REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

In the matter between:

Case No. 2011/27316

DATE:15/11/2011

REPORTABLE

JONATHAN STUART BUDGE N.O. First Applicant
FARRELL EAN BOON N.O. Second Applicant
VIVIEN BARBARA BUDGE N.O. Third Applicant
(in their capacities as trustees of the JSB Family Trust)

versus

MIDNIGHT STORM INVESTMENTS 256 (PTY) LTD First Respondent
RUSSELL GLYN-CUTHBERT Second Respondent

And, in the matter between:

Case No. 2011/14531

JONATHAN STUART BUDGE N.O. First Applicant

versus

WAVELENGTHS 1147 CC First applicant
RUSSELL GLYN-CUTHBERT Second Respondent

MEYER, J

[1] The applicants in *Jonathan Stuart Budge N.O. & Others v Midnight Storm Investments 256 (Pty) Ltd & Another* (case no 2011/27316) (Midnight Storm) seek the winding-up of the first respondent company, Midnight Storm, and the applicant in *Jonathan Stuart Budge v Wavelengths1147 CC & Another* (case no 2011/14531) (Wavelengths) seeks the same relief in respect of the first respondent close corporation, Wavelengths. The protagonists in the two applications are the same - Messrs Jonathan Stuart Budge and Russell Glyn-Cuthbert – and the grounds for seeking the winding-up of Midnight Storm and of Wavelengths are essentially identical. The parties agreed that the two applications should be heard together and that Wavelengths should follow the fate of Midnight Storm.

[2] Each application was brought in terms of s 344(h) of the Companies Act 61 of 1973 (the old Companies Act) upon the erroneous supposition that the transitional provisions of the Companies Act 71 of 2008 (the new Companies Act) have the effect of keeping s 344(h) of the old Companies Act operative. The supposition was incorrect insofar as the winding-up of solvent companies, such as Midnight Storm and Wavelengths, is concerned. This is clear from the provisions of item 9 in Schedule 5 of the new Companies Act.

[3] In terms of a supplementary affidavit that was filed in each instance the applicants indicated that they nevertheless sought the winding-up of Midnight Storm and of Wavelengths pursuant to the terms of s 81(1)(d)(iii) of the new Companies Act. The

applicants rely *inter alia* on the as yet unreported judgment of *Heinrich Muller v Lily Valley (Pty)* (case no. 2011/22041) that was delivered in this division on 24 October 2011, in which Weiner J held that the legal basis for winding-up under s 81(1)(d)(iii) of the new Companies Act is the same as that under s 344(h) of the old Companies Act. Mr LJ Morison SC, who appeared with Ms EJ Keeling for the applicants, limited the case of the applicants to grounds analogous to those for the dissolution of a partnership, and particularly 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. Mr ARG Mundell SC, who appeared for the respondents, submitted that the just and equitable ground for winding-up referred to in s 81(1)(d)(iii) of the new Companies Act should be restrictively interpreted and limited to the circumstances referred to in the preceding ss 81(1)(c) and 81(1)(d) thereof, which circumstances do not include the circumstances upon which the applicants rely in seeking the winding-up of Midnight Storm and of Wavelengths. These conflicting contentions call for an interpretation of s 81(1)(d) of the new Companies Act.

[4] S 344 of the old Companies Act reads:

> 'A company may be wound up by the Court if-
> (a) the company has by special resolution resolved that it would be wound up by the Court;
> (b) the company commenced business before the Registrar certified that it was entitled to commence business;
> (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
> (d) in the case of a public company, the number of members has been reduced below seven;
> (e) seventy-five percent of the issued share capital of the company has been lost or has become useless for the business of the company;
> (f) the company is unable to pay its debts as described in section 345;

(g) in the case of an external company, the company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

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

[5] The 'just and equitable' ground for winding-up referred to in s 344(h) of the old Companies Act was held not to be construed *ejusdem generis* the other grounds specified in s 344. See: *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D&CLD), at p 365H, and *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (WLD), at p 181D. Coetzee J, in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (WLD), at pp 349G – 350H, referred to the long legal history of the just and equitable ground for winding-up and to the following five broad categories of cases that may be brought under it:

'The first is the disappearance of the company's substratum. Where the company was formed for a particular purpose for instance, and that purpose can no longer be achieved at all, its *raison d'etre,* its *substratum* has gone and it may be fair and equitable to the incorporators under those circumstances to wind it up. There are a variety of circumstances which can possibly lead to the disappearance of a company's *substratum.*

Secondly, illegality of the objects of the company and fraud committed in connection therewith. If a company is promoted in order to perpetrate a serious fraud or deception on the persons who are invited to subscribe for its shares, it is the kind of case in which the persons who are defrauded in that fashion can take the promoters to Court and, provided the circumstances demand that, ask that the company be wound up.

The third is that of deadlock which results in the management of companies' affairs, because the voting power at board and general meeting level is so divided between dissenting groups, that there is no way of resolving the deadlock other than by making a winding up order. The kind of case which falls most frequently to be dealt with under this heading is one where there are only two directors or only two shareholders, usually in a private company, who hold equal voting shares or rights and have irreconcilably fallen out.

Fourthly, grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held wholly or mainly by the directors and it is in substance a partnership in corporate form, the Court will order its winding up in the same kind of situation that it would order the dissolution of a partnership on the ground that it is just and equitable to do that.

Fifthly, there is oppression. Where the persons who control the company have been guilty of oppression towards the minority shareholders whether in their capacity as shareholders or in some other capacity, a winding up order in suitable cases may be made. This is in addition to other remedies in the Companies Act, which are available to oppressed minorities to obtain not only dissolution, but also a money judgment.'

[6] S 81(1) of the new Companies Act set out the grounds upon which a Court may order a solvent company to be wound up. It reads:

'(1) A court may order a solvent company to be wound up if –

(a) the company has –

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that –

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

(ii) it is otherwise just and equitable for the company to be wound up;

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –

(aa) irreparable injury to the company is resulting, or may result, from the deadlock: or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that –

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the company's assets are being misapplied or wasted; or

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that –

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with the compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 of 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.'

[7] The respondents' contention is that s 81(1)(d)(iii) of the new Companies Act should be construed *ejusdem generis* the other grounds specified in ss 81(1)(c) and 81(1)(d) thereof. In *Colonial Treasurer v Rand Water Board* 1907 TS 479, at p 484, Bristowe J formulated the *ejusdem generis* rule or principle as follows:

> 'The principle of *ejusdem generis* is a principle which is very usually applied to the construction of clauses where words of limited meaning are followed by others of general application.'

[8] Schreiner JA, in *Grobbelaar v De Vyver* 1954 (1) SA 255 (A), said this:

> 'The instrument of interpretation denoted by *ejusdem generis* or *nascitur sociis* must always be borne in mind where the meaning of general words in association with specific words has to be ascertained; but what is often a useful means of finding out what was meant by a provision in a contract or statute must not be allowed to substitute an artificial intention for what was clearly the real one.'

[9] The 'just and equitable' basis for the winding-up of a solvent company in terms of s 81(1)(d)(iii) of the new Companies Act should for the reasons that follow not be interpreted so as to only include matters *ejusdem generis* the other grounds enumerated in s 81. The *ejusdem generis* rule, in my view, is inapplicable to s 81(1)(d)(iii) of the new Companies Act.

[10] In enacting s 81(1)(d)(i), which applies to a situation where the directors are deadlocked in the management of a company, and s 81(1)(d)(ii), which applies to a situation where the shareholders are deadlocked in voting power, the legislature modified the judicially developed deadlock category that forms part of the just and equitable ground for winding-up of a company and made its application subject to certain new requirements. The application of s 81(1)(d)(iii) to deadlock categories and to the circumstances referred to in s 81(1)(c) would render the provisions of s 81(1)(d)(i) and of s 81(1)(d)(ii) nugatory since an applicant who is unable to meet the requirements of those sections would nevertheless be able to invoke the judicially developed deadlock category that forms part of the just and equitable ground for winding-up in terms of s 81(1)(d)(iii). I am further of the view that the *ejusdem generis* rule is excluded, because the specific words of s 81(1)(d)(i) and of s 81(1)(d)(ii) exhaust the genus, in this instance deadlock. See: *Carlis v Oldfield* (1887) 4 HCG 379, at p 383.

[11] I have earlier referred to the long history of the just and equitable ground for winding-up and to the five broad categories of cases which by judicial interpretation thus far may be brought under it. The just and equitable phrase appears in the old Companies Act and its predecessors. The application of the *ejusdem generis* rule would, in my view, be contrary to the legislature's object of adopting the same meaning which has been given to the 'just and equitable' words forming the basis for the winding-up of companies by the courts over many decades when it incorporated or made the same words part of s 81(1)(d)(iii) of the new Companies Act. In *Wray v Minister of the Interior and Another* 1973 (3) SA 554 (WLD), at p 561A, Coetzee J said this:

> 'It is trite law that when the words of an older statute are either incorporated in or made part of a later statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the Courts.'

[12] The dictionary meaning of the phrase 'or otherwise' is that it is 'used to indicate the opposite or negation of a preceding noun, adjective, adverb, or verb.' See: *The New Shorter Oxford English Dictionary on Historical Principles* Clarendon Press Oxford 1993 Ed Vol II, at p 2032. The words 'or … it is otherwise just and equitable for the company to be wound up' must accordingly in their context be given the meaning that a court may order a solvent company to be wound up on the just and equitable ground other than in terms of the deadlock category so that all the other categories of cases that may be brought under the just and equitable ground are included. Compare: *R v Bono* 1953 (3) SA 509 (C). The language used in s 81(1)(d)(iii) is clear and unambiguous and must accordingly be given effect to. Only the deadlock category is excluded from the broad just and equitable ground for the winding-up of a solvent company referred to in s 81(1)(d)(iii). Subject to this qualification, I agree with the

finding of Weiner J in *Heinrich (supra)* that the legal basis for winding-up under s 81(1)(d)(iii) of the new Companies Act is the same as that under s 344(h) of the old Companies Act.

[13] I now turn to consider the question whether or not it is just and equitable that Midnight Storm and Wavelengths should be wound up. A decision on this question involves a factual determination, and, if it is concluded on the facts found to be relevant that winding-up would be just and equitable, the exercise of a judicial discretion that takes into account all the relevant circumstances and 'with due regard to the justice and equity of the competing interests of all concerned.' See: *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at p 136G – H; *Kyle and Others v Maritz & Pieterse Inc* [2002] 3 AA SA 223 (T), para [30]; and *Henochsberg on the Companies Act* Vol I, p 702.

[14] The applicants seek the final winding-up of Midnight Storm and of Wavelengths and the *onus* accordingly rests upon them to satisfy the court, on a balance of probabilities, that it is just and equitable to finally liquidate those companies. The papers are interspersed with disputed issues of fact. The well known test enunciated by Corbett JA in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at pp 634E – 635C, is of application. Final winding-up orders may, in terms of the test, only be granted if the facts stated by the respondents together with the admitted facts in the applicants' affidavits justify the orders. See: *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA), paras [3] – [4].

[15] Applying this test to the facts of the present matters, it emerges that a pre-existing partnership between Messrs Budge and Glyn-Cuthbert continues to underlie the company structure. They utilised various 'special purpose corporate vehicles', including Midnight Storm and Wavelengths, through which immovable properties were acquired and developed in the carrying out of their partnership business. Each of them – Mr Budge through the JSB Family Trust and Mr Glyn-Cuthbert personally - holds fifty percent of the issued shares of Midnight Storm and each holds a fifty percent members' interest in Wavelengths. They are the only two directors of Midnight Storm. Until 26 November 2007, they both equally participated in the conduct and management of the businesses and affairs of the various corporate entities utilised by them, and in particular those of Midnight Storm and of Wavelengths. By October 2007, they agreed to part ways and that the only feasible manner in which to extricate themselves from their business relationship was to wind down the businesses of the relevant companies, a process which would involve the finalisation of the developments that were undertaken by them and the sale of all immovable properties owned by the companies utilised by them.

[16] Messrs Budge and Glyn-Cuthbert concluded a written 'dissolution of partnership' agreement on 26 November 2007, in terms whereof they agreed to dissolve their business association ('the dissolution agreement'). Midnight Storm and Wavelenghts were *inter alia* also parties to the dissolution agreement. Mr Budge's participation in the conduct and management of the businesses and affairs of the various corporate entities ceased from then on and Mr Glyn-Cuthbert was to wind down the affairs of the various corporate entities in accordance with the dissolution agreement. Mr Glyn-Cuthbert

states that 'the provisions which could not be given effect to were readily varied by agreement between Budge and me.'

[17] The undisputed evidence, however, establishes instances in which Mr Glyn-Cuthbert materially failed to give effect to the dissolution agreement without *consensus* having been reached on variations thereof. Mr Glyn-Cuthbert was to incorporate a new property-holding company, Rusco, and various of the companies utilised by Messrs Budge and Glyn-Cuthbert, including Midnight Storm and Wavelenghts, were, according to the dissolution agreement, to sell certain of the immovable properties owned by them to Rusco at specified prices. One such property, known as the Sandy Ridge development, which is owned by Midnight Storm, was to be sold to Rusco for R6 million. Rusco, according to the dissolution agreement, was also to '… be paid a consulting and management fee of R3 million, plus VAT for management and collection services rendered, to be paid in 12 equal monthly instalments from 1st January 2008 until 31st December 2008.' Mr Glyn-Cuthbert, however, did not cause Rusco to be incorporated and no plausible explanation is given as to why he failed to give effect to the dissolution agreement in this regard. With reference to the Sandy Ridge property, Mr Glyn Cuthbert merely states that '[t]he originally proposed price is unrealistic and cannot be achieved. The property must be sold on public auction and the proceeds thereof paid to Midnight Storm whereafter they can be disbursed amongst its shareholders as agreed.' Mr Glyn-Cuthbert caused the total management fee of R3 million, which according to the dissolution agreement was to be paid to Rusco, instead to be paid in monthly installments from the coffers of Wavelengths to another company called Rusking Real Estate Marketing (Pty) Ltd, which company, on Mr Glyn-Cuthbert version, '… was not

incorporated for the purposes of giving effect to the dissolution agreement', but was incorporated for the purpose of conducting Mr Glyn-Cuthbert's 'estate agent's activities.' Mr Glyn-Cuthbert also makes the startling statement that the fact that he caused amounts to be deposited to the credit of Rusking Real Estate Marketing (Pty) Ltd '…is entirely coincidental.'

[18] Mr Glyn-Cuthbert also caused further amounts totaling R4m to be paid by Wavelengths to Rusking Real Estate Marketing (Pty) Ltd during the period 1 March 2009 to 28 February 2010. He says that such payments constituted a further management fee that was payable to him for the year 2009 in terms of an oral agreement concluded between him and Mr Budge at a meeting held on 4 December 2008. This is disputed by Mr Budge. The dissolution agreement does not provide for the payment to Rusco or to Mr Glyn-Cuthbert of any management fees other than the one of R3 million to which I have referred in the preceding paragraph. It is also to be noted that the dissolution agreement contains a non-variation clause. Wavelengths also paid Mr Glyn-Cuthbert a 'salary' of R150, 000.00 per month for the months of March and April 2010. Mr Budge avers that these payments to Mr Glyn-Cuthberts were against his wishes and unauthorised.

[19] Mr Glyn-Cuthbert maintains that the dissolution agreement was impossible of implementation. The averment of Mr Budge that Mr Glyn-Cuthbert '… has approbated and reprobated on the dissolution agreement …' is supported by the undisputed facts. Mr Budge avers that the dissolution agreement had been repudiated by Mr Glyn-Cuthbert, which repudiation he accepted and that the agreement was accordingly at an end. There is accordingly, on either version, no longer an agreement in place for the

winding down of the corporate entities, and in particular Midnight Storm and Wavelengths. There remain assets vested in Midnight Storm and in Wavelengths. The participation of Mr Budge in the management of the companies ceased from November 2007. The business of the corporate entities has largely been wound down. Issues have developed between Messrs Budge and Glyn-Cuthbert. Attorneys became involved. They now only communicate through their attorneys. Their relationship is acrimonious and there is clearly, on the undisputed facts, a complete breakdown in the relationship of trust that had once existed between them.

[20] It has, in my judgment, been established on a balance of probabilities that Mr Budge has a justifiable lack of confidence in Mr Glyn-Cuthbert's conduct and management of the affairs of Midnight Storm and of Wavelengths. See: *Moosa, NO v Mavjee Bhawan (Pty) ltd and Another* 1976 (3) SA 131 (T), at p 137 and *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (WLD), at p 182B *et seq*. Mr Budge has not been shown to have been wrongfully responsible for the situation which has arisen nor has it been established that he is acting unreasonably in seeking to have Midnight Storm and Wavelengths wound up.

[21] Midnight Storm and Wavelengths have ceased to carry on business and are managed by Mr Glyn-Cuthbert only for the purpose of winding down their affairs. I have referred to the undisputed material respects in which the dissolution agreement, which was intended to bring about a consensual winding down of the affairs of Midnight Storm and Wavelengths, have unilaterally not been given effect to by Mr Glyn-Cuthbert. Messrs Budge and Glyn-Cuthbert are not *ad idem* about the disposal of the remaining properties and assets of Midnight Storm and of Wavelengths and how the agreed

winding down process should be completed. Despite being represented by attorneys since the end of 2010 the disputes between them could not be resolved. Mr Glyn-Cuthbert previously refused the request of Mr Budge that their disputes be referred to arbitration. A most weighty consideration in the present matters is that winding-up will be in the hands of the Master, who will appoint an independent liquidator to complete the winding down process on which Messrs Budge and Glyn-Cuthbert cannot agree. In my view, regard being had to all the relevant circumstances of these matters, it is just and equitable that Midnight Storm and Wavelengths be finally wound up.

[22] In the result I make the following orders:

A. In *Jonathan Stuart Budge N.O. & Others v Midnight Storm Investments 256 (Pty) Ltd & Another* (case no 2011/27316):

1. The first respondent company is placed under final winding-up;
2. The costs of the application, including the costs attendant upon the engagement of two counsel for the applicants, are to be costs in the winding-up.

B. In *Jonathan Stuart Budge v Wavelengths1147 CC & Another* (case no 2011/14531):

1. The first respondent close corporation is placed under final winding-up;
2. The costs of the application, including the costs attendant upon the engagement of two counsel for the applicant, are to be costs in the winding-up.

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P.A. MEYER
JUDGE OF THE HIGH COURT

15 November 2011

Date of hearing:	7 November 2011
Date of Judgment:	15 November 2011
Counsel for the applicants:	Adv. L.J. Morison SC Adv. E.J. Keeling
Counsel for the respondents:	Adv. A.R.G. Mundell SC
Attorneys for the applicants:	Ramsay Webber 269 Oxford Road Illovo Johannesburg Ref: Mr B Webber
Attorneys for the respondents:	Schwarz-North Inc. Block 7 Albury Park Cnr Jan Smuts Ave & Albury Road Hyde Park Ref: Mr H P North