THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 238/08

In the matter between:

ANTHONY ROBERT JOHN CUNINGHAME	**FIRST APPELLANT**
WIMBLEDON LODGE (PTY) LTD	**SECOND APPELLANT**
and	
FIRST READY DEVELOPMENT 249 (ASSOCIATION INCORPORATED UNDER SECTION 21)	**RESPONDENT**

Neutral citation: *Cuninghame v First Ready Development 249* (238/08) [2009] ZASCA 120 (28 September 2009)

CORAM:	**Brand, Maya, Mhlantla JJA, Hurt *et* Tshiqi AJJA**
HEARD:	**21 August 2009**
DELIVERED:	**28 September 2009**

SUMMARY: Section 21 of the Companies Act 61 of 1973 – association with main object to conduct commercial hotel – not an 'association not for gain' as contemplated by section – object non-compliant with provisions of s 21(1)(b) – business operation in accordance with object thus unlawful in itself – winding-up of association therefore found to be just and equitable in terms of s 344(h) of the Act.

ORDER

On appeal from: Cape High Court (Rose-Innes AJ sitting as court of first instance).

1. The appeal is upheld. The costs of the appeal, including the costs of two counsel, are to be costs in the liquidation of the respondent.
2. The order of the court a quo is set aside and replaced by the following:
   '(a) The respondent is placed under a final winding-up order.
   (b) The costs of the application, including the costs of two counsel, are to be costs in the liquidation of the respondent.'

JUDGMENT/S

BRAND JA (Maya, Mhlantla JJA *et* Hurt, Tshiqi AJJA concurring)

[1] What eventually turned out to be most prominent amongst the many issues that arose in this case, revolved around the interpretation of s 21 of the Companies Act 61 of 1973. As indicated by its name, the respondent, was incorporated as an association not for gain under that section. The first appellant is Mr Anthony Cuninghame. He is also the sole owner of second appellant, Wimbledon Lodge (Pty) Ltd. In September 2006 the appellants launched an urgent application for the provisional winding-up of the respondent in the Cape High Court. Despite the designation of the matter as 'urgent', it only came before Rose-Innes AJ in December 2007. The reason for the delay was that, in the meantime, numerous sets of affidavits were filed which, together with their annexures, ran into more than 2 300 pages. Since by then the matter had become fully ventilated, the appellants sought a final rather than a provisional winding-up order. That of course, meant that they had to establish their case on a balance of probabilities rather than on the

lower level of a *prima facie* basis, which is the degree of proof required for a provisional order (see eg *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 979A-E). In the event, Rose-Innes AJ found that the appellants had failed to satisfy the onus which they attracted and dismissed their application with costs. The appeal against that judgment, which has since been reported as *Cuninghame v First Ready Development 249 (Association incorporated in terms of s 21)* [2008] 4 All SA 88 (C), is with the leave of the court a quo.

[2] Originally the application was brought on the basis of both s 344(f) of the Companies Act – that the respondent was unable to pay its debts – and s 344(h) – that a winding-up order would be just and equitable. The s 344(f) ground was, however, not pursued, either in this court, nor in the court a quo. The reason is not difficult to find. The respondent denied that it was unable to pay its debts. This gave rise to factual disputes which could not possibly be resolved on the papers. Since the appellants did not seek an order referring any dispute of fact for the hearing of oral evidence it meant that, in accordance with the standard approach to motion proceedings, the matter had to be decided, essentially, on the respondent's version of the disputed facts. Other disputes that were of significance in the court a quo were no longer live issues on appeal. They emanated from the respondent's objection to the appellants' *locus standi*. These issues were decided in the appellants' favour (see paras 21-33 of the court a quo's judgment) and not pursued by the respondent on appeal.

[3] As has often been said about the only remaining winding-up ground persisted in by the appellants, namely, that of 'just and equitable' – it postulates not facts but a broad conclusion of law, justice and equity. The contentions upon which the appellants sought to justify that broad conclusion, will be better understood against the factual background that follows. It all started with what appears to have been a rather ambitious development around a harbour in Gordon's Bay. Part of the development was the Harbour's Edge Hotel, a conference hotel which was completed in 1997. The whole hotel – subsequently known as the Villa Via, Gordon's Bay – was then registered as a sectional title scheme in accordance with the Sectional Titles

Act 95 of 1986. The sectional title units essentially comprised of hotel rooms. Apart from these there were also the commercial areas which included the parking areas, conference rooms, restaurants and so forth.

[4] At the commencement of the sectional title scheme, agreements of sale were concluded between the developer, Casisles Property Investments CC and the individual purchasers of hotel room units. One of these purchasers was Wimbledon. It bought two units and thus became a member of the Harbour's Edge Body Corporate ('the HE Body Corporate'). The room units were not primarily intended for occupation by their purchasers. In the main, the units were bought for investment purposes while the rooms were destined to be rented out to guests as part of the hotel operation. Accordingly, the standard deed of sale of a room unit incorporated a further contract, referred to as a rental pool agreement. Parties to the rental pool agreement were the developer, ie Casisles, the individual purchaser and a management company, called Harbour's Edge Hotel (Pty) Ltd ('HEH'). The rental pool agreement envisaged that all the owners of units to be used as hotel rooms would participate in a rental pool. In terms of the agreement the purchaser agreed to let the hotel room linked to his or her sectional title unit to HEH who took responsibility for the administration and management of the rental pool. HEH also undertook to contract with a hotel operator to conduct the actual running of the hotel. As a return on his or her investment, the purchaser would receive part of the total revenue of the hotel. In order to facilitate these payments, the rental pool agreement provided that the total revenue received for hotel accommodation, net of operating expenditure, would be pooled and then apportioned among the unit owners by HEH. The apportionment would take place in accordance with an agreed formula involving every individual owner's predetermined 'income participation share', as stipulated in his or her agreement of sale.

[5] The developer, Casisles, was controlled by the Scharrighuisen family. So was the management company, HEH. At the outset, HEH contracted with a hotel operator, Villa Via Cape Town (Pty) Ltd, to conduct the hotel business. On 15 June 1999 a number of companies controlled by the Scharrighuisens,

including Casisles and HEH, were however placed under provisional liquidation, which orders were subsequently made final. In consequence, the effective control of the entire development, including the management and administration of the rental pool, passed on to the liquidators appointed for the various companies, while Villa Via continued to run the hotel.

[6] What happened in practice was that the management of the rental pool was taken over by a committee of the HE Body Corporate, on behalf of the liquidators of HEH. The committee included Cuninghame and an attorney, Mr Meyer de Waal. The proposition that the management function of the rental pool should be performed by an association incorporated under s 21 of the Companies Act, came from De Waal. In consequence the respondent was acquired as a 'shelf company' for that purpose. Initially, the members of the respondent were made up of members of the former management committee of the HE Body Corporate, all of whom were, of course, representatives of rental pool owners. So were the respondent's first directors. This is how Cuninghame himself became one of the first members and directors of the respondent. He remained a director until 14 August 2003 and was still a registered member at the commencement of the present proceedings in the court a quo.

[7] On 21 May 2001 a deed of assignment was entered into between HEH (in liquidation) – represented by its liquidators – and the respondent. In terms of the agreement, all the rights and obligations of HEH, including those arising from the rental pool agreements, were ceded and assigned to the respondent. Some time later, during about 2002, the respondent's relationship with the operating company, Villa Via, was terminated. Attempts to find an alternative hotel operator proved to be unsuccessful. In the result, the respondent assumed the dual functions of managing the rental pool and conducting the business of the hotel.

[8] The appelllants' case is that Casisles originally undertook to place the commercial areas, including the parking garage, the conference centre and the restaurants, under the control of the HE Body Corporate, as part of the

common property, for the benefit of the rental pool owners. As it happened, however, the Scharrighuisen family transferred these areas, in the form of commercial sectional title units, to corporate entities under their control. Subsequent to the liquidation of these entities, as part of the whole Scharrighuisen conglomerate, their liquidators sold the commercial units to a company, Meridian Bay Restaurant (Pty) Ltd ('Meridian Bay'). The appellants' contention that the commercial areas should form part of the common property led to litigation initiated by Cuninghame in the name of Wimbledon. The application for the appointment of a *curator ad litem* for the HE Body Corporate, as a preliminary step in that litigation, eventually came to this court where it was decided in favour of Wimbledon (see *Wimbledon Lodge (Pty) Ltd v Gore NO* [2003] 2 All SA 179 (SCA)). Despite the appellants' success in the preliminary skirmish, the dispute about the ownership of the commercial units has not as yet reached the stage of final determination. At present the commercial units therefore still belong to Meridian Bay.

[9] From the outset, the hotel was planned as a conference hotel. Because the commercial areas, including the conference centres, the wellness centre and the restaurants, did not form part of the common property they had to be rented from the owner of the sectional title units comprising these areas. Originally the owners of the commercial units were entities controlled by the Scharrighuisen family. These units now belong to Meridian Bay. The rental paid under the leases has always been treated as an operational expense. Not unexpectedly, this led to a conflict of interest between the rental pool owners of hotel rooms, on the one hand, and Meridian Bay on the other. This is so, because self-evidently every increase in the rental for the commercial areas brought about a decrease in the net accommodation revenue available for distribution amongst the rental pool owners.

[10] The conflict between the two groups was exacerbated when those with an interest in Meridian Bay were elected as members and directors of the respondent. More pertinently, the directors of Meridian Bay were Messrs Georgios Stavrou, Alexander Acavalos and Anthony de la Fontaine. During about 2002 and 2003 all three of them became members of the respondent.

On 13 April 2002 Stavrou was elected as a director of the respondent. Later on he was replaced by Acavalos. The other two directors of the respondent at the commencement of these proceedings were Messrs Craig Needham, who is the managing director, and Mr Bryan Logan. Although Needham and Logan have no direct interest in Meridian, they are accused by the appellants of aligning themselves with the Meridian interests. These allegations of an alliance in favour of Meridian were emphatically denied on behalf of the respondent.

[11] What remains a mystery on the papers is how the rental pool owners lost the control which they had over the respondent. The reason for the mystery lies in the respondent's articles of association. Because the respondent is, by virtue of s 21, a company limited by guarantee, it has no shareholders; only members. In terms of the respondent's articles, membership is controlled by its board of directors in the sense that the Board can both elect a member and refuse the admission of any person to membership. The directors, on the other hand, are elected by the members. It follows that once a particular interest group has come into power, it will be hard to break the circle of control. That, so the appellants contend, is what has now happened. In effect, they say, the Meridian Bay alliance had gained perpetual control over the respondent's affairs which includes both the management of the rental pool and the conduct of the hotel operation as a whole.

[12] Departing from their thesis that the control of the respondent had been hijacked by the Meridian Bay alliance, the appellants' contention was that the new controller had caused the respondent to deviate from its original object to the extent that the respondent had lost its whole *raison d'être*. Whereas the original object of the respondent was to administer the rental pool scheme for the benefit of the room owners, so the appellants averred, it had now been converted into the commercial operator of a hotel. What is more, so the appellants contended, the respondent is conducting the hotel business for the benefit of those of its members who have an interest in Meridian Bay and against the interest of the rental pool owners for whose benefit it originally

came into existence. In consequence, so the appellants concluded, the business of the respondent is conducted in contravention of both s 21(1)(b) and s 21(2)(a) of the Companies Act and is thus unlawful.

[13] A further complaint raised by the appellants in their founding papers relied on the alleged mismanagement of the respondent's affairs by its new controllers. The grounds for this complaint were essentially threefold. First, that the leases entered into on behalf of the respondent for the commercial areas were unnecessary and the rental paid to Meridian Bay, exorbitant. Secondly, that its new controllers involved the respondent in needless litigation, which caused the respondent to incur legal costs, essentially for their own benefit, that were both wasteful and excessive. Thirdly, that the controllers of the respondent had misappropriated funds which accrued to the rental pool and which ought to have been distributed to the hotel room owners. But for the mismanagement complained of, so the appellants contended, the rental pool owners would have made a substantial profit on their investment in hotel room units. In marked contrast to this, they said, their actual position was that they were suffering a loss in having to pay in on their levies due to the HE Body Corporate.

[14] As pointed out in the judgment by the court a quo (para 37) the courts, both in England and South Africa, have over the years evolved broad categories of circumstances in which they would grant a winding-up order on the just and equitable ground (see eg *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350A-I). Although these categories do not constitute a complete and closed list, they do serve the purpose of useful practical guidelines. In the court a quo and in this court, the appellants sought to rely on three of these categories, namely:

(a) illegality of the respondent's business objects;
(b) disappearance of the respondent's substratum; and
(c) misconduct in the management of its affairs.

In the event, the court a quo held against the appellant on all three grounds.

[15] In considering the correctness of that decision, I propose to deal first with the appellant's contention that the respondent's whole operation is unlawful in that it constitutes a contravention of s 21(1)(b) and s 21(2)(a) of the Companies Act. The relevant part of s 21 provides:

'21. Incorporation of associations not for gain.

(1) Any association –

(a) formed or to be formed for any lawful purpose;

(b) having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests;

(c) which intends to apply its profits (if any) or other income in promoting its said main object;

(d) which prohibits the payment of any dividends to its members; and

(e) . . .

may be incorporated as a company limited by guarantee.

(2) The memorandum of such association shall comply with the requirements of this Act and shall, in addition, contain the following provisions:

(a) The income and property of the association whencesoever derived shall be applied solely toward the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association or to its holding company or subsidiary: Provided that nothing herein contained shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof in return for any services actually rendered to the association.'

(b) . . .

[16] The central element of s 21(1)(b) turns on 'the main object' of the association which must, self-evidently, I think, be determined with reference to its memorandum of association. Reference to the respondent's memorandum of association reflects that, during its corporate existence, its main object underwent the following changes.

- As a shelf company its main object was described as 'housing development for the under-privileged'.
- After the respondent had been acquired by the HE Body Corporate to serve as manager of the rental pool, its main object was amended to read:

'To conduct its main business on behalf of the owners of the furnished hotel apartments, or on behalf of any scheme and/or rental pool to which the said owners may belong.'

- Its 'main business' was defined in turn as: 'to manage, operate, administer, let and market furnished hotel apartments on a non-profit basis.'
- Later on, when the respondent's functions were extended to include both the management of the rental pool and the operation of the hotel, its main object was again amended to read:

'To conduct its main business on behalf of the owners of the furnished hotel apartments, conference facilities and restaurant facilities, or on behalf of any scheme and/or rental pool to which the said owners may belong.'

- At the same time its 'main business' was amended as: 'to manage, operate, administer, let, market and lease furnished hotel apartments, conference and restaurant facilities'.

[17] As I see it, the main object of the respondent therefore changed from managing a rental pool on a non-profit basis to the management of the hotel business as a whole, which essentially reflects how the actual business of the respondent effectively changed over time. Relying on these changes, the appellants sought to make out the following case in their founding affidavit:

'Section 21(1)(b) of the Companies Act, provides that an association incorporated in terms of that section must have as its main object the promotion of religion, arts, sciences, education, charity, recreation or any other cultural or social activity or communal or group interests. It is clear from the section that such an association must be one not for gain and that its main object must be a charitable, benevolent or philanthropic one. An association whose main object is a purely commercial one or intended to achieve a purely commercial purpose and to make a profit is not in compliance with s 21(1)(b) of the Companies Act. The main object of [the respondent] referred to above is clearly one which is intended to achieve a purely commercial purpose, namely, the operation and administration of furnished hotel apartments and the management and operation of conference, wellness and restaurant facilities. This is not an object which is provided for in s 21(1)(b) of the Companies Act.'

[18] The respondent's answer to this contention, as formulated on its behalf in its opposing papers, was as follows:

'. . . Section 21(1)(b) of the Companies Act provides that an association incorporated in terms of that section must have as its main object the promotion of inter alia communal or group interests. Clearly the room owners fall into [that] category. . . . [F]urthemore . . . there is nothing in s 21 of the Companies Act prohibiting the company from making a profit. The only prohibition is that no profits can be distributed amongst the members of a s 21 company. Accordingly I deny that the main object and the main business of [the respondent] is not in accordance with the provisions of s 21(1)(b) . . .'

And:

'I reiterate that [the respondent] is entitled to make a profit and by so doing advance the interests of the room owners as a group. This falls within the contemplation of s 21(1)(b) of the Companies Act. . . . [The respondent] conducts a commercial hotel operation for the sole interests of the group of rental owners.'

[19] When the s 21(1)(b) issue was raised with the respondent's counsel at the hearing of the appeal, they essentially persisted in the answer thus formulated. With reference to this answer I agree that there is nothing in s 21 which prohibits an association not for gain from making a profit. On the contrary, s 21(1)(c) specifically provides that the association is obliged to apply its profits (if any) to promote its main object. For the rest, however, I cannot agree with the respondent's answer. If the expression 'group interests' in s 21(1)(b) is to be construed without any limitation, the preceding references in the section to religion, arts, sciences and so forth could hardly have any meaning. As I see it, an association of persons seeking to promote, eg religion, arts, sports and so forth would of necessity qualify as a group with a common interest. Conversely, it could probably be said of the shareholders and members of most – if not all – companies that they are a group with a common interest. With commercial companies that common interest will usually lie in the purpose of profit or gain. It is true that most companies, and particularly commercial companies, will not comply with the other requirements of s 21. But that is not the point. The point is that if the reference to 'group interest' is to be afforded the wide meaning contended for by the respondent it will for all intents and purposes render s 21(1)(b) nugatory. To

my way of thinking, the phrase to 'communal or group interests' must therefore be construed *eiusdem generis* with that which comes before it. This raises the question: can it be said that the preceding words share a genus or common denominator? I think they do. As I see it, they all refer, as the appellants suggested, to associations pursuing charitable, benevolent, cultural or social activities, as opposed to commercial enterprises. In order to comply with s 21(1)(b) the object of the association must therefore be a communal or group interest of the kind contemplated in the earlier part of the section and not a commercial enterprise.

[20] Furthermore, s 21(1)(b) must, in my view, be interpreted in the context of 'an association not for gain'. As correctly pointed out on behalf of the respondent, the expression is only used in the heading and not in any provision of s 21. Nonetheless, and even though headings and marginal notes are said not to be passed by the legislature, they are often used to determine the meaning of ambiguous or doubtful statutory expressions (see eg Cockram, *Interpretation of Statutes*, 3ed 63 et seq and the cases there cited). Even more significant in the present context, I think, is that there are other sections in the Companies Act (eg s 24 and s 49(3)) which refer to an entity incorporated under s 21 as 'an association not for gain'.

[21] The concept 'not for gain' is not defined in the Act. Nor has it, as far as I know, been judicially considered in the context of s 21. But it has been considered with reference to other sections, as appears from the following statement by Nienaber JA in *Mitchell's Plain Town Centre Merchants Association v McCleod* 1996 (4) SA 159 (A) at 169 *in fine* -170:

'"Gain" in the context in which it appears in ss 30(1) and 31 means a commercial or material benefit or advantage . . . in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, . . . or sporting organisation, for instance, seeks to achieve. The sections [ie 30(1) and 31] are concerned with commercial enterprises and "gain" must be given a corresponding meaning.'

[22] In *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199, Davis J (with Centlivres J concurring) had to determine the meaning of 'a business for the acquisition of gain' in the context of the

predecessor to s 31 in the 1926 Companies Act. In the course of his judgment he referred (at 202) with approval to the following statement by Jessel MR in *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co* (1987) 10 Ch App 542 at 545:

'Now, if you come to the meaning of the word "gain", it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. . . . I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain something . . . It seems to me that the Act broadly means this: all commercial undertakings shall be registered. It distinguishes . . . between commercial undertakings on the one hand . . . and what we may call literary or charitable associations on the other hand, in which persons associate, not with a view to obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity or something of that kind.'

[23] It is true, as pointed out by the respondent, that in ss 30 and 31 the concept of a company having as 'its object the acquisition of gain', is used in conjunction with 'carrying on business' and that the mischief which s 21 seeks to address is different from those at which ss 30 and 31 are aimed. But in construing ss 30 and 31 the expression 'carrying on business' has been given such a wide meaning – even wider than 'trade' – (see eg *South African Flour Millers Mutual Association v Rutowitz Flour Mills Ltd (supra)* at 204; *Mitchell's Plain Town Centre Merchants Association v McCleod (supra)* at 167E-F) that it takes the matter no further. And the difference in the mischief at which the respective sections are aimed does not provide an answer to what I consider to be the vital question in the present context. It is this: why must the legislature be understood to have ascribed a different meaning to exactly the same expression within the compass of a few sections in the same Act? Without more, I do not believe there is a rational answer to this question.

[24] A further signpost to the understanding of s 21(1)(b) in the same direction comes into sight, I think, when one investigates the mischief at which the section was aimed. According to the main report of the Commission of Enquiry into the Companies Act (R.P. 45/1970 of 15 April 1970) – which led,

inter alia, to the enactment of s 21 – the objective, as stated in para 25.02 (c) of the report, was to exclude from the ambit of s 21, companies which 'are engaged in ordinary business enterprise both commercial and industrial' and which 'are being carried on in competition with ordinary tax payers'. Though these companies were not allowed to pay dividends, so the report stated, 'it has been observed that in some cases very substantial salaries [were] being paid'. On the other hand, so the commission found, (in para 25.04(e)) 'the case of associations intending to carry on business for gain which yet wish to comply with the conditions of s 21 is . . . so limited that it may be ignored.' The reason for the reference to 'communal or group interests', seems to stem from the further consideration by the Commission (in para 25.02(d)) that the additional requirement in s 21 of the 1926 Companies Act, to the effect that the charitable or social purposes pursued by the association, should also be mainly 'in the interest of the public'; had been found to be unduly restrictive. The latter requirement, so the Commission found, had the unintended consequence of excluding, for example, local sports organisations from the ambit of s 21. This also appears from the finding in para 20.6 that the old s 21 was 'too restrictive and that the Act should provide a company form suitable for all charitable, religious, cultural and other such like associations without the stringent condition of having to be in the general public interest'.

[25] On my understanding of s 21(1)(b) it therefore excludes purely commercial enterprises, which means that the respondent's commercial hotel business falls outside the ambit of what the object of a s 21 association may lawfully be. What is more, even if s 21(1)(b) should be interpreted – as I see it, incorrectly – so as to include the pursuit of any group interests as a legitimate object, it would at least require a group with common interests. It stands to reason that if the members of the 'group' identified in the memorandum of the particular association were to have conflicting interests, the reference to 'group interests' would constitute a contradiction in terms. This, I believe, is exactly the position we find with reference to the memorandum of the respondent.

[26] In accordance with the latest amendment to the respondent's main object in its memorandum of association, it refers to the interests of both the rental pool owners and the owners of the commercial areas. The respondent's argument is that these two groups have a common interest in that they both want the conference hotel to be conducted as a profitable business. Though obviously correct as far as it goes, the statement reflects a superficial analysis of the real situation. The real situation is that there is an inherent conflict between the rental pool owners and Meridian Bay as the owner of the commercial units. As I have said earlier, the conflict seems to be unavoidable. The rental paid for the commercial units is deducted from the total hotel revenue as part of operational expenses. The balance is then distributed among the room owners. Logic dictates that every increase in the rental for the commercial areas would bring about a decrease in the net amount available for distribution amongst the rental pool owners. There is a dispute on the papers as to whether the rental paid to Meridian Bay is fair. The appellants contend that the rental that the new controllers of the respondent had agreed to pay Meridian Bay is exorbitant. The respondent, on the other hand, produced expert evidence that the rental is market related and reasonable. This dispute cannot be resolved without a referral to evidence. Nonetheless, the conflict of interest between the two groups cannot be gainsaid. When challenged to identify the group interest that the respondent seeks to promote, Needham, who deposed to the answering papers on behalf of the respondent, unequivocally stated that the respondent 'conducts a commercial hotel operation for the sole interests of the group of rental owners'. That, of course, is in direct conflict with the respondent's object as defined in its memorandum, which refers to the owners of the commercial areas as well. What I find significant is that even Needham did not see his way open to describe the group identified in the respondent's memorandum as having a homogenous interest. That is why I say that even if s 21(1)(b) must be understood to include the promotion of any group interests, the respondent would still not comply with that requirement. Both its main object and its business would still be in contravention of s 21(1)(b) and therefore unlawful.

[27] What we also know is that it is this very conflict of interest between the two groups referred to in the respondent's main object which lies at the heart of these proceedings. It is because of this conflict that the liquidation application was brought and supported, in the main, by rental pool owners and opposed, in the main, by those who seek to protect the interests of Meridian Bay. If the respondent had been a company with shareholders, the rental pool owners, whose interests the respondent originally set out to pursue and who constitute the majority in numbers, would probably have changed the membership of the board. But because the respondent's membership, as a s 21 association, is controlled by its directors who are in turn elected by the members, the perception prevails that the respondent's business is conducted in the interest of Meridian Bay and in conflict with the interests of the rental pool owners.

[28] During argument all these indicators to the understanding of s 21(1)(b) were raised with counsel for the respondent. At the time, they did not indicate that they required any further opportunity to consider their response. Three days after the hearing, the Cape Town attorney for the respondent, quite unexpectedly in the circumstances, wrote a rather indignant letter to the registrar of this court in which he contended, inter alia, that his client was not given a fair hearing. But, despite the indignant tone of the letter, the attorney essentially sought leave to file what he referred to as 'a note on the point of law' raised in argument. That leave was duly granted. In consequence, the respondent's counsel filed a 'note' extending over 58 pages. To that 'note' I now turn.

[29] A theme that runs through the note and the letters by the respondent's attorney is that the appellants did not rely on the respondent's non-compliance with s 21(1)(b) and that this was an issue raised *mero motu* by this court during argument without prior notice to the parties. As my earlier quotation from the appellants' founding affidavit, however, shows, the respondent's non-compliance with s 21(1)(b) was squarely raised by the appellants. The respondent's further contention that the issue was thereafter conceded by the appellant appears to be factually incorrect. On the contrary, it was expressly raised, albeit rather

obliquely and under a different rubric, in the appellants' heads of argument on appeal. But be that as it may, the respondent was granted ample opportunity to deal with the issue and it did so extensively. What I find unfortunate is the accusatory tone by the respondent's legal representatives, who should know better. It clearly stems from a misconception of what a hearing in this court entails. This is explained with admirable clarity by Harms JA in *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7 when he said:

'The function of oral argument, especially in a Court of appeal, is supplementary to the written argument. If a party chooses not to raise an obvious issue in his heads, he does so at his peril. The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the Court will not be able to function.'

[30] What is more, even if it is accepted for the sake of argument that the appellants had indeed conceded a point of law in their favour, the respondent's object and its business is, on my interpretation of s 21(1)(b), unlawful. In this light any suggestion that this court should allow an unlawful business to continue because the other side had made a concession of law which is found to be incorrect, would, in my view, be untenable. This is an *a fortiori* situation of the one described as follows by Ngcobo J in *Cusa v Tao Ying Metal Industries* 2009 (2) SA 204 (CC), para 68:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'

[31] After noting the respondent's protestations of alleged unfair treatment, the note proceeds to record the debate about the interpretation of s 21(1)(b) as it developed during argument at the hearing of the appeal. The recordal reflects a clear understanding by the respondent's legal representatives of the difficulties raised by members of this court with regard to the interpretation the respondent sought to attribute to s 21(1)(b). By and large, these difficulties are

echoed by what I have said earlier in this judgment. The note then goes on to deal with the difficulties. Insofar as I consider the answers given in the note to be pertinent, they have been incorporated in my earlier deliberations on the interpretation of s 21(1)(b). Apart from these, the note also contained a number of other arguments which are, in my view, of no consequence. After due consideration, I decided not to record these rather lengthy expostulations which do not take the matter any further. As I see it, it will serve no purpose other than to extend the length of this judgment. Suffice it, in my view, to illustrate the point by three examples.

[32] First, there is the argument that since the amendment of s 10 of the Income Tax Act 58 of 1962 in 2000, an association incorporated under s 21 no longer enjoys an automatic income tax advantage. Though factually correct, I do not believe that this argument is of any consequence in the present context. The proposition that a reduction of the benefits derived from incorporation under s 21 by the Income Tax Act must somehow be taken to have resulted in the automatic diminution of the requirements for such incorporation in terms of the Companies Act, is in my view, simply unsustainable.

[33] Secondly, there is the argument that we must take judicial notice of the fact that there are numerous associations with purely commercial objects that were incorporated under s 21 which will obviously be affected by the interpretation of s 21(1)(b) in that it will render their objects unlawful. Apart from the fact that I can hardly take judicial notice of something that I simply do not know, this is another argument that, in my view, takes the matter no further. We can hardly avoid what we consider to be the proper meaning of a statutory provision because it will cause considerable inconvenience to a substantial number of people. If that is true, it is something to be taken up with the legislature.

[34] Thirdly there is the argument that the new Companies Act 71 of 2008 – which has been enacted but is not yet operative – would seem to allow for the equivalent of the present s 21 association to become involved in purely

commercial activities. But that, if anything, would seem to go against the respondent's construction of the present s 21. It is a trite principle of statutory interpretation that a change in wording must usually be understood to indicate a different intent on the part of the legislature.

[35] In the result there is nothing in the note which causes me to change my view of what I consider to be the proper interpretation of s 21. On that interpretation, the respondent is conducting an unlawful business which should be terminated by way of a liquidation order. This renders it unnecessary to consider the further grounds advanced by the appellants as to why the winding-up of the respondent would be just and equitable. I am mindful of the special considerations contained in s 21(2)(b) for the winding-up of s 21 associations which are reflected in the respondent's memorandum. But it is clear, in my view, that these provisions presuppose that the respondent is a genuine s 21 association which, I believe, it is not. In consequence the respondent stands to be liquidated in the ordinary course.

[36] As to the matter of costs, the respondent contended that if the appeal were to succeed on the s 21(1)(b) ground, the appeal record of 2 300 pages would be unwarranted, which should be reflected in the costs order of this court. In my view, however, this contention could only have been endorsed if all the other issues were decided against the appellant whereas, of course, they were not. In the result:

1. The appeal is upheld. The costs of the appeal, including the costs of two counsel, are to be costs in the liquidation of the respondent.
2. The order of the court a quo is set aside and replaced by the following:
   '(a) The respondent is placed under a final winding-up order.
   (b) The costs of the application, including the costs of two counsel, are to be costs in the liquidation of the respondent.'

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F D J BRAND
JUDGE OF APPEAL

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