IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 9178/2010

In the matter between:

HENDRIK DANIEL HEYNS N.O.	First Applicant
SALLY CHRICHTON VERSVELD N.O. (formally HEYNS)	Second Applicant
QUINTON DUDLEY HEYNS N.O.	Third Applicant
TARYN LISA HEYNS N.O	Fourth Applicant
TIMOTHY ELLIOT HEWAN N.O.	Fifth Applicant
and	
STARS AWAY INVESTMENTS 102 (PTY) LTD	Respondent
DALE FEASEY FAMILY TRUST	Intervening Party

JUDGMENT

SEEGOBIN J

[1] This is an application for the provisional winding-up of the respondent company in terms of s344(h) of the Companies Act No.61 of 1973 ("the Act"), on the basis that it is *just and equitable* to do so.

[2] The application was brought by the first to fifth applicants in their capacities as co-trustees of the Quintara Trust. An application was made by the Dale Feasey Family Trust for leave to intervene in this application and to oppose it. There was no opposition to this application which was granted at the commencement of the argument on 22 August 2011. The Dale Feasey Family Trust will hereafter be referred to either as the "*Feasey Trust*" or the "*Feasey Group*". The various individuals who seem to play a significant role in these proceedings will be referred to as follows: The first applicant as "*Heyns*", the fifth applicant as "*Hewan*", Tony Feasey as "*Feasey*", Geoffrey Clifford Little as "*Little*" and Karen Rudolf Willem Louw as "*Rudi Louw*". Mr *Harcourt SC* (together with Mr *van Rooyen*) appeared on behalf of the applicants while the Feasey Trust was represented by Mr *Hartzenberg SC*. I am indebted to both counsel for their comprehensive heads of argument and oral submissions made on 22 August 2011.

[3] Some background is necessary. The respondent was registered and incorporated by the Registrar of Companies on 7 April 2003 and at that stage was a shelf company. On 15 April 2005 a Shareholder's Agreement was concluded to acquire and develop some residential properties and some hectares of agricultural land at Lynnfield Park, Camperdown, KwaZulu-Natal, as an upmarket equestrian estate. The respondent acquired a number of properties listed in the Shareholders Agreement for approximately R12 million and presently owns the land having taken transfer of the properties. On 6 February 2006 Feasey was appointed Chief Executive Officer (CEO) of the residential development and Heyns was appointed CEO of the agricultural development.

[4] On 17 April 2005 the other shareholders of the respondent furnished the Quintara Trust with a suretyship in terms of which they bound themselves as sureties and co-principal debtors to the Quintara Trust for the due and punctual performance by the Feasey Group of their obligations for every claim, indebtedness, liability or other commitment to the Quintara Trust.

[5] At the time of the conclusion of the agreement it was clear to everyone concerned that this would be a long term project. The agreement recorded that the shareholders and the respondent were aware that land claims for the restitution of

the property had been lodged with the Land Claims Commission and published in the Government Gazette. They were also aware that the entire development was subject to and dependent upon a number of approvals, authorizations and consents being obtained. These included, *inter alia,* obtaining the consent of the Minister of Land Affairs for the release of the land from the provisions of the Sub-division of Agricultural Land Act No.70 of 1970; obtaining environmental authorization from the KwaZulu-Natal Department of Environment Affairs and Rural Development; and obtaining the necessary approval for the development from the Development Facilitation Tribunal in terms of the Development Facilitation Act or in terms of the Natal Planning Ordinance No. 27 of 1949.

FACTS THAT ARE COMMON CAUSE OR NOT DISPUTED

[6] The applicants as trustees of the Quintara Trust hold 51% of the shares in the respondent whilst the remaining 49% is owned by the other shareholders.

[7] It was envisaged in terms of the agreement that the respondent would secure bank finance and loan finance from third parties for purposes of the development.

[8] On 15 September 2008 the shareholders concluded an Addendum to the Shareholders Agreement in terms of which it was agreed that a bond for the total amount of R25 million would be registered over the properties in favour of the Quintara Trust as security for the company's indebtedness to that Trust. In terms of Clause 2.9 of the Addendum, a restriction was agreed on the amount which the Quintara Trust could require the respondent to pay for it. The respondent itself has not taken up any bank finance or loans from third parties. A covering mortgage bond in favour of the Standard Bank of South Africa Limited for an amount of R4.4 million was registered over the land owned by the respondent.

[9] As at 28 February 2009 the loan account of the Quintara Trust (funds advanced to purchase and finance the development) stood at R18 million and interest has been accruing at the rate of 1.67% per month since 28 February 2009. [It bears

mentioning that the other shareholders, including the Feasey Group, dispute this amount and contend that it is approximately R13 million].

[10] None of the authorizations and/or approvals: [see para. 5 *supra*] which are pre-requisites for the development to take place, have yet been finalized. None of the land claims have been resolved. These are set down for further hearing in November 2011. A pre-requisite to an application to the DFA Tribunal is the approval of an environmental assessment report by the Department of Agriculture, Environmental Affairs and Rural Development. [While this approval was only just given on 15 August 2011 as evident from a supplementary affidavit filed on behalf of the Feasey Trust on 16 August 2011, the approval is itself subject to a number of conditions itemized in the record of decision as well as to appeals in terms of sub-regulation 10(2) of the Environment Impact Assessment Regulations, 2010]. Approval by the DFA Tribunal has not yet been obtained as a hearing by that body is scheduled for 30 September 2011. The National Department of Agriculture has not provided consent for the release of agricultural land for the proposed development as it is concerned that this will lead to the creation of a new residential node.

[11] Feasey has resigned as director of the respondent and as CEO of the residential component of the development.

[12] At the Annual General Meeting of the respondent which took place on 29 June 2011, attorney Mr OD Hart, was appointed director of the respondent in place of Feasey.

THE APPLICANT' CASE FOR A WINDING-UP

[13] The applicants as the trustees of the majority shareholder viz the Quintara Trust, contend that it is "*just and equitable"* that the respondent be wound up on the following grounds:

> [13.1] Since the formation of the respondent, the South African property market collapsed in 2008 and there is no commercially realistic prospect of

the development succeeding. The applicants are of the opinion that the respondent should cut its losses and sell for the best price it can but, despite the Quintara Trust being the majority shareholder, it cannot achieve this because in terms of the old and new Companies Act, as the property is the main asset of the respondent, it's sale requires the approval of 75% of shareholders. With the deadlock that currently prevails between the two groups, it is unlikely that the Quintara Trust will be in a position to obtain the requisite support for such approval.

[13.2] The applicants aver that they have lost confidence and trust in the ability of the CEO, Feasey, which Feasey acknowledged by resigning and although *Hart* was appointed as an independent director for the respondent, the applicants contend that there is no adequate management of the respondent.

[13.3] The Feasey Group cannot justify the loan accounts they claim in the respondent and the auditors are unable to prepare audited financial statements for the years 2007, 2008 and 2009.

[13.4] The development has been substantially financed by the Quintara Trust and although the Trust has a Second Bond for R25 million, there is a serious risk that the security will not be adequate. The other shareholders who want to continue with the development do not share this risk.

[13.5] The Feasey Group who wish to continue with the development cannot afford to buy out the Quintara Trust or find a third party buyer.

[14] The applicants contend that it is highly unlikely that the respondent will be able to achieve the purpose for which it was formed. Six years later there is no certainty that all of the approvals, authorizations and consents referred to above will be obtained. Even if the *substratum* of the company has not disappeared in the sense that the land continues to exist, they contend that the commercial reality is that the prospects of a successful development *at a profit* are remote.

[15] The applicants are concerned about the finances of the respondent. They aver in this regard that during the financial years 2007, 2008 and 2009, Feasey (as CEO of the residential component) presented the respondent with a demand to be credited with R2.7 million to his loan account for expenses which could not be vouched. During the same period Feasey incurred expenditure purportedly on behalf of the company which has been funded by the Quintara Trust and cannot now account for it to the auditors. The auditors themselves are unable to prepare audit reports for the financial years 2007, 2008 and 2009 (let alone a qualified audit report) because they were not furnished with the necessary financial information and vouchers. Additionally, the auditors are owed the sum of R217 578,64 and there is now an impasse as to whether they should be paid or whether new auditors should be appointed. As far as the applicants are concerned, they have confidence in the present auditors and will not agree to a substitution of auditors which requires a special resolution with the support of 75% of shareholders.

[16] The applicants aver that they have lost all confidence and trust in Feasey and this in turn has led to a loss of confidence and breakdown of trust between the applicants as trustees of the Quintara Trust on the one hand and other shareholders, including the Feasey Group, on the other.

[17] The applicants contend that the Quintara Trust has advanced enough money and in its opinion has "*burnt its fingers*" and will not advance any more finance. In any event, it seems that commercial banks will not advance finance unless there are pre-sales of not less than 50% of the sites. This is compounded by the reality that commercial banks are unlikely to even look at financing a development where the development company cannot even produce audited balance sheets.

[18] According to the applicants, even if they as the majority shareholders, wanted to dispose of the main asset of the company, they would require a special resolution i.e. 75% of shareholders support. This would not be achieved as the Feasey Group which holds 49% of the shares would oppose such a move, hence the deadlock between the parties.

[19] The applicants contend that the existence of a deadlock and breakdown of confidence due to Feasey's financial mismanagement, was acknowledged by the Feasey Group when Feasey proposed that he be mandated to find a buyer for the shares of the Quintara Trust, which came to nothing. The applicants aver that the Feasey Group does not have the funds to purchase the shares and loan account of the Quintara Trust. Despite the efforts of the parties, there are no buyers who wish to acquire the shares of the Quintara Trust.

THE INTERVENOR'S CASE RESISTING A WINDING-UP

[20] The Feasey Group has resisted the application on a number of grounds. The full extent of the opposition is set out in the founding affidavit put up in support of the application to intervene. For the purposes of this judgment, what follows is a summary of the defenses raised.

[21] In the main they contend that the applicants have failed to make out a case that it is *just and equitable* to wind-up the respondent. In particular they aver that the applicants have failed to establish that the *substratum* (purpose) of the company has disappeared. They assert that the proposed development of the land, physically, legally and in every other way remains possible. They maintain that the alleged *deadlock* between the shareholders (and directors) of the respondent *per se,* is not sufficient justification for the winding of the company. According to them the probabilities indicate that such deadlock has been exploited and unjustifiably perpetuated by Heyns. All reasonable efforts to address the deadlock have met with a negative and intractable response.

[22] With regard to the absence of audited financial statements, the Feasey Group aver that the position is the following: First, responsibility for the preparation of accounting records and annual financial statements is a collective responsibility resting on all the directors of the company. According to them Feasey's wife would, on a regular monthly basis, prepare a schedule of expenses on the property to which there would be attached copies of the relevant vouchers and invoices. She would then provide same to Rudi Louw (a shareholder of the company), who was the

bookkeeper. Rudi Louw would verify same and would send it to the company's auditors. Little also liaised with the company's auditors, and more recently Hewan as well. It was contended that the auditors themselves and in particular a Ms Lynda Muella performed basic account work and functions on behalf of the company, including the preparation of VAT returns. The auditors, RMS Betty and Dickson were, as evident from their letters dated 20 May 2010, addressed to the company's directors, prepared to finalize audited financial statements for the company, on the basis of certain undertakings and assurances to be given by the directors. The Feasey Group avers that such efforts were thwarted by Heyns. According to them the latest set of queries raised by the auditors which affect the 2006 annual financial statements which were audited by KPMG, were duly approved by Heyns and Feasey and other matters which must have been addressed previously, more especially by 20 May 2010. They contend that the reluctance of the auditor, Mr Jason Howitz, to furnish the applicants with a confirmatory affidavit can only be explained on the basis that he does not support Heyn's version. They accordingly submit that it suits Heyns and the Quintara Trust to perpetuate the dispute with regard to the absence of audited financial statements for the company and the dispute over shareholders loan accounts and that all reasonable efforts to overcome same would be resisted. Such conduct, so they submit, is oppressive.

[23] It was submitted on behalf of the Feasey Group that the parties have contractually bound themselves to having any serious deadlock as defined in Clause 32 of the Shareholders Agreement to be determined by an expert. It was submitted that the disputes of the kind that exist between the parties herein are suitable for resolution in terms of Clause 32. They contend that while these disputes have been extensively discussed and debated among members as is *inter alia* evident from the minutes of directors' and shareholders' meetings, it does not suit Heyns and accordingly the Quintara Trust's agenda, to invoke the provisions of Clause 32.

[24] As far as the applicants concerns raised with regard to the approvals, authorizations and consents referred to above, the Feasey Group maintain that these formalities are all on track to be achieved. They accept however that there have been huge delays in this regard as the processes are involved and cumbersome.

[25] Finally, it was submitted that the applicants have not discharged the *onus* of showing, as they set out to do, that the deadlock which has resulted, has come about as a result of some improper conduct on the part of Feasey. They contend that in any event, justice and equity dictate strongly against the winding-up of the company for the following reasons: First, liquidation will result in the forced sale of the property. The proceeds from such sale will be less than what ought to be realized for the properly in the normal course. Second, winding-up introduces a further significant cost component which otherwise can be avoided. Third, the only shareholder who has any form of security in the winding-up is the Quintara Trust. Other shareholders will therefore be unduly prejudiced should a liquidation ensue.

ONUS

[26] It is well established that an applicant for a provisional order of liquidation need only make out a *prima facie* case. The determination of the question as to whether the evidence adduced by the party bearing the *onus* constitutes a *prima facie* case is aptly set out by Corbett JA *in Kalil v Decotex (Pty) Ltd* [1] as follows:

> "Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the *onus* lies, having to establish a *prima facie* case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the court should decide whether or not to grant an order without reference to respondents rebutting evidence."

[1] 1988(1) SA 943 (A) at 976 H-I

DISPUTES OF FACT

[27] There is no doubt that there are a considerable number of facts in dispute on the affidavits and many of these disputes relate to material points in issue between the parties. Mr *Harcourt* was fully alive to this but urged that the disputes of fact need not be resolved because their very existence justifies a provisional winding-up order. In addition he submitted that most of the disputes on the papers are not disputes of act but disputes of opinion as to the viability of the development of the property which the respondent purchased and which development was the main purpose for which the respondent was established.

[28] Mr *Hartzenberg* on the other hand submitted that the disputes in this matter constitute material and fundamental disputes of fact which cannot be resolved on the papers. He accordingly urged, at the commencement of the argument on 22 August 2011, that the matter be referred for the hearing of oral evidence on certain defined issues contained in a draft order which was handed up. The defined issues contained in the draft order are the following:

> "(1) Whether the *substratum* (purpose) of the company has disappeared;
>
> (2) The competence or lack of competence of Feasey, the CEO of the residential development;
>
> (3) What the reasons are for the delay in the company securing development approval for the land which it owns;
>
> (4) The reasons for the company's auditors not preparing audited annual financial statements for the company for the years 2007 to 2009;
>
> (5) What legitimate loan account claims of the Quintara Trust and the Dale Feasey Family Trust, in the respondent are.
>
> (6) Whether the applicants are using the winding-up procedure as a means of oppression *vis-à-vis* the other shareholders of the company."

Mr *Hartzenberg's* approach in this regard is in line with a number of cases which hold that an application to refer a matter to evidence should be made at the outset and not after argument on the merits[2]. Commenting on this approach Corbett JA in *Kalil v Decotex (Pty) Ltd and Another, supra,* at page 981, said the following:

> "This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the *Hymie Tucker* case *supra* at 179 D:
>
> > 'One can conceive of cases on the other hand, exceptional perhaps, … when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope'."

[29] The proper approach to be adopted in determining whether an application for a provisional order of winding-up should be referred to oral evidence is that set out by Corbett JA in *Kalil v Decotex (Pty) Ltd, supra,* at page 979 B-I where the learned Judge said the following:

> "Where on the affidavits there is a *prima facie* case (i.e a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted and, save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of *viva voce* evidence. This does no lasting injustice to the respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues. As it was put in the *Wackrill* case *supra* at 285H-286A:
>
> > 'Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of

[2] See: Di Meo v Capri Resturant 1961(4) SA 614 (N) at 615H-616A; De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980(2) SA191 (T) at 204C-206D; Spie Batingnolles Societe Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriele Korporasie Bpk en Andere 1980 (2) SA441 (NC) at 448E-G; Erasmus v Pentamed Investments (Pty) Ltd (supra at 180H); Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd 1981(4) SA 175 (N) at 179B-E; cf Klep Valves (Pty) v Saunders Valve Co Ltd 1987(2) SA 1 (A) at 24I-25D

> *viva voce* evidence, where that may be necessary, to resolve material disputes on the affidavits. That also appears to be the standard of proof required for a final sequestration order in terms of s 12 of the Insolvency Act 24 of 1936, according to which the Court must be "satisfied" that the petitioning creditor has established the elements of his case.'

Where, on the other hand, the affidavits in an opposed application for a provisional order of winding-up do not reveal a balance of probabilities in favour of the applicant, then clearly no *prima facie* case is established and a provisional order cannot at that stage be granted. The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. The alternative, viz refusal of the provisional order of winding-up, represents a final decision against the applicant and, if such a decision is always made purely on the affidavits, injustice may be done to the applicant. (Cf the general reluctance of the Court in motion proceedings to decide finally genuine and fundamental disputes of fact purely on the basis of probabilities disclosed in contradictory affidavits: see *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 294D-295A, 299H-300A.) Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

JUST AND EQUITABLE PRINCIPLE

[30] It is convenient at this stage to decide, in the context of the present case, how the courts have interpreted the "*just and equitable*" principle. The principles of winding-up a company on the grounds that it is just and equitable can be summarized as follows:

(a) The words "*just and equitable*" are not to be regarded as being *eiusdem generis* with the situations contemplated in the preceding sub-sections of section 344[3].Rather the words confer a discretionary power of the widest character on the court[4].

(b) The sub-section is a recognition that a company like other entities, commercial or non-commercial may become dysfunctional and that, being artificial persons, when that happens their existence should be brought to an end[5].

(c) In the nature of things the facts giving rise to such circumstances in different cases fall into a number of similar broad categories but those categories do not constitute a *numerus clausus.* [see: Apco Africa (Pty) Ltd & Ano, *supra*.]

(d) As a generalization, the only limitations in the exercise of the discretion is where:

(i) A minority of shareholders seek relief from majority shareholders where they are not entitled to relief from minority oppression and there has not been a lack of probity on the part of the majority shareholders, in other words, where a minority seeks to overturn a commercial democracy[6].

[There are, however, borderline cases where a majority has taken an opportunistic and unfair advantage of the minority.][7]

---

[3] Re Yenidje Tobacco Co. [1916] 2 Ch 426; [1916-17] All SA ER Rep. 1050 (CA); Emphy v Pacer Properties (Pty) Ltd 1979(3) SA 363 (D) at 565; Rand Aiv (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985(2) SA 345 (W)

[4] See: Sweed v Finbain 1967(3) SA 131 (T) at 136; Erasmus v Pentramed Investments (Pty) Ltd 1982(1) SA 178 (W) at 181

[5] See: Apco Africa (Pty) Ltd & Ano v Apco Worldwide Inc. 2008(5) SA 65 SCA

[6] See: Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972(1) SA 464 (D)

[7] See: Tjospomie Boerdery Bpk v Drakensberg Botteliers (Pty) Ltd 1989(4) SA 31 (T)

(ii) The cause of the corporate problem is the wrongful conduct of the applicant himself[8].

(e) This ground also postulates, not facts, but a broad conclusion of law, justice and equity as a ground for winding-up. The power is to be exercised judicially with due regard to justice and equity of the competing interests of all concerned.

[31] The five broad categories that have evolved through the cases are conveniently summarized by Coetzee J in *Randair (Pty) Ltd v Ray Bester Investments (Pty) Ltd, supra* at page 350, as being the following:

> "The type of case in which it would apply is very adequately described by Pennington in Company Law 4th ed at 691 et seq. The learned author points out that this is an independent and separate ground for a winding-up order and that it is no longer, as it used to be, necessary that the circumstances should be analogous to those which justify an order on one or more of the specific grounds which precede this one; that consequently new kinds of cases may be brought under this head by judicial interpretation, but the cases which have so far been decided, the author points out, in England, and that is also the position in South Africa, have fallen into only five broad categories. It should be emphasized that these categories may be extended by the Courts in the future, but more about that later. Only a very broad description of these categories is called for. They are the following:
>
> 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'être*, 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 …

[8] See: Emphy's case, supra, at 467

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 the 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.

Now, whilst it is true that these categories certainly do not constitute any kind of *numerous clausus*, leaving it open to the Courts to devise other categories in future, it is nevertheless useful and instructive to list them in this fashion so as to illustrate the kind of thing which can be complained of under this heading."

[32] In *Emphy and Another v Pacer Properties (Pty) Ltd*, *supra*, Leon J at page 366 said the following:

"The cases also show that the just and equitable clause must not be limited to cases where the *substratum* of the company has disappeared or where there has been a complete deadlock. Where, as here, 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 clause. Thus in **Marshall v Marshall (Pty) Ltd and Others 1954(3) SA**

571 (N) Broome JP followed **Lawrence v Lawrich Motors (Pty) Ltd 1948(2) SA 1029 (W)** and applied what was said by Lindley on **Partnership 11th ed at 691**:

'Keeping erroneous accounts and not entering receipts … continued quarrelling, and 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 … 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.'

EVALUATION

[33] The present case seems to fall into more than one of the categories referred to above and such facts also overlap the different categories. This being the case, I find myself in agreement with the submission by Mr *Harcourt* that the discretion conferred on the court should be exercised viewing the facts: cumulatively rather than attempting to assess whether the facts satisfy one or other of the different categories.

[34] A reading of the papers in this matter leaves one in no doubt that much has changed since the conclusion of the Shareholders Agreement in April 2005. What started out as a rather ambitious project to establish an up-market equestrian estate has now degenerated into a sorry tale of acrimony, distrust, lack of confidence and extreme disappointment. The shareholders are split into two camps – the trustees of the Quintara Trust on the one hand and the other shareholders which include the Feasey Group on the other. The applicants are of the opinion that since the collapse of the South African property market in 2008, the proposed development has become a financial failure and the company should cut its losses and sell for the best possible value because the holding costs are increasing incrementally. On the other hand the Feasey Group are still optimistic that the development will be approved by the DFA Tribunal and the development will eventually succeed.

[35] The reality, however, is that six (6) years down the line not a single approval/authorization/consent which are prerequisites for the development to commence, have been finalized. While the Feasey Group argues that much time and effort have been spent in trying to obtain these approvals, there is no guarantee that these will be in place anytime soon. In the meantime the Quintara Trust has continued to provide the finance which runs into millions of rands. Except for acquiring the land and the sale of some residential sites, the Quintara Trust itself has nothing else to show for the huge investment it has made into the development. One thing is certain and that is that the Quintara Trust will no longer fund the development. In these circumstances, it seems to me that if the *substratum* of this company has not already disappeared because the land continues to exist, the unfortunate commercial reality is that the prospects of a successful development at a profit are becoming remote as the days pass.

[36] Parties who are prepared to engage in long term investments must undoubtedly appreciate and accept the risks that go with it. No investment can be said to be completely risk free. However, having the ability to stand together to deal with whatever risks that arise in the hope of making a profit should be paramount. This is so in the present case. This case is replete with allegations and counter-allegations of financial mismanagement, lack of confidence and trust by one group of shareholders against the other. This state of affairs has resulted in a deadlock and a complete breakdown of the relationships between the two groups. This is much like the situation described by Ponnan JA in *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc. supra,* at page 628, para [28] where the learned Judge said the following:

> "[28] The true factual position, however, that may have arisen, is that there is a deadlock and a complete breakdown in the relationship which makes the company unable to function in its current configuration. If there were 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 reasons 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 …" [my emphasis]

[37] It is plain, in my view, that a relationship of trust, integrity and confidence between shareholders is integral to the success of the business of the company as well as the continuation of that relationship. Failure in this regard seriously jeopardizes and puts at risk any prospect of a successful development.

[38] It is not clear on the affidavits (and nothing emerged in argument) on how the company would be able to convince a financial institution to lend it money in the absence of properly audited financial statements. Whatever explanations that the Feasey Group may wish to advance for the failure of the auditors to finalize the financial statements for 2007, 2008 and 2009, the factual position is that these statements remain incomplete. In my view, it is highly improbable that the company would be able to secure finance either from a financial institution or a third party without properly audited financial statements.

[39] Additionally, I consider that the resignation of Feasey as CEO of the residential component does not bode well for the company. This single act, in my view, sends out a message to people on the outside that there is something amiss in the affairs of the company.

[40] Inasmuch as the Feasey Group may wish to assert that Feasey resigned "*in order to defuse the conflict between him and Heyns",* the fact remains that Feasey's resignation amounts to an acknowledgement on his part and the Feasey Group itself of the existence of a deadlock and breakdown of confidence. Continuing conflicts, animosity and constant bickering amongst shareholders signifies, in my view, the end of what once was a healthy relationship working for the common benefit of everyone concerned.

[41] Given the deep-seated acrimony and conflict which currently prevails between the two groups, it serves no purpose, in my view, to refer the various disputes which have arisen for the hearing of oral evidence. The hearing of oral evidence in these circumstances will only serve to further entrench the conflict and polarise the

shareholders even more. It is clear from all the affidavits filed in this matter that the parties have reached a deadlock. However, it must be emphasized that generally a court is concerned with what is just and equitable, not with whether there is a deadlock *per se* or not. The existence of a deadlock is but one example of what might be regarded in a proper case as just and equitable but a court must always have regard to all the circumstances of the case. This was the approach of the court in K*anakia v Ritzshelf, supra,* and *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc. supra,* and which recently found approval by the SCA in *Smith v Mew*[9]*.*

[42] The inclusion of Clause 32 in the Shareholders Agreement means that the parties had envisaged the possibility of a deadlock and conflict in their future dealings with each and sought to regulate their relationships by stipulating a deadlock-breaking mechanism. That this mechanism was never resorted to is again testament to the fact that they are unable to agree on anything.

[43] The respondent company was formed for a specific purpose. Unfortunately, however, the internal disputes, mutual disillusionment, distrust and lack of confidence and the consequent breakdown of the relationship between the shareholders have paralyzed it. Perhaps the time has come to put an end to this misery. Additionally, I consider that parties should have the freedom to contract with whoever they want to and if relations break down due to a lack of confidence and trust they should be afforded the freedom and choice to end such a relationship.

[44] I accordingly conclude that the applicants have established a *prima facie* case (based on the probabilities) for the provisional winding-up of the respondent.

ORDER

[45] For all the reasons set out herein, I grant the following order:

1. The respondent is provisionally wound-up in the hands of the Master of the High Court, Pietermaritzburg.

[9] 2010(6) SA 537 SCA

2. A rule *nisi* is hereby issued calling upon the respondent and all other interested parties to show cause before this Honourable Court on the 14th day of October 2011 at 09h30 or so soon thereafter as the matter may be heard why a final winding-up order should not be made.

3. A copy of the provisional winding-up order shall:

   (a) be published once in the Government Gazette and The Witness on the 30th day of September 2011.

   (b) be served in compliance with the provisions of section 346A of the Companies Act, 1973, on or before the 30th day of September 2011.

4. The costs of this application will be costs in the winding-up of the respondent.

JUDGMENT RESERVED **22/08/2011**

JUDGMENT HANDED DOWN **14/09/2011**

COUNSEL FOR APPLICANTS **A W M HARC OURT SC**

R M VAN ROOYEN

(Instructed by Login Attorneys)

COUNSEL FOR INTERVENOR **C J HATZENBERG SC**

(Instructed by Tatham Wilkes Inc)