emerging from its current malaise to carry on at a profit, there may well have been insufficient reason for a court to wind up the Company on the just and equitable provision. But that is not what one encounters here. Here, the parties are hopelessly at loggerheads. The flurry of litigation by Arcay did little to help the situation. It added further to the disintegration of what was by then an already fragile relationship, prompting Apco to describe the *Anton Piller* proceedings as the 'final nail in the coffin'. It does not end

there. On 3 November 2006, in a letter addressed to Apco's attorney, Arcay's attorney stated

'Having touched on the conduct of your clients, and in particular that of Thomasine Kamerling, briefly set out above, our clients are of the view that such conduct as carried out by Ms Kamerling is tantamount to fraud. In this regard particular reference is made to the diversion of funds from our client to Apco Europe in the sum of US$ 12 000. It is our instructions to institute criminal proceedings against your clients.

By virtue of the above and your client's unlawful appropriation of our clients' information, our client has suffered the damages which our client continues to attempt to mitigate however which continue to escalate. At present without an exact quantification of such damages, our clients believe the figure runs into millions of Rands.

In the interim, it is our instructions to demand from your clients, which we hereby do, payment in the sum of US$12 000, together with interest thereon at the rate of 15.5% from 7 August to date, which payment is to be made on or before the close of business of 10 November 2006, failing which, legal action for the recovery of such amount shall be made.

In addition, we are instructed that the affidavits filed on behalf of your clients contain several patently false allegations (quite apart from your client's prospect of success) amounting to perjury. Our clients regard these allegations as criminally injurious and will equally pursue criminal charges in respect thereof.'

[29] It is plain that a relationship of trust and integrity between the shareholders is integral to the success of the business of the Company as well as the continuation of that relationship. That much is evident from the nature of the Company's business as well as the fact that the parties are all privy to sensitive and confidential information. When one of two partners threatens civil and criminal action, including prosecution for fraud, is it reasonable to suppose that those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass as we have here? Commonsense seems to dictate that the answer has to be a resounding no. In those circumstances it seems to me that it is just and equitable that a court should intervene, for plainly this is not what the parties contemplated by the arrangement into which they entered. On the contrary they assumed that each would conduct itself reasonably and with basic courtesy towards the other. Having regard to the fact that the directors and shareholders cannot communicate with each other and

that no business of the Company can be carried on, one is inclined to the conclusion that if ever there were a state of deadlock, it exists here. If, as Arcay claims, there was fraud by Kamerling and a calculated design to wreck the Company and it can establish that in due course, it will have a remedy in damages. In those circumstances there can be no reason to seek to protect Arcay's rights, as it sought to contend, by sustaining the corporate form.

[30] But it is perhaps not necessary to go that far. It suffices, on the analogy of partnership law, to state that the Company is now in a state which could not have been contemplated by the parties when it was formed and that it ought to be terminated as soon as possible. It is, after all, contrary to the good faith and essence of the agreement between the parties that the state of things encountered here should be allowed to continue. As it was put in *In re Yenidje Tobacco Co Ltd* (at 430):

'In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think that it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership and for the reasons which are stated by Lord Lindley in his book on Partnership ... and which, I think, is quite justified by the authorities to which he refers: "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner or the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."'.

In my opinion the proved facts bring the present case well within this passage. The result may well have been the same even if the analogy with the partnership were to have been ignored as, in my view, the papers also disclose that the substratum of the company has disappeared.

[31] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

MPATI ADP
CAMERON JA
VAN HEERDEN JA
SNYDERS AJA