IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 9988/2006

In the matter between:

ANOTHONY ROBERT JOHN CUNINGHAME First Applicant

WIMBLEDON LODGE (PROPRIETARY) LIMITED Second Applicant

and

FIRST READY DEVELOPMENT 249
(ASSOCIATION INCORPORATED IN TERMS OF
SECTION 21) Respondent
[Registration Number:)

JUDGMENT DELIVERED ON 12 MARCH 2008

ROSE-INNES AJ:

Introduction

[1] The Harbours Edge Hotel ("the hotel") is part of Harbour Island, a development in Gordons Bay consisting of a harbour, residential and commercial buildings. The hotel is a sectional title scheme with trie sectional title units comprising hotel rooms and commercial areas. The commercial areas include conference rooms, a wellness centre and restaurants. The

hotel was established ten years ago.

[2] The hotel operates as a commercial hotel. The hotef rooms and conference areas are leased to the public, who also make use of the other facilities. The owners of the units which comprise the hotel rooms participate in what is described as a rental pool scheme, regulated by rental pool agreements. The rooms are made available for use as part of the hotel operations. The idea is that the owners should participate in the revenue generated by the rental pool scheme.

[3] The respondent, First Ready Development 249 ("the company"), is an association incorporated in terms of section 21 of the Companies Act 61 of 1973 ("the Companies Act"). The company is the management company responsible for the administration of the rental pool.

[4] The first applicant, Anthony Cuninghame fCuninghame") is a practising land surveyor. He is a former director of the company. He was also a member of the company. HEs membership was suspended and thereafter terminated and the validity thereof is in *issue.* The second applicant, Wimbledon Lodge (Pty) Ltd ("Wimbledon Lodge"), is the owner of two sectional units in the hotel, consisting of hotel rooms. Cuninghame is the sole director and sharehotder of Wimbledon Lodge.

[5] The operation of the hotel and the rental pool scheme has had a troubled history. This has given rise to considerable litigation.[1] The applicants now seek the winding-up of the company on the basis that it is just and equitable to do so in terms of section 344(h) of the Companies Act. The contention advanced on the papers that the company should be wound-up because it is unable to pay its debts was not pursued in argument.

[6] The appiicants seek a final winding-up order despite the fact that no provisional order has been granted. This is competent in an appropriate case.[2] The company opposes the application and asks that it be dismissed. The parties are in agreement that if a winding-up order is to be granted it should be a final order. This application was brought as a matter or urgency on 15 September 2G06. The papers that have been filed are voluminous.[3] In addition to the usual three setsof affidavits, various supplementary affidavits have been filed.[4] The application has been postponed on a number of occasions. The matter has been fully ventilated and was argued over three days. In these circumstances the applicants' approach of seeking a final rather than a provisional winding-up order is the appropriate one.

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1 **This litigation [Deludes the following which are recited in some detail in the founding affidavit: the winding-up of the former management company Harbour's Edge Hotel (Fty) Ltd; an application for the removal of the trustees of the Harbour's Edge Body Corporate; the winding-up of the original developer Casisles Coastal Property Investments CC; an application for the appointment of an administrator of the sectional title scheme; an application for the appointment of a curator ad litem to the Harbour's Edge Body Corporate; an application to interdict the transfer pursuant to agreements of sale of 40 units in the sectional title scheme; actions instituted by the administrator for the payment of levies; an action instituted by the curator ad litem declaring that sections**

2 **Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 SCA at para 9**

3 **They exceed 2400 pages.**

4 **An affidavit an behalf of the union representing the company's employees was by agreement handed up sit the bearing of the application.**

[7] The onus rests on the applicants to establish that it is just and equitable for the company to be liquidated. As a final liquidation is sought the applicants must establish their case on a balance of probabilities, rather than *prima facie* which is the degree of proof required for a provisional liquidation order.[5] The lengthy affidavits reveal that there are material disputes of fact on many issues. The well established approach, where disputes of fact arise in motion proceedings, is that final relief may be granted if the facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. In certain instances the denial by a respondent may not give rise to a real, genuine or *bona fide* dispute of fact. There may also be exceptions to this general rule, for example, where the allegations ordenials by the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.[6]

[8] Counsel for the applicants, recognising the disputes of fact which exist, argued the matter on what they contended were the admitted facts. The applicants did not seek an order referring any disputes of fact for the hearing of oral evidence.[7] Counsel for the respondent, while submitting that I should refuse the application on the papers, contended in the alternative that in the exercise of my discretion I should refer certain disputes of fact for the hearing

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5 **Kalil v Decote* fPtvl Ltd and another 1988(1) SA 943 (A) at 979 A - E, Faarwater v South Sahara Investments fPfrfl Ltd [2005] 4 All SA 185 (SCA) at para 3.**

6 **Fiasco n-Evans Faints Limited v Van Riebeeck Faints fFty) Limited 19S4f3) SA 623(A) at 634 E - 635C.**

7 **Kali] supra at979C-D.**

of oral evidence. These disputes of fact were not defined with any precision. The general rule of practice remains that an application to refer disputed factual issues for oral evidence should be made prior to argument on the merits. It is oniy in exceptional cases that a Court should be asked to decide the issues without oral evidence if it can, and to apply in the alternative for the matter to be *referred to* oral evidence.[8]

[9] It is therefore necessary to determine whether the applicants have, on a balance of probabilities, established on the affidavits, in accordance with the **Plascon-Evans** rule, that it is just and equitable for the company to be finally wound-up. There are two principal issues which arise. Firstly, do the applicants or either of them have standing to bring a just and equitable winding-up? Secondly, are there grounds which justify the final liquidation of the company on the basis that it is just and equitable to do so? The applicants rely in this regard on a number of alfegations, including the disappearance of the company's substratum, the contention that it is carrying on business unlawfully and that its affairs are being mismanaged. It is necessary to set out a brief history relevant to a determination of these issues.

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8 **Kalil supra at 981 F - G, Administrator, Transvaal and Others v Theletsane and Others 1991{2) SA 192(A) at 20OC, DeReszke v Marais and Others 2006(1) SA 401(C) at 413 B**

The relevant factual background

[10] The hotel was developed by Casisles Coastal Property investments CC ("the developer"). It was completed in 1997 and has been in operation since then. At that time the sectional title scheme was registered and the Harbour's Edge Body Corporate was established.

[11] Agreements of sale were concluded between the developer and various purchasers in terms whereof the purchasers acquired sectional title units comprising rooms in the hotel. One such purchaser was Wimbledon Lodge. The agreements of sale incorporated rental pool agreements to which the developer, the purchaser and themanagement company, at that stage Harbour's Edge Hotel (Pty) Limited, were party.

[12] The salient features of the agreements of sale and rental pool agreements can be summarised as follows. The hotel would operate as a commercial apartment hotel. It would have hotel rooms and other facilities such as conference rooms and restaurants.[9] The purchasers agreed to place the units at the disposal of the management company. The developer similarly agreed to place certain sections which it had retained at the disposal of the management company. In this way the entire hotel would be at the disposal of the management company so as to enable it to contract with the operator for the operation of the hotel.[10]

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9 **This appears from the plans anneied to the agreement of sale.**

10 **See in particular clause 8 of the agreement of sale and clause** *44* **of the rental pool agreement.**

[13] The rental pool agreements constituted a scheme in terms whereof the owners of the hotel rooms let their units to the management company so that the management company could let the rooms to guests.[11] The rental pool agreements were concluded in respect of the hotel rooms (excluding the penthouses) but not the commercial areas, which were the subject matter of other agreements. The units leased to the management company are pooled and the rental payable to the owners is determined in accordance with a formula provided for in theagreement.[12] The owner is liable to pay the management company an operating levy to cover the operating costs of the units, the payments made by the management company to the operator in consideration of its operating the units and the costs of running the management company. [13]

[14] The terms of the rental pool agreements are such that the owners effectively invest in the hotel, with their returns being dependant on how successful it is. They no doubt anticipated that they would derive rental income from the profitable operation of the hotel and the rental pool. At the same time they are also liable for operating levies to meet operational costs. Their investment in the hotel through the units acquired by them is consequently not without risk.

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11 **See the definition of "rental pool"' in the rental pool agreement**

12 **Clause 13 read with clause 10.**

13 **Clause 9 of the rental pool agreement read with the definition of "operating Levy".**

[15] The rental pool agreements are for an initial period of five years, with a further period of five years at the option of the management company. Thereafter they continue indefinitely until terminated by the management company or the owners acting unanimously giving nine months written notice.[14]

[16] The rental pool agreements contemplated that an operator could be appointed by the management company in respect of the hotel. Villa Via Cape Town (Pty) Limited was initially appointed as the hotel operator and it performed this function for a period. As reflected in the rental pool agreements the operator would receive a monthly management fee in accordance with a management agreement to be concluded between the developer and the operator.[15]

[17] The initial management company, Harbour's Edge Hotel (Pty) Limited, was liquidated in 1999. In 2001 its right, title and interest in and to the rental pool agreements were assigned to the company. Pursuant thereto the company assumed the role of the management company in place of Harbour's Edge Hotel.

[18] The directors of the company are Craig Needham ("Needham"), Georgio Stavrou ("Stavrou"), and Bryan Logan ("Logan"). Cuninghame was a director

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14 **Clause 6 of the rental pool agreement.**

15 **Clause 14 of the rental pool agreement. The management agreement itself is not part of the papers but the budget annexed to the rental pool agreement makes provision for a management fee of R796 091,00 for the first year.**

until his appointment was terminated on 14 August 2003. There are seven registered members, including Needham, Stavrou, Logan┬ Anthony de la Fontaine {"de la Fontaine") and Alexander Acavalos ("Acavalos").

[19] it appears from the papers that a division exists between two factions regarding the operation of the hotel and the rental pool scheme and the role which should be played by the company in that regard. This division lies at the heart of the history of litigation to which reference has been made and this application for winding-up in particular. On the one hand there are the applicants who are supported in their endeavour to wind-up the company by a large number of rental pool owners. They take the view that it was the intention that the company would only manage the rental pool scheme and not conduct a large scale hotel operation which it is now doing. They object to the fact that the company is effectively controlled by a minority grouping through their interests in a company Meridian Bay Restaurant (Pty) Limited ("Meridian Bay"). The Meridian Bay interests are represented by Stavrou, de la Fontaine and Acavalos. The Meridian Bay interests on the other hand assert that the hotel business is being legitimately pursued in accordance with the company's objects and in the interests of all the owners of sectional title units, including the rental pool owners.

[20] Meridian Bay owns 12 sectional title units in the hotel. These units include section 1, which is utilised as a parking area, sections 7, 10 and 120, which are utilised as conference rooms and a wellness centre and section 21,

which was intended to be utilised as a kitchen but has been converted into a suite. Another company Dreamcatcher Six (Proprietary) Limited ("Dreamcatcher") owns thirteen sectional title units in the scheme. Meridian Bay and Dreamcatcher are directly or indirectly owned and controlled by Stavrou, de la Fontaine and Acavalos.

The applicants' standing

[21] in terms of section 346(1){c) of the Companies Act an application for the winding-up of a company may be made by a member irrespective of whether his name has been entered in the register of members. Section 346(2) requires that the member must have been registered in the register of members for a period of six months immediately prior to the date of the application. Cuninghame claims standing on the basis that he is a member of the company and that he has been so registered for the requisite period. The company denies his standing, contending that his membership of the company was suspended and thereafter terminated.

[22] Wimbledon Lodge relies on the fact that it is a contingent creditor, in terms of section 346(1)(b) of the Companies Act, by virtue of the provisions of the rental pool agreement. A contingent creditor is one who by reason of some existing *vircuium juris* has a claim against acompany which may ripen into an enforceable debt on the happening of some future event or on some

future date.[16] The company does not dispute that Wimbledon Lodge is a contingent creditor but contends that it does not have sufficient interest to seek a winding-up.

[23] Cuninghame's name was entered in the register of members of the company on 9 October 2000. As section 103(2) of the Companies Act recognises he therefore became a member of the company. The general rule is that a person whose name is on the register of members remains a member until his name is removed from the register.[17]

[24] Cuninghame's membership of the company was suspended on 8 August 2006. The winding-up application was brought on 15 September 2006. The company disputed Cuninghame's standing on the grounds that his membership had been suspended. Thereafter on 25 October 2006 the company terminated Cunninghames membership. Cuninghame maintains that the suspension and subsequent termination of his membership was an unlawful attempt to frustrate his right to seek a winding-up of the company.

[25] When the winding-up application was brought Cuninghame was still a member of the company and his name was stilt reflected on the register of members. At that stage his membership had been suspended but not yet terminated. Generally an applicant must have standing at the stage when

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16 **GiUis-Mason Construction Co fPM Ltd v Overvaal Crushers fPtv) Ltd !971 <1}SA524 (T) at 528 C - D; Spendiff NO v JAJ Distributors tPtv) Ltd 19S9 (4) SA 126 (Q at 136B-**

17 **Blackmail Commentary on the Companies Act Vol 1,5 - 296.**

proceedings are initiated.[18] A suspension of membership is typically for a limited period and it may or may not, depending on the circumstances, ultimately result in the person ceasing to be a member. At the time the winding-up application was brought, while Cuninghame's membership of the company had been suspended, it had not yet terminated. He should therefore be regarded as a member of the company who is entitled to bring an application for winding-up in terms of section 346(1)(c).

[26} The company relies on article 2 of the company's articles of association which regulates membership. The board of directors has the power to elect any person as a member and to refuse to admit any person as a member.[19] Provision is made for the rights of a member to terminate in various circumstances including his suspension. There is no express power given to the directors to suspend or terminate a person's membership. I cannot on the papers find any satisfactory basis for concluding that such a power exists as a matter of necessary implication and if so, in what circumstances it may be exercised. The reference in article 2.6.3 to a suspension would be consistent with a power of suspension to be exercised by way of a general meeting of members rather than the directors. Even if t were to assume that the directors have the power in an appropriate case to suspend a person's membership, the suspension itself would not bring that person's membership to an end. Although the articles contemplate that a member's rights terminate on

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18 **SneiidiTf v J A J Distributors supra at 13SH-I.**

19 **Article *2.6.***

suspension, a suspension would not, for the reasons given, deprive the member of the right to seek a winding-up. The company's articles are, in terms of section 65(2) of the Companies Act, to be read subject to the provisions of the Act and are not to be interpreted in such a way that a suspension, in the circumstances of this case, deprives Cuninghame of the right to seek a winding-up.

[27] Cuninghame in any event contends that the suspension and subsequent termination of his membership were not legitimate but an attempt to deprive him of standing to bring winding-up proceedings. It is common cause that one of the reasons for suspending Cuninghame's membership was because the directors were aware *that* he was considering bringing an application for the winding-up of the company. This was conveyed to him in his fetter of suspension.

[28] In **Sweet v Finbain** issue was taken with the applicant's standing to wind-up a company of which he was a member, director and creditor. He had been removed as a director and his shareholding had been transferred to another company. The court found that he had standing as a creditor to apply for a winding-up on just and equitable grounds. In reaching this conclusion the Court hetd[20] that "An **applicant cannot be in a worse position where the management of a company unlawfully deletes his name from the**

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[20] **1984{3)SA** *441* **(W). At 445 C-D.**

register of members, or causes his shares to be transferred to another - a matter to which the Court cannot be required to shut its eyes."[21]

[29] The directors were aware that Cuninghame was considering taking steps to liquidate the company. The decision to suspend his membership was motivated by a desire to prevent him from doing so. It may not have been the only reason advanced for his suspension but it was a primary consideration. They wished to deprive him of the opportunity of bringing liquidation proceedings which he had threatened. Indeed when the application was brought the directors then claimed that he lacked standing because he had been suspended.

[30] A company cannot legitimately suspend a person's membership of the company in order to frustrate the statutory right which the member has to seek the winding-up of the company. There may of course be circumstances where a power to suspend a member may be properly exercised for reasons unreEated to an endeavour to avoid a winding-up at the instance of that member. This is not such a case. The suspension of Cuninghame's membership is therefore to be disregarded for the purposes of determining his standing.

[31] As far as Wimbledon Lodge's standing is concerned it brings the application in its capacity as a contingent creditor. In terms of section 346{1}

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21 **See *akb* Barnard v Car] Greaves Brokers jTlvi Ltd & Others {case number 802iy2006) and two related cases, unreported judgment of the Cape of Goad Hope Provincial Division delivered on *22* January 2007.**

(b) a creditor (including a prospective or contingent creditor) may bring an application for winding-up. The Act does not limit the grounds upon which a creditor may seek a winding-up. A creditor has standing to bring a winding-up on just and equitable grounds where it is shown that the creditor has a sufficient interest for doing so.[22] Such an approach accords with the general requirement of *locus standi* in our law, that a party who seeks relief must demonstrate that he or she has a sufficient interest in the subject matter of the proceedings This is to be determined in the light of the particular facts of each case.

[32] Having regard to the facts of the present case I am satisfied that Wimbledon Lodge, as a contingent creditor, has a sufficient interest in seeking a just and equitable winding-up of the company to confer standing upon it. Wimbledon Lodge is the entity through which Cuninghame owns units in the hotel. Wimbledon Lodge is a party to a rental pool agreement and participates in the rental pool scheme. It has a real and direct interest in the operation and management of the hotel and in the affairs of the company.

[33] Accordingly both Cuninghame and Wimbledon Lodge have standing to seek a winding-up of the company on a just and equitable basis. It is necessary therefore to consider whether grounds exist for winding-up the company on that basis.

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[22] **Sweet v Fmbain** ***op cit*** **445 B -E, Kia Intertrade Johannesburg fPtvl Ltd v Infinite Motors (Ptv) Ltd [19991 2 Ail SA 268(W) at 277b-d, 279i-2S0a; Barnard v Carl Greaves Brokers** ***op est,*** **15-20.**

The grounds for a just and equitable winding-up

[34] The company is an association not for gain incorporated under section 21 of the Companies Act. It was acquired as a shelf company and in terms of the original memorandum of association its main business and main object were described as housing development for the underprivileged. On 16 July 2002 the company's main business and main object were amended to allow it to manage a hotel. On 23 March 2004 and pursuant to a special resolution the memorandum was again amended. In its amended form the main business of the company is described as being "to manage, operate, administer, let, market and lease furnished hotel apartments, conference and restaurant facilities". The main object is reflected as being "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".

[35] The applicants contend that it is just and equitable that the company be wound-up in terms of section 344(h) of the Companies Act. They rely in this regard essentially on three averments. Firstly, it is contended that the company's substratum has disappeared. Secondly, they argue that the company is carrying on business unlawfully. Thirdly, they complain that the affairs of the company are being mismanaged.

[36] Section 344(h) provides that the court may wind-up a company if it appears that it is just and equitable to do so. This ground postdates,

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 the justice and equity of the competing interests of all concerned.[25]

[37] The courts have developed certain general principles which serve as useful guides for determining whether or not it is just and equitable for a company to be wound-up in a particular case. Five broad categories have evolved in which in appropriate cases, it has been considered just and equitable for a company to be wound-up.[26] These five categories are: disappearance of the company's substratum; illegality of objects and fraudulent purpose; deadlock in the company's administration; fraud, misconduct and oppression; and domestic companies. These categories do not represent a closed list and each case must be considered on its own facts.

(i) <u>The contention that the company's substratum has disappeared</u>

[38] The applicants develop their argument that the company's substratum has disappeared as follows. The main object and sole business of the company, as an association not for gain, was the administration of the rental pool agreements. Its activities were to be confined to that The company's main business is now of a very different character, involving a large hotel operation. In the circumstances its substratum has disappeared.

[39] The main object of the company was initially housing development for the underprivileged. When the company was acquired by the then trustees of

the Harbour's Edge Body Corporate its main object and main business were amended to allow it to administer the rental pool scheme. The applicants' complaint is that in 2002, when those representing the Meridian Bay interests acquired control of the company, its purpose changed dramatically. It was no longer utilised for the exclusive benefit of the rental pool owners generally, but to further the interests of Stravrou, de la Fontaine and Acavalos, through Meridian Bay in particular. Other business activities, such as the running of the conference centre and wellness centre, were now engaged in. In 2004 the main object and main business of the companywere again amended to allow the company to operate conference and restaurant facilities.

[40] Section 55 of the Companies Act allows a company by special resolution, to alter the provisions of its memorandum with respect to its objects and powers. The company has done so from time to time to align its objects and powers with the nature of its business operations. There has been no challenge to the amendments made to the memorandum.[23] The contention that the company's substratum has disappeared and the related contention that it is acting unlawfully must be viewed in the light of the memorandum as amended.

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23 **Section 252(2)(a) of the Act provides a remedy to a member who complains that the alteration of the memorandum is oppressive or unfairly prejudicial. An application may be made within six weeks of the special resolution.**

[41] It is so that the hotel's operations have changed somewhat over the years. Conference, restaurant and spa facilities have been introduced and expanded. Such facilities were in fact contemplated from the outset as appears from the development plans incorporated in the rental pool agreements. They are the sort of facilities that are often undertaken as part of the operation of a hotel. The provision of these facilities accords with the objects of the company stated in its memorandum. The company has the capacity to carry on the hotel operations conducted by it. There is no basis for concluding that in terms of its memorandum its functions are to be confined to the management of the rental pool to the exclusion of other aspects of the hotel business.

[42] The fact that the hotel operations now include additional facilities such as a conference centre, wellness centre and restaurants does not support the contention that the company's substratum has disappeared. It is if anything indicative of the development of the hotel business.

[43] The applicants point to the fact that the conference and spa facilities are intended to operate at a profit. They are leased by Meridian Bay to the company at what are described by the applicants as substantial rentals. To

the extent that there is any suggestion that the leases were improperly concluded or that the rentals are inflated and not market related there is a dispute of fact which cannot be resotved on the papers. Meridian Bay does benefit from the rental income derived from the lease of these units. These facilities are also to the potential benefit of the owners of the sectional title units comprising the hotel rooms. They are facilities which should attract guests to the hotel for the ultimate benefit of the rental pool system as a whole. The fact that the conference and wellness centres may in the past have operated at a loss may be a poor reflection of that part of the business operations. It is not however a basis for concluding that the company's substratum has disappeared.

[44] Generally a company's substratum has disappeared if it has become impossible for the company to achieve its objects. It must be established that it has become legally or objectively impossible for the company to achieve its objects.[24] The case law provides a number of instances where it has been found that the substratum has disappeared. For example where a company has been formed for one purpose and that purpose has been accomplished or its accomplishment has become impossible then the shareholders are entitled to a winding-up and a return on their investment.[25] Where a

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24 **Pienaar v Thusano Foundation & Another 1992f2> SA 552 (BGD) at 582 G-H, Alpha Bank Bpk en Andere v Registrateur van Banke en Andere 1996(1) SA 330 (A) at 344C-D, Atkinson v Rare Earth Extraction Co Ltd 2002(2) SA 547(C) at 552 E - F, Blackman op crt 14 -106 -14 -107.**

25 **Strong v J Brough & Son fStratfield) (Ptv) Ltd (1991) 5 ACSR 296 300 SC (NSW).**

company lacks the necessary capital or the ability to raise capital topursue its objects this may demonstrate that it is impossible for it to achieve its object.[26]

[45] In the present case it has not been established that it is impossible for the company to achieve its objects. It is pursuing the objects reflected in the memorandum by operating a hotel and rental poo! scheme, it is not suggested that the company lacks sufficient capital to do so. In terms of the rental pool agreements any losses are effectively to be funded by the owners of the units.

[46] The applicants and those who support the winding-up application are no doubt unhappy about the fact that the rental pool scheme has not been as commercialty successful as they would have hoped. They may not have derived the returns they wished for from their investments. They are also concerned about the fact that the rental pool agreements may remain in force for a long period of time. For these and other reasons they wish to put an end to the venture. The doubts which the applicants and others may have about the rentat pool scheme and the relative lack of financial success are not a basis for concluding that the company's substratum has disappeared. A just

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26 **Pienaar v Thusano Foundation, *supra,* at 440 B - C$_T$ Alpha Bank v REgistrateur van Bank *supra* at 344C-D; Atkinson v Rare Earth Extraction Co Ltd *supraz*t 552 E - F.**

andequitable winding-up is not an escape mechanism for dissatisfied investors in a company.[27]

(it) <u>The allegation that the company is unlawfully carrying on business</u>

[47] The allegation that the company is acting contrary to its memorandum by conducting the business of a hotel has been dealt with in the context of the contention that its substratum has disappeared. It was also argued on behalf of the applicants that the company was acting contrary to section 21(2){a) of the Companies Act and that this justified its winding-up on a just and equitable basis. Section 21(2)(a) requires that the memorandum of an association not for gain shall contain the following provision:

> ***"The income and property of the association whencesoever derived shatl be applied solely towards 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 rendered to the association."***

[48] In argument it was contended that the rental paid by the company to

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27 **<u>Robs on v War Works fFtvl Ltd</u> 20trlffl SA 1117(C) at 1127 G.**

Meridian Bay in respect of the conference and spa areas contravened section 21(2)(a). It was suggested that they constituted payments directly or indirectly made to certain members of the company who were shareholders of Meridian Bay.[28] This contention cannot be sustained.

[49] Section 21(1) sets out the essential features of an association not for gain. It must be formed for a lawful purpose. Its main object must be the promotion of religion, arts, services, education, recreation or any other cultural or social activity or communal or group interests. Its profits (if any) and other income are to be applied in promoting its main object and the payment of any dividend to its members is prohibited. Section 21(2)(a) gives further effect to this last requirement. The memorandum of the company contains the provisions required by this section. A company such as the respondent, managing a rental pool scheme and hotel business, is not one that would typically be regarded as an association not for gain having a main object to be found amongst those listed in section 21(2). The validity of the company's

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[28] **This particular contention is one that was not explicitly raised in the affidavits filed by the applicants. I shall assume in the applicants' favour that it was a matter of legal argument which arose from the facts set out in the affidavits.**

incorporation as an association not for gain has however not been questioned.

[50] Section 21{2)(a) has three main features. The first part thereof requires that the income and property of the company be applied solely towards the promotion of its main object. Secondly, this feature is then amplified by the specific prohibition against the payment or transfer of income or property to the members of the association or to a holding or subsidiary company. Thirdly, there is a provisio which permits the payment in good faith of reasonable remuneration to any officer, servant or member of the association for services rendered to the association.

[51] The fact that the company leases areas of the hotel in order to provide conference and spa facilities is in accordance with its main object. The availability of such facilities serves to promote the hotel to hotel guests and others who may use the facilities. The conclusion of these leases and the payment of rental in terms thereof is therefore not contrary to the company's main object.

[52] The payment of rental to Meridian Bay does not in the circumstances constitute a payment or transfer of income or property of the company to the members thereof as contemplated by section 21(2)(a). Even if it were to beregarded as such a payment or transfer it would fall within the terms of the

proviso to that section. It would be the payment in good faith of reasonable remuneration in return for services rendered to the company. The ordinary meaning of the phrase "the **payment ... of reasonable remuneration ... in return for any services actually rendered'** is the payment of a sum of money as compensation for an act which has been performed or a need which has been provided.[29] The making available of the areas which comprise the conference and spa facilities in terms of the lease agreements constitutes the provision of services to the company, in return for which rental is paid.

[53] Accordingly the company has not been acting contrary to the provisions of section 21(2)(a), Even if it were the appropriate remedy would be to interdict that particular conduct rather than liquidate the company.

(iii) <u>The alleged mismanagement of the company</u>

[54] Where there is a justifiable lack of confidence in the conduct and management of the company's affairs it may be just and equitable for the company to be wound-up. For the loss of confidence to be justifiable it must be based on some misconduct or impropriety which undermines a reasonable shareholders confidence that the company's affairs are being properly conducted in the interests of all shareholders. This requirement has been expressed in differing formulations. The fact that some shareholders may question the business rationale or operational efficiency is not in itself a basis for liquidation.

29**cf <u>Maseti v Key, NO and Others</u> 195H21SA 187(C) at 192 D -E.**

[55] The applicants contend that certain of the directors and members of the company, in particular those who control Meridian Bay, have mismanaged the affairs to the company to such an extent that it would be just and equitable to wind the company up. Various allegations have been advanced in this regard.

[56] Certain of these allegations have already been dealt with. I have referred above to the complaint that those persons who represent the Meridian Bay interests are conducting the affairs of the company for their own benefit. It is said that they have acted contrary to their fiduciary duties in conctuding lease agreements between Meridian Bay and the company and procuring the payment by the company of substantial rental income. Given the disputes of fact that exist in this regard there is no basis for finding, on the papers, the alleged breach of fiduciary duties.

[57] A number of other complaints are raised by the applicants. They point to the fact that large amounts of money have been spent by the company in legal fees in various legal proceedings, including this application. The

[60] In the light of the conclusion to which I have come it is unnecessary to deal with the respondent's striking out application.

[61] I therefore conclude that the applicants have not made out a case for the

winding-up of the company on a just and equitable basis. The parties are agreed that the costs of two counsel are warranted.

[62] The order which I accordingly make is as follows:

(i) the application for the winding-up of the respondent is dismissed;

(ii) the applicants are to pay the respondent's party and party costs, jointly and severally, the one paying the other to be absolved with such costs to include the costs of two counsel.

L A ROSE-INNES, AJ