Budge NO and Others v Midnight Storm Investments 256 (Pty) Ltd and Another
(Budge NO v Wavelengths 1147 and Another- similar case) (15 November 2011)
The applicants sought the winding-up of the first respondent company, Midnight Storm.

The 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 Midnight Storm was concerned. This is clear from the provisions of item 9 in Schedule 5 of the new Companies Act. The applicant indicated that it nevertheless sought the winding-up of Midnight Storm pursuant to the terms of s 81(1)(d)(iii) of the new Companies Act. The applicant relied *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 it was 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.

The applicant's case was limited 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 was a justifiable lack of confidence in the conduct and management of the company's affairs. The respondent 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 applicant relied on in seeking the winding-up of Midnight Storm. These conflicting contentions called for an interpretation of s 81(1)(d) of the new Companies Act.

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 not be interpreted so as to only include matters *ejusdem generis* the other grounds enumerated in s 81.

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).

The applicant sought the final winding-up of Midnight Storm and the *onus* accordingly rested upon it to satisfy the court, on a balance of probabilities, that it was just and equitable to finally liquidate the company.

Applying this test to the facts it emerged that a pre-existing partnership between the parties continued to underlie the company structure. They utilised various 'special purpose corporate vehicles' through which immovable properties were acquired and developed in the carrying out of their partnership business. .

The parties concluded a written 'dissolution of partnership' agreement in terms whereof they agreed to dissolve their business association. Their relationship was acrimonious and there was clearly a complete breakdown in the relationship of trust that had once existed between them. It was therefore found that regard being had it was just and equitable that Midnight Storm be finally wound up.