Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 12442/2011

Before: The Hon Mr Justice Binns-Ward

In the matter between:

DR MATTHYS PETRUS CILLIERS N.O. **(In his capacity as trustee of the** **Thys Cilliers Family Trust)**	First Applicant
AJ DE KOCK	Second Applicant
HD VAN HUYSTEEN	Third Applicant

and

DUIN & SEE (PTY) LTD	Respondent

JUDGMENT DELIVERED: 28 FEBRUARY 2012

BINNS-WARD, J:

1] The applicants seek a provisional winding up order against the respondent company on just and equitable grounds. The application is opposed by the company. An objection by the applicants raised in their replying papers to the effect that the directors had lacked authority to resolve that the company

should oppose the application was abandoned at the hearing, advisedly.

2] It is accepted by all concerned that the company is solvent, and that the application thus falls to be determined in terms of s 81 of the Companies Act 71 of 2008. The only part of that provision that can be of application is paragraph (d) of subsection (1), which provides:

> A court may order a solvent company to be wound up if-
>
> (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

The applicants' counsel have identified the current application as having been brought in terms of s 81(1)(d)(iii). One of the principal grounds upon which the applicants rely is the application of the so-called 'deadlock principle'.

3] Section 81(1)(d)(iii), apart from the qualification imported by the word 'otherwise', replicates the ground for winding up provided in terms of s 344(h)

of the 1973 Companies Act (Act 61 of 1973).[1] The effect of the qualification contained in s 81(1)(d)(iii) was recently considered by Meyer J in *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ). The learned judge held that the qualification related to the instances of deadlock set out in sub-paragraphs (i) and (ii) of paragraph (d) and had the effect of excluding consideration of deadlock in applications brought in terms of s 81(1)(d)(iii). As I understood their argument, the respondent's counsel submitted that the construction of s 81(1)(d) in *Budge* excluded the applicants' ability to invoke the 'deadlock principle'.

4] At para. 10 of the judgment in *Budge*, Meyer J held:

> 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.

5] Jurisprudence concerning the winding up of companies on just and equitable grounds has employed the concept of 'deadlock' in two quite distinguishable senses. Deadlock in the strictly literal sense - what might be termed 'complete deadlock'[2] - applies in the case where, because the directors or

1 Cf. ***Muller v Lilly Valley (Pty) Ltd*** [2011] ZAGPHCJ 146 (24 October 2011), at para. 1-2.
2 Cf. e.g. *APCO Africa (Pty) Ltd v APCO Worldwide Inc* 2008 (5) SA 615 (SCA) ([2008] 4 All SA 1), at para 18; and *Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W). Cases involving complete deadlock comprise the third of the five broad categories of just and equitable winding up cases

shareholders are equally divided, there is an inability to make decisions that are necessary for the company to function. The wider or looser sense of the concept is encountered in the context of the so-called 'deadlock principle',[3] which is applied in respect of the consequences of a breakdown of trust and confidence between members of a company which because of its peculiar character is in substance akin to a partnership, and thus amenable – subject to important qualifications - to dissolution as a partnership would be if relations between the partners became untenable through no fault of the partner claiming the dissolution. The dichotomy between the two concepts of deadlock is highlighted in the difference between the majority and the minority judgments in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch. 426 (CA); see also *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T), at 137-8; *Emphy and another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 367B-C and *APCO Africa (Pty) Ltd v APCO Worldwide Inc* 2008 (5) SA 615 (SCA) ([2008] 4 All SA 1), at para 19.

6] Scope for confusion about the relevant import of the judgment in *Budge* arises from the judge's reference to the '*judicially developed deadlock category*' because that might easily be mistaken to include the '*deadlock principle*'. On an analysis of the judgment as a whole, however, it is evident that the learned judge's aforementioned observations were intended to pertain only to deadlock understood in the strict or narrow sense of the word. Indeed the winding up orders that were granted in *Budge*, apparently in terms of s 81(1)

described in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 349G-350H, in a passage quoted *in extenso* in *Budge* at para. 5.

3 See e.g. *Emphy and another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 367B-C. Cases involving the application of the 'deadlock principle' comprise the fourth of the five broad categories described in *Rand Air* (see note 3, above).

(d)(iii) of the 2008 Companies Act, were plainly premised on the application of the deadlock principle; in other words in the context of the use of the term in its aforementioned wide or loose sense.[4]

7] Sub-paragraphs (i) and (ii) of paragraph (d) of s 81(1) pertain only to instances of complete deadlock and do not have any bearing on the incidence of 'the deadlock principle' in determining whether it might be just and equitable to wind up a solvent company. Therefore, irrespective of whether or not Meyer J is correct in the effect he gives to sub-paragraphs (i) and (ii) of s 81(1)(d) – as to which I express no opinion - s 81(1)(d)(iii) of the Act is amenable for use in the determination of winding up applications on just and equitable grounds involving 'deadlock' cases in the wider sense of the word.

8] The only business of the respondent company is the ownership of a valuable beachfront property in Plettenberg Bay. The property has been held in ownership by the company since 1959. During all of that time it has been used by the shareholders and their families for their beach holidays. For that purpose a number of rudimentary holiday houses, described in the papers as 'shacks', have been erected at various spots on the property. One of the shareholders and his family live permanently on the property in one of the shacks.

9] The holdings of the respective members in the company are proportionately quite disparate and bear no direct relationship with the respective holders' use of the property for the purposes aforementioned. This characteristic has

4 When Meyer J spoke of a '*judicially developed deadlock category*', he was thus evidently meaning only the third broad category of cases described in *Rand Air* (see note 3, above).

given rise over the years to debate between the members as to whether their holdings should be adjusted *inter se* and as to whether their respective holdings should be differentially valued with reference to the usage individually enjoyed by each shareholder of the property. An idea of the content of these debates is evident from the correspondence annexed to the papers in the application. It is not necessary to go into the detail. Suffice it to say that it is apparent that much of the debate has proceeded on the basis of an evident misapprehension by some of the members of the nature of the proprietary interest inherent in their share ownership. The debate has given rise to the exchange of a variety of proposals between the shareholders as to the possible restructuring of the company, including the idea of its conversion into a shareblock company. Other ideas have included the establishment by the company of a sectional title scheme on its land, or rezoning and subdividing the property so that it might be transferable as individually owned portions to the members. While the tone of some of the exchanges between members deteriorated in the months before the institution of these proceedings, the evidence does not show that this fundamentally undermined the functioning of the company, or brought about a situation in which it would be unjust or inequitable to hold any member wishing to dispose of their shares from doing so in the manner provided in the articles of association.

10] No concrete steps have been taken by the company to bring any of these proposals to fruition, but that is hardly surprising in the absence of any indication, other than those mentioned below, that any resolutions have been moved by members at general meeting to achieve such objects. The

company did, however, resolve in July 2008, with the support of the holders of 85,8% of the shares, to invite tenders for the purchase of the property. The resolution provided that the company would consider the tenders received and in a special general meeting determine whether to accept one. The wording of the resolution made it clear that it was not the intention that the company would be bound to accept the highest tender received, or indeed any offer at all. It follows that there was no fixed commitment by the company or the members who supported the resolution to the sale of the property.

11] Tenders were thereafter duly invited. The offers received were considered by the members at a general meeting of the company held on 23 January 2010. To assist in the consideration of the offers submitted, the company had commissioned a market valuation of the property by an expert. The expert valued the property at R60 million, as of 14 January 2010. The cash offers received for the property were in sums significantly below that figure. This was ascribed to the depressed state of the property market. (A valuation report, dated 16 September 2011, in respect of the company's property by an experienced valuer with local knowledge put its market value as at that date at R40 million.)

12] The minutes of the meeting reflect that after some deliberation it was resolved not to accept any of the tenders, but the directors were mandated to pursue negotiations with two of the parties who had submitted tenders, including one who had offered a cash price of R45 million coupled with giving the right to the members to the use for a period of 50 years of certain accommodation which the tenderer would erect on the property, something which the tenderer,

rather arbitrarily, suggested added R60 million in value to its cash offer. The negotiations came to nought through no fault of the directors. By the time the current proceedings were instituted, on 22 June 2011, it was apparent that an imminent sale of the company's property was not in the offing.

13] The applicants hold in total 35% of the issued shares in the company. The first applicant has instituted the proceedings in his capacity as the trustee of a trust which holds 12,8% of the shares. The second applicant is an individual who holds 7,2% of the shares. The third applicant, also an individual, holds 15% of the shares. He has lived in Israel for about 30 years. The applicants' complaint is that relative to their respective shareholdings in the company they derive little or no use and enjoyment of the company's property. They assert that the owners of 50% of the shares in the company have the use of only two of the aforementioned shacks on the property, while the other 50% enjoy what they term 'access' to 10 shacks. They allege that the inequity that this would suggest is exacerbated by reason that the expenses of the company are charged to the shareholders *pro rata* their holding. The latter allegation was contradicted in the answering affidavit, from which it is evident that the members' liability to contribute towards the company's expenses is weighted with regard to a number of factors, including the availability to them of the use of the shacks. The relevant determinations are made by agreement between the members. The applicants nevertheless contend that disputes among the shareholders have caused '*a complete meltdown and stalemate in the company's affairs*'. I should say at once that that description is hyperbolical and does not reflect the factual position as it appears from the

papers. Certainly, there is no evidence of any instances of complete deadlock in regard to the administration of the company's affairs. Furthermore, the distribution of and access to shacks on the property appears to be a function of the investment by individual shareholders over the years in their own respective accommodation requirements, and not the result of any discriminatory determination by the company. There is nothing to suggest that any constraints imposed by the company, or the other shareholders prevent the applicants from obtaining or exercising the privilege of using the company's property. Although there is no direct reference thereto in the papers, it might well be that planning legislation applicable in the Western Cape since 1986 might have prevented the erection or extension of shacks on the property after that date. This might explain the value which some of the members apparently ascribe to their existing 'footprints' on the company's land. The applicants do not, however, rely on the incidence such factors, which are external to the company's functioning, in support of their application.

14] It is clear that the applicants wish to divest themselves of their shareholdings and realise the value of their investments without further delay. They are plainly frustrated by the fact that the aforementioned resolution by 85,8% of the members to proceed towards obtaining the sale of the company's only asset has not been consummated. They are also exasperated by the company's failure to implement a resolution adopted by 100% of the members, also at the July 2008 meeting, '*to appoint an appropriately qualified arbitrator to evaluate and review all relevant factors regarding the weighting of*

the shareholding in the Company, to receive submissions from the shareholders in this regard and to make a final and binding decision as to the adjustments to be made to the existing shareholdings in order to ensure that the economic interests in the Company are fairly distributed'. It is unnecessary to make a finding to that effect, but it seems to me that the resolution adopted by 100% of the members was ill-conceived, and but another manifestation of a lack of understanding by some of them of the nature of their proprietary interest in the company - which did not give any of them the right *vis à vis* the company to occupy or utilise any portion of its land, and which furthermore was not represented through the holding of different classes of shares in the company. There is no evidence that the members have ever formally proposed that the company exercise the power in terms of the memorandum of association to divide the issued shares into classes. Where the contemplated arbitrator was to obtain the power to make a determinative adjustment of the holdings of the members is not explained. On the contrary, a consideration of the document entitled '*Stated Case'*, to which regard was apparently had by the members in their decision to adopt the second resolution, and which sets out two contesting arguments reflecting the members' opposing contentions, shows that all that the so-called arbitrator was to be called upon to do in effect was to furnish advice on a number of questions.

15] It is unnecessary to make any finding in regard to what, on the face of it, seems to me to have been the futility of the exercise contemplated by the second resolution because it is evident from the applicants' founding papers

that its object was to resolve an anticipated dispute between the shareholders in respect of the division between them of the net proceeds of the sale held in contemplation by the first resolution. As the contemplated sale did not proceed, by reason of the exercise by the members of the right expressly reserved to them in general meeting, in terms of the first resolution, not to accept any of the offers that had been submitted, the non-compliance by the directors with the second resolution is immaterial, and the applicants' complaint about it of no weight.

16] There is no merit in the applicants' allegation that the decision not to accept any of tenders submitted reflected a 'dysfunctionality' in the company. On the contrary it reflected the operation of the principle of majority rule, trenchantly described in *Sammel and others v President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (A) at 678H-679C, to which persons acquiring shares in a company with a share capital invariably subject themselves.

17] The applicants' frustration on the basis aforementioned, and because some of them found themselves in personal disagreement with their fellow members on the nature of their proprietorship and in respect of proposals on the future conduct of the company's affairs and the re-ordering of the means of ownership of the company's asset, culminated in their making an offer to sell their shares. The sale of shares by a member of the company is restricted in terms of the company's articles of association. The applicable article provides:

4. NIETEENSTAANDE enige strydige bepalings in hierdie artikels vervat is geen

aandeelhouer of die eksekuteur of trustee van 'n afgestorwe of insolvente aandeelhouer bevoegd om enige van sy aandele aan enige persoon oor te dra nie, tensy sodanige aandele in die eerste plek aan die oorblywende aandeelhouers aangebied is teen 'n prys waarop die partye moet ooreenkom. En indien daar nie tot 'n ooreenkoms geraak word nie, teen 'n prys wat deur arbitrasie vasgestel word as die waarde van sodanige aandele, watter aanbod skriftelik moet wees en oor 'n tydperk van sestig dae vir aanname beskikbaar moet bly. Indien al die oorblywende aandeelhouers nie verkies om die aandele binne die vermelde tydperk van sestig dae of binne enige tydperk wat deur toestemming of deur die arbiters verleng is, teen die waarde wat aldus bepaal is of teen sodanige goedkoper prys as wat die verkopers bereid is om te aanvaar te koop nie, dan mag die aandele verkoop word aan enigeen of meer van die oorblywende aandeelhouers teen 'n prys wat nie minder is en teen voorwaardes wat nie beter is as dié waarvolgens hulle aan al die oorblywende aandeelhouers aangebied is nie. Indien geeneen van die aandeelhouers verkies om die aandele binne veertien dae van die datum af wat volg op die vermelde tydperk van sestig dae of enige verlengde tydperk soos hiertevore bepaal, te koop nie, dan mag die aandele aan enige persoon verkoop word teen 'n prys wat nie minder is en op voorwaardes wat nie beter is as die waarvolgens hulle aan die oorblywende aandeelhouers of aandeelhouer aangebied is nie, met dien verstande dat die direkteure die voorgenome persoon aan wie die aandele oorgedra word, goedkeur, enige geskilpunt daaromtrent moet deur arbitrasie besleg word. Dit word uitdruklik bepaal dat enige sodanige aanbod van aandele betrekking moet hê op al die aandele van die verkoper wat nie daarop geregtig is om 'n gedeelte van sy aandele te koop aan te bied nie.

18] The applicants' offer to sell their shares was conveyed in a letter from their attorneys, dated 28 January 2011, which went as follows:

Dear Sirs

RE: OFFER TO PURCHASE SHARES IN THE COMPANY

We act for the Trustees for the time being of the Thys Cilliers Familie Trust. Mr H D van Huyssteen and Mrs A J de Kock ("our clients"). We have further confirmed with Mr Tim Maughan from the firm Francis Thompson & Aspden who acts for the Trustees for the time being of the Jan T Beukes Family Trust that a similar letter will follow on behalf of their clients.

We advise herein as follows:

1. Our clients are collectively the beneficial owners of 35% (Thirty Five Percent) of the issued shares in the Company. The Trustees for the time being of the Jan T Beukes Family Trust are the beneficial owners of 15% of the issued shares of the Company.

2. Paragraph 4 of the Statues (*Articles*) of the Company records the following:

   "4. Nieteenstaande enige strydige bepalings in hierdie artikels vervat,…."

   [The content of the article, which has been quoted above, was set out.]

3. In accordance with the content of the aforesaid paragraph 4 *(which is tantamount to a right of pre-emption)* we are instructed to offer for sale to yourselves on behalf of our clients their shares in die Company for a total purchase consideration of R21 000 000.00 (Twenty One Million Rand) i.e R120 000.00 (One Hundred and Twenty Thousand Rand) per share ("the Offer").

4. Our clients have resolved to sell their shares in the Company as per the provisions of paragraph 3 above.

5. The Offer is open for acceptance in writing until 12h00 noon on **4 April 2011** and such written acceptance can be hand delivered or sent per fax *(021 9750816)* to our firm at 4th Floor De Ville Centre, cnr. Wellington & Durban Road, Durbanville which is the address nominated by our clients for this purpose.

6. Payment for our clients shares must be made by a bank guaranteed cheque within 14 (Fourteen) days of your acceptance of the Offer at the registered offices of the Company against signature by our clients of all statutory documentation required to give effect to the aforesaid sale.

Please be guided accordingly

The price asked by the applicants for their shares suggests that it was premised on the R60 million valuation of the property in January 2010. It certainly exceeds by a significant margin what they would have received *pro rata* their respective shareholdings from the net proceeds of the disposal of the property in terms of any of the cash offers submitted in the aforementioned tender process.

19] The applicants' offer elicited the following response, in a letter dated 22 March 2011:

Dear Mr Kotze

RE: DUIN-EN-SEE (PTY) LTD ("THE COMPANY"): OFFER OF SHARES FOR SALE

1. I refer to your letter dated 28 January 2011 which was addressed, *inter alia,* to Dr. P.L. Cilliers, Prof. A. Gagiano, the trustees for the time being of the Tim Hunter Family Trust, Mr J.A. Joubert, Mr H. Swanepoel and the trustees for the time being of the Van Huyssteen Trust ("**the Remaining Shareholders**").

2. I have been instructed to respond to your letter by all of the Remaining Shareholders other than Prof. Gagiano, who is currently away at a conference in Trinidad & Tobago. Whilst I believe that Prof. Gagiano will agree with the contents of this letter, I will only be in a position to confirm this after her return to South Africa on 30 March 2011.

3. I will not respond to each and every statement made in your letter and my failure to do so should not be construed as an admission of the contents of your letter.

4. As regards the first paragraph of your letter under reply, kindly note that none of the Remaining Shareholders has yet received any letter from the trustees of the Jan Beukes Family Trust or their attorneys.

5. As regards paragraph 3 of your letter, I note that the offer that your clients have extended to the Remaining Shareholders does not comply with the provisions of article 4 of the Company's articles of association ("**the Article"**).

6. In this regard and without limitation, I wish to draw your attention to the following:

    a. Article 4 requires that your clients offer their shares for sale at a price to be determined by agreement with the Remaining Shareholders, and failing that at a price to be determined by arbitration. No agreement regarding the price at which your clients have offered their shares has been reached, nor have your clients attempted to engage with the Remaining Shareholders with a view to reaching such an agreement. Likewise, no arbitration to determine the price has been conducted. Your clients attempt to set the price at which their shares are offered unilaterally, does thus not comply with Article 4.

    b. Furthermore in terms of Article 4, the period of 60 days within which the Remaining Shareholders are entitled to accept your clients' offers only commences once a valid offer has been made in accordance with that Article (i.e. an offer stipulating a price that has been determined either by agreement or by arbitration). Note also that the article envisages that the period of 60 days may be extended by the arbitrator.

    c. Finally, Article 4 requires that each shareholder should offer his or her shares to

the other shareholders individually. Therefore, to the extent that your clients purport to offer the shares for sale as a single, indivisible block of shares, their offer is again not in compliance with the Articles.

7. Accordingly, the Remaining Shareholders hereby call on your clients to comply with the provisions of Article 4, to withdraw your letter and then to engage with the Remaining Shareholders in a *bona fide* attempt to agree the price at which your clients' shares should be offered to them.

8. In this regard, we would suggest that your clients attempt to establish the open market value of their shares by obtaining arm's length, third party offers to purchase each of their shareholdings. Such offers could then form the basis for an informed discussion between your clients and the Remaining Shareholders with a view to agreeing the price at which each of your clients should offer their shares for sale to the other shareholders.

9. Finally I wish to encourage your clients to engage with the Remaining Shareholders in relation to the sale of their shares without at this stage involving legal representatives (whilst that of course remains their right). To date the relationships between the Company's shareholders have in the main been amicable, and I can assure your clients that it is the Remaining Shareholders' sincere desire to facilitate the sale of their shares in a manner that benefits all.

10. I look forward to receiving your clients' response.

Yours faithfully

ADAM BEKKER

20] Mr Bekker's letter was replied to by the applicants' attorneys in a letter dated 5 April 2011. That letter read as follows:

IN THE MATTER OF DUIN & SEE (PTY) LTD ('THE COMPANY'): OFFER OF SHARES FOR SALE

In response to your letter of 22 March 2011 we are instructed as follows:

1. We do not intend to deal with each and every statement in your letter and any failure to do so should not be construed as an admission of the content thereof.

2. We await confirmation whether you are in fact also instructed by Prof A Gagiano and if she agrees with the contents of your letter. We further confirm that although you might not have

received a letter from the Jan Beukes Family Trust, the issues were canvassed with Marlene Beukes and it is only due to logistical problems that the letter has not been sent from the aforementioned Trust.

3. Please note that although our clients' made the offer collectively, the purchase consideration is also stated per share and as such the offer per shareholder is also made individually.

4. Our clients' have made a *bona fide* offer in terms of the statutes of the Company. Our clients' have unequivocally stated the price at which they are prepared to sell their shares. The aforementioned price was determined taking various factors in consideration not the least of which the offers previously received by the Shareholders. It is quite clear from your letter that you do not agree on the price and that further negotiations on the price would be a futile exercise. With respect, our clients' offer to sell their shares provided you with an opportunity to make a *bona fide* counteroffer. It is clear that there is a dispute between the parties as to the price of the shares. Accordingly my clients, in terms of Section 4 of the Statutes, will exercise their right to refer to dispute regarding the price of the property to be decided by an arbitrator.

5. Attached you will find a list of suggested arbitrators, all senior counsel at the Cape Bar, to act as arbitrator in the matter. We invite you to agree to an arbitrator of your choice or to add any other individuals you might prefer to conduct the arbitration. As soon as you have indicated your willingness to refer the dispute between the parties concerning the price of the shares to an arbitrator, we will provide you with or stated case to be decided by the arbitrator.

6. Our clients' place on record that as far as they are concerned the Company is dysfunctional. Should you not purchase our clients' shares as per Section 4 of the Statutes as offered at a price to be decided by an arbitrator, our clients will offer their shares firstly to individual shareholders and thereafter to external parties (as per Section 4 of the Statutes) failing which to sell the shares my client's will apply for the liquidation of the company on the basis that it is just and equitable to do so. The complete reasons for such application will in due course be contained in the Founding Papers. All our clients' rights are reserved.

7. We therefore await your reply as a matter of urgency on or before close of business on Thursday 21 April 2011.

Yours faithfully

21] Mr Bekker replied to the applicants' attorneys, apparently on behalf of the remaining shareholders (except perhaps the trustees of the Jan T Beukes Trust), in a letter dated 21 April 2011, which went:

Dear Mr Kotze

RE: DUIN-EN-SEE (PTY) LTD ("THE COMPANY"): OFFER OF SHARES FOR SALE

1. I refer to your letter dated 5 April 2011.

2. As indicated to you in my letter of 7 April 2011, Prof. Gagiano has confirmed that she agrees with the contents of my letter of 22 March 2011.

3. At the outset, I would like to state that in my view this matter has become unnecessarily hostile, and that the parties should at least make an attempt to agree on a procedure that will address everyone's interests whilst avoiding unnecessary legal and arbitration costs. I remain firmly of the view that a practical and amicable solution to the parties' differences can be found.

4. Accordingly, whilst I do not agree that the offer that your clients made to the Remaining Shareholders (as defined in my letter of 22 March 2011) complied with the Company's articles of association ("the Articles"), and without prejudice to the Remaining Shareholders' rights to require full compliance therewith, I am nevertheless of the view that the pre-emptive rights procedure in the Articles is impractical.

5. The central issue for the Remaining Shareholders is that your clients are not entitled to determine the price at which their shares are to be offered in terms of the pre-emptive rights unilaterally (which is what they purported to do in your letter of 28 January 2011). The Remaining Shareholders furthermore do not understand how your clients arrived at the price at which their shares were offered, as it does not appear to be based on any of the serious offers recently obtained for the Company/s property.

6. Whilst it does therefore seem that there is a dispute between the parties as to the price at which your client's shares are to be offered, arbitration is not a suitable manner in which to determine that dispute. Senior counsel are not qualified or experienced in valuations, and arbitration itself is extremely costly. The only definitive test of the value of an asset is to determine what a willing buyer would pay for that asset in an open market transaction.

7. I would accordingly suggest that the parties agree a more usual and commercial pre-emptive right procedure than that provided for in the Articles (which will speed up the process and remove the need for negotiation or costly arbitration), along the following lines:

    a. The Remaining Shareholders will agree that your clients may immediately start

the process of obtaining *bona fide* offers from unrelated third parties for their shares, without the need for them to offer their shares to the Remaining Shareholders prior to doing so (although contrary to the articles of the Company, this may be achieved by way of agreement by unanimous assent);

b. Your clients will in turn agree that the Remaining Shareholders may likewise procure or themselves make offers for your clients' shares, and your clients will agree to provide the offerors introduced to your clients in this manner with the same information and access to their portions of the property as offerors that they themselves identity;

c. The parties will agree on a cut-off date by which all offers must be submitted, and after which no further offers will be entertained. In this regard I would suggest that the period be at least the 60 day period referred to in the Articles (or longer, to provide a realistic period for marketing your clients' shares); and

d. After the above period has expired, your clients will offer their shares to the Remaining Shareholders at the same price and on the same terms as the offer received in terms of the above process which they wish to accept. Thereafter the third sentence *et seq* of Article 4 of the Articles will apply (i.e. the Remaining Shareholders will have 14 days within which to purchase your clients' shares, and so on.)

8. I trust that your clients will find the above broad proposal acceptable, as it will allow them to begin the process of finding purchasers for their shares immediately, and will avoid the unnecessary cost and delays associated with arbitration. If acceptable, the above proposal should be reduced to a short agreement and signed by each of the shareholders (as it will amount to a variation of the Articles).

9. Please note that I have not at this stage been able to obtain instructions from the Swanepoels and Gagianos in relation to the proposals made herein. However, as I believe that they will support the proposals, and in view of your request that we respond to your letter not later than today, I am sending this letter to you now. I will confirm in writing in due course whether or not the Gagianos and Swanepoels agree with the contents of this letter.

10. Whilst I have not responded to your letter under reply in full, I reserve the right to do so at a later stage should that become necessary.

11. I will be out of the office from tomorrow, 22 April 2011, and will return on 4 May 2011. Should you wish to contact me during this period, kindly leave a message on my cellphone, on 082 469 3077.

22] There would appear to have been further relevant correspondence dated 10 May 2011, which is not included in the papers. Its existence is however confirmed in a letter from the applicants' attorneys to Mr Bekker, dated 23 May 2011, which read (as corrected):

> Dear Sir
>
> **IN THE MATTER OF DUIN & SEE (PTY) LTD ('THE COMPANY'): OFFER OF SHARES FOR SALE**
>
> 1. We refer to your email dated 10 May 2011, the contents of which are noted.
> 2. We confirm that we are in the process of consulting with our clients who as you know is dependent on the availability of the clients.
> 3. We trust that we will be able to revert to you with or client's response before the end of this month.
> 4. We trust you find the above in order and will act accordingly.
>
> Yours faithfully

The applicants' attorneys did not revert, as indicated. Instead, without further ado, these proceedings for the winding up of the company were instituted.

23] In their founding papers the applicants contend that it would be just and equitable for the company to be wound up because the other members have repudiated the articles and indicated their unwillingness to apply the mechanisms and procedures provided therein for the disposition by the applicants of their shares. They also contend, by implication, that the relationship between shareholders and the manner in which the company being administered are such that there is a situation of deadlock in the wider

sense of the word. Expressly they contend for a situation of actual deadlock between the shareholders, but for good reason, quite apart from the implications of the judgment in *Budge*, that contention was not pursued at the hearing.

24] The applicants' counsel conceded that the first of the aforementioned contentions can be made good only if the letter of 21 April 2011 falls properly to be construed as a repudiation of the articles. In my judgment it does not. Repudiation entails the demonstration of a deliberate and unequivocal intention no longer to be bound by the contract (per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F) The letter does not have that character. It is plainly just a proposal to enter into an agreement with the applicants deal with the disposition of their shares in a different manner, which the writer appears to have considered would be more practicable. It does not purport to deny the applicant's contractual entitlement to compliance with the articles, nor does it convey a refusal to submit the issue of the determination of the price at which the shares should be disposed if the applicants should not look with favour on the proposal of an alternative mechanism for the purpose. A consideration of the letter, fairly read, does not objectively support an inference of impending non- or malperformance, or exclude a construction equally consistent with any other feasible hypothesis. Repudiation is not lightly to be presumed; see *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at para. 18. There is thus no merit in the first contention.

25] As to the alleged amenability of the application to determination in terms of

the so-called deadlock principle, I am prepared to assume in favour of the applicants, without so finding, that the company is of the character that would render it susceptible to winding up on the application of the principles pertaining to the dissolution of partnerships. Approaching the matter on that assumption, however, 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*' (per Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at 500).

26] A mere loss of confidence or trust by the applicants in their fellow shareholders, or in the directors of the companies, would not, in the assumed situation of a small domestic company or quasi-partnership, in itself entitle them to a winding up of the company on just and equitable grounds. They would have to show that the mechanisms contractually available to them in the articles to achieve their disassociation with the company were ineffectual, or that it would be inequitable or unjust for them to be kept to their contract. This is so because, as is evident from the passage quoted from *Ebrahimi*, above, (which has been cited with approval in this country's courts on repeated occasions, most recently in the Supreme Court of Appeal in *Louw and others v Nel* 2011 (2) SA 172 (SCA at para. 21), the primary principle is that parties should be held to the terms of their contracts. Furthermore, in

determining what would be just and equitable, regard has to be had to the interests of all the potentially affected parties and not just to those of an applicant.

27] In the current case it is evident that the applicants want the company's asset to be sold and for them to be paid out the net proceeds of such disposition *pro rata* their holding in the company. They are intent on this end, or its pecuniary surrogate, regardless of the evident concerns of some of their fellow shareholders that the currently depressed market conditions provide an adverse environment in which to dispose of the company's property to best advantage. And the applicants press for this result despite the sentiment of members at the meeting of 23 January 2010 that the property should not be disposed on the terms offered in an open tender process. Ordinarily, the disposition of the company's asset would require the support of at least 75% of the votes at a meeting constituted compliantly with the requirements of s 115(2)(a) of the 2008 Companies Act. On the evidence, that level of support from the company's members for the disposition of the asset is plainly lacking.

28] The applicants are not trapped in the company. In the context of the provisions in the articles described above, they are able to use the procedures provided to dispose of their shares. Their own actions in initially, only a few months before the institution of this application, seeking to follow that route are a powerful indicator of its feasibility. That indication of feasibility is supported by the indication in the respondent's answering papers that the '*remaining shareholders are eager to pursue the purchase of the shares of*

the applicants, either by themselves, or failing that, by willing buyers outside the company'; albeit, hardly surprisingly, not at the price demanded by the applicants . The possibility that a disposal of shares in the company subject to the restrictions that attach under the articles might result in an adverse disparity between what might be achieved on a sale of their shares and a *pro rata* dividend on the net proceeds of the disposition of the company's property is not something they can be legitimately heard to complain about. If it were to eventuate, such a result would be an incident of the manner in which the applicants' indirect investment in the property was originally devised. The prospect of such a comparatively adverse consequence does not make out an inequity or an injustice.

29] The professed eagerness of at least some of the other shareholders to acquire the applicants' shares cannot be dismissed as fanciful. It is evident on the papers that there has been an acceptance by a great majority of the shareholders that the zoning status of the company's property will soon have to change from agricultural use to something more appropriate because its agricultural zoning is not consonant with the manner in which the property has been used for the past 50 years and a recognition that this, coupled with the high value of the land, will afford opportunities to realise at least part of its monetary value while retaining the opportunity of continued enjoyment of its use for those of the members who might wish that. It is thus evident that the acquisition of a significant additional interest in the company would assist the acquirers in determining the timing and character of these future prospects and potentially give rise to significant profit. These no doubt will be amongst

the considerations that would be placed before an arbitrator if the shareholders are unable to agree upon a price for the applicants' shares.

30] In their replying affidavits, the applicants introduced new evidence in support of their application for a winding up of the company. This was premised on the annual general meeting of the company held on 23 July 2011. Various courses for the determination of the future of the company were proposed in terms of one of the resolutions (resolution 6) placed on the agenda of the meeting by the directors. The proposed resolutions that the applicants appear to regard as objectionable or oppressive were:

> 4 That the arbitration to determine the allocation of expenses and profits of the company (whether by current shareholding or on an adjusted basis) be held in abeyance pending the outcome of resolution 6 below.
>
> 5 That the company proceed with the deemed rezoning of the Company's property to Resort Zone II
>
> 6 That the directors be authorised to investigate the possibility for converting the company into a share-block company, a sectional title development or subdividing and distributing the property to shareholders, and to report back to the shareholders thereon.
>
> 7 That the Company ratify the directors' resolution to defend the liquidation application against the Company brought by certain of its members (NOTE: MEMBERS THAT INSTITUTED THE ACTION MUST ABSTAIN)

As might be deduced from their content, the resolutions, even if adopted, would not have committed the company to any course of action that would have changed the nature of the applicants' proprietary interest. On the contrary, their terms would merely direct the investigation and reporting back on the viability of the mooted courses. Whatever their possible merits, the mooted courses set out in proposed

resolution 6 could in any event not have been adopted in the face of the combined opposition of the applicants.

31] The covering letter sent out to members by the company's directors in connection with the July 2011 annual general meeting purported to set out the majorities expressed in percentage terms required to adopt the various resolutions. As appears from what is set out above, the covering letter also purported to indicate that the applicants were not permitted to vote on the resolution concerning the opposition to the winding up application. That was manifestly incorrect. Had the meeting been conducted in accordance with the indication it might have afforded an instance of oppressive conduct. As it was, the proposed resolutions were not put to the meeting, and none of those present moved that they should be. The decision not to put the resolutions to the meeting was premised on advice given to the directors by the company's legal advisers.

32] The applicants contend that the content of the proposed resolutions constituted '*a patent disregard of the right of the Applicant members*'.[5] There is no substance in that accusation. As mentioned, the proposed resolutions were not put to the meeting. The applicants cannot found a case on a foundation that did not come into existence. In any event, even had any of the resolutions set out above been adopted in the context of a valid voting process, I am unable to discern how the result would have adversely affected the applicants in any cognisable way.

5 I quote from the applicants' heads of argument.

33] I should also mention that in my judgment the applicants' allegations that the proposed resolutions were indicative of improper conduct by the directors were also unfounded, and indeed unfortunate. The respondent's counsel argued that the court should mark its displeasure at the recklessness which characterised these unfounded allegations of impropriety. I have not been persuaded to follow that course. Should they be advised to pursue them (as to which I express no opinion), there are other more appropriate remedies available to those whose personal rights might have been affected by these ill-considered allegations. Moreover, while I consider that the current proceedings were misdirected, I am not persuaded that they were vexatious in the sense exemplified in the cases of *In re Alluvial Creek, Ltd.* 1929 CPD 532 and *Delfante and another v Delta Electrical Industries Ltd and another* 1992 (2) SA 221 (C) on which the respondent's counsel also relied to support their request for a punitive costs order.

34] In the result the application is dismissed with costs, including the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

JUDGMENT : The Honourable Justice A.G. Binns-Ward

FOR THE APPLICANT : Adv. G. WOODLAND SC

Adv. D. WELGEMOED

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INSTRUCTED BY : BOWMAN GILFILLAN ATTORNEYS

DATE OF HEARING : 21 FEBRUARY 2012

DATE OF JUDGMENT : 28 FEBRUARY 2012