THE SOUTH AFRICAN LAW JOURNAL

VOL 127
(Part 2)
2010

NOTES

MUST A SECTION 21 NON-PROFIT COMPANY BE CONCERNED ONLY WITH CHARITABLE, BENEVOLENT OR PHILANTHROPIC ACTIVITIES? A CLOSER LOOK AT THE SCA JUDGMENT IN *CUNINGHAME v FIRST READY DEVELOPMENT 249*

TSHEPO H MONGALO
Associate Professor, Department of Commercial Law, University of Cape Town; Corporate Law Consultant, Edward Nathan Sonnenbergs Inc; Project Director, Business Registration Reform Project in South Africa

INTRODUCTION

On 28 September 2009, the Supreme Court of Appeal in South Africa ('the SCA') delivered a judgment in *Cuninghame v First Ready Development 249* [2010] 1 All SA 473 (SCA) regarding a section 21 company, the principal business of which was the management of a commercial hotel. The judgment, it is submitted, will have far reaching practical consequences for a substantial number of registered section 21 companies which undertake commercial objects for 'group or communal interests' as provided for under s 21(1)*(b)* of the Companies Act 61 of 1973 ('the 1973 Companies Act').

The purpose of this case note is to analyse the judgment critically, with particular reference to whether a non-profit company, in the form of a section 21 company, can lawfully undertake a business with a view to advance a 'group or communal interest' unrelated to the promotion of religion, arts, sciences, education, charity, recreation or any other cultural or social interests (i e 'public benefit/charitable purposes').

In justifying the conclusion that such a section 21 company cannot lawfully undertake any commercial or trading activities unrelated to public benefit/charitable purposes, the court, per Brand JA (with whom Maya and Mhlantla JJA, Hurt and Tshiqi AJJA concurred), concluded as follows in para 17:

> '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 one 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] . . .

> 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.'

The court went on to state in para 19 that:

> '[I]f 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. . . . 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.'

The court ultimately concluded that because of its association with the words 'religion, arts, sciences, education, charity, recreation, or any other social or cultural activity', the phrase 'communal or group interests' should be interpreted in accordance with the eiusdem generis doctrine so as to restrict its meaning to 'charitable, benevolent, cultural or social activities, as opposed to commercial enterprises' (ibid).

It is submitted that the court should have appreciated that in order to determine whether the main object of the association was for profit or not, the question to be answered was whether the association was formed for the purpose of carrying on a business *the object of which was the acquisition of gain by individual members* (my emphasis: see, among others, *In Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137 at 147). In other words, the question should not only be whether an association was formed for the purpose of carrying on business, but should also include whether the object was the acquisition of gain by individual members.

I am aware of the concession made by the court that '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 an association is obliged to apply its profits (if any) to promote its main object' (para 19). This concession, however, is very limited in its application as the court sought to restrict the main object for which the profit may be used to the promotion of 'charitable, benevolent, cultural or social activities . . .' (ibid). In other words, the profit referred to in s 21(1)*(c)* may only be pursued by associations or organisations that promote benevolent, cultural or social activities, thus unduly restricting the meaning of 'communal or group interests' in s 21(1)*(b)*.

The court tried to justify this conclusion by reference to the heading of s 21, which refers to section 21 companies as being 'associations not for gain' (paras 20–2). In this regard, the court referred to legal authorities (among them *Mitchell's Plain Town Centre Merchants' Association v McCleod* 1996 (4) SA 159 (A) at 169–70, *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199, and the English case of *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co* (1987) 10 Ch App 542 at 545) which effectively interpreted 'gain' as being 'tantamount to a commercial enterprise, as distinguished from a charitable, benevolent, humanitarian . . . or sporting organisation, for instance'. Although this interpretation is within the context of a section requiring

registration of a profit-making association with more than a prescribed number of proprietors (i e s 30(1)), such a section makes no reference to group or communal interest in the alternative, as s 21(1)*(b)* does. It is within this context that the relevance of this comparison is questionable. The court justifies its conclusion by asserting that it is not possible that the legislature could have intended to ascribe a 'different meaning to exactly the same expression within the compass of a few sections in the same Act . . .'(para 23). This reasoning appears to be inventive, is unsupported by any of the statutory interpretation principles, and is conveniently optimistic. (A well known statutory interpretation principle is that 'in construing words of a statute it must be assumed that the legislature used them in their popular sense . . . *unless the context or the subject-matter clearly shows that they were intended to be used in a different sense*' (emphasis supplied). See E A Kellaway *Principles of Legal Interpretation: Statutes, Contracts & Wills* (1995) at 71; *Beedle & Co v Bowley* (1895) 12 SC 401 at 402 and *Van Coller v Commissioner of Child Welfare, Vrede* 1956 (4) SA 807 (O) at 810.) In the context of ss 30 and 31, the word 'gain' is used in the context of the requirement to register a commercial enterprise with more than 20 proprietors, whereas in s 21 the word 'gain' was used in the context of the association not for gain of the members. (This is confirmed by the court in para 19 and also by the provisions of s 21(1)*(c)* and s 21(2)*(a)*.) Furthermore, within the context of a non-profit company, even though the company's main object may seem to be concerned with the acquisition of gain in the same way as a profit company's is, if the gain so acquired is not distributed as dividends to the members but is used for some communal or group interest, such a company should still be capable of being registered as a section 21 company even though the main object is unrelated to philanthropic, benevolent, cultural, or social interests. For example, a section 21 company may have as its main object the operation and management of a hotel. This main object or principal business will almost invariably be undertaken at a profit. However, if the members of such a company are all owners of sectional title units which make up hotel rooms of the hotel the company is operating, the company would still qualify as a non-profit one if the owners/members of the company get no more than reasonable remuneration for services rendered — i e making their units available and suitable for use by hotel customers. Any additional profit made may then be used by the company to enable it effectively to undertake its principal business for the purposes of communal or group interests, the group or community being owners of the sectional title units who are also members of the company.

The court further relied on the recommendation of the Commission of Inquiry into the Companies Act (RP 45/1970 of 15 April 1970) which concluded in para 25.04*(e)* that 'the case of associations intending to carry on business for gain which yet wish to comply with the conditions of s21 is . . . so limited that it may be ignored' (para 24). Although this statement may have been true in 1970, the same cannot be said today: I argue elsewhere in this note that a substantial number of section 21 companies registered on the Companies and Intellectual Property Registration Office's ('CIPRO's')

database are not the classic benevolent, charitable or social organisations, but do carry on business to promote or support some other group or communal interest. As mentioned above, a common (and legitimate) example of a communal or group interest that may be pursued within this context is that of sectional title unit owners, who may prefer, for whatever reason, to use a section 21 company, which may benefit them only to the extent of remunerating them for services rendered in connection with the said sectional title units.

The reasoning of the court in para 25 to the effect that 'the pursuit of group interest would require a group with common interest' is perhaps the court's strongest argument for distinguishing the facts on the basis that in the case in point, the members of the group for which the association was formed had divergent interests. However, to conclude that the members' interests have to be common for the purposes of a legitimate group interest is not the same as concluding that 'communal or group interests' will have no meaning if divorced from benevolent, charitable or social activities. In the example provided above, if the group or communal interests advanced extend beyond those of sectional title owners and include those of ordinary property investors, then clearly the group for which the association was formed would have divergent interests in the manner explained by the court. Sectional title owners as a group may not be concerned with benevolent, philanthropic or benevolent objects, but they may still constitute a legitimate group for whose interests the company may be formed in terms of s 21(1)*(b)*. It is the conclusion of the court that a group interest must be for charitable or benevolent purposes which, I would argue, is misguided.

It is this conclusion of the court which is bound to have grave ramifications for the non-profit sector in South Africa and for the economy of the country. This is because, according to a recent survey of all section 21 companies on CIPRO's database, of the 22 645 registered section 21 companies, a significant number of between 8000 and 10 000 clearly fell outside of the category of companies undertaking what the court referred to as 'charitable, benevolent, cultural or social activities' (this information has been extracted from a document entitled 'Copy of total section 21 entities per code per year from 1800–2009' obtainable from CIPRO: see *http://www.cipro.co.za//about_us/Web_Statistics_Version7.pdf*). These companies will thus be operating illegally, if this judgment is to stand in its current form.

In dismissing the argument by the respondent that the court's judgment would have serious consequences for a number of associations with purely commercial objects (in the sense explained above) incorporated under s 21, the court said in para 33: '[W]e can hardly avoid what we consider to be the proper meaning of a statutory provision because it will cause considerable inconvenience to a number of people. If that were true, it is something to be taken up with the legislature.'

There is no judgment to my knowledge that has ever been delivered in South Africa which provided meaning to 'communal or group interests' in

s 21(1)*(b)*. As such, CIPRO, as a regulatory agency, was entitled to accord the phrase the literal meaning, and not to restrict it by the eiusdem generis method of interpretation, as the court did in this case, so limiting its meaning to a category of benevolent, charitable and social activities. One can point out that in an earlier Supreme Court of Appeal decision in *Grobbelaar v Van de Vyver* 1954 (1) SA 248 (A), the court made it clear that the eiusdem generis doctrine 'must not be allowed to substitute an artificial intention for what was clearly the real one' (at 255A).

In relation to the distinction the court drew between section 21 companies and commercial enterprises (in para 19), the court clearly failed to appreciate the distinction between a commercial enterprise (such as a private or public company or a close corporation or a partnership) and a section 21 company which undertakes commercial activities or trading for the purpose of promoting its non-profit purposes in advancing group or communal interests. The latter practice is common among non-profit organisations — particularly section 21 companies — and it is erroneous to conclude that such a practice is prohibited by the language of s 21(1)*(b)* of the 1973 Companies Act. Even though the court conceded that 'there is nothing in s21 which prohibits an association not for gain from making a profit' (para 19), its interpretation of 'group interests' as being synonymous with benevolent, charitable and social activities nevertheless leaves no scope for any type of section 21 company to be capable of making such profit, as purely benevolent, charitable and social organisations rely on donations or public funding and do not, as a norm, engage in commercial or trading activities to promote their objects. The undertaking of trading or commercial activities would ordinarily be undertaken by associations promoting communal or group interests unrelated to benevolent, charitable or social objects, such as property owners' associations referred to above. It is clear that in pursuing a main object or principal business which is exclusively benevolent, philanthropic, social or cultural in nature, the likelihood of any commercial trading is severely restricted.

Having outlined the decision of the court above, the rest of this note considers four specific issues that require further analysis: (1) whether 'communal' or 'group' interests are restricted to religion, arts, sciences, education, charity, recreation or other cultural or social objects; (2) whether a section 21 company is precluded from undertaking or being concerned with any commercial or profit making activities; (3) how the comparable provisions of the recently promulgated Companies Act 71 of 2008 deal with non-profit companies; and (4) the effect of a liquidation order on unlawful non-profit companies.

WHETHER 'COMMUNAL' OR 'GROUP' INTERESTS ARE RESTRICTED TO RELIGION, ARTS, SCIENCES, EDUCATION, CHARITY, RECREATION OR OTHER CULTURAL OR SOCIAL OBJECTS

The court concluded that the phrase 'communal or group interests' in s 21(1)*(b)* 'must therefore be construed eiusdem generis with that which

comes before it' (para 19). The words which precede 'communal or group interests' are 'religion, arts, sciences, education, charity, recreation, or any other cultural or social activity'. These latter words clearly envisage a category of benevolent, educational, charitable, cultural and social activities or objects.

The view of the court as reflected above is to the effect that the promotion of group or communal interests should be limited to what, in effect, are benevolent, educational, charitable, cultural and social activities or objects. Indeed, the court said this in so many words when it concluded by saying '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' (ibid). This restricted interpretation of the provisions of s 21(1)*(b)* by the court was based on the application of the doctrine of statutory construction known as the eiusdem generis doctrine, which in essence requires that general words such as 'all other property, 'communal or group interests' should sometimes be used in a more restricted sense than they would bear if construed in isolation. In the words of Professor R H Christie (*The Law of Contract in South Africa* 4 ed (2001) 252), when this doctrine is employed, 'the meaning of the general words [is] known from the company they keep'.

It is questionable whether the words 'group' or 'communal' interests should be restricted to a varied list of words such as 'religion,' 'arts,' 'sciences,' 'education,' 'charity,' 'recreation' or any 'other cultural or social object', particularly as it is apparent that the latter list consists of words which contemplate the undertaking of what may generally be referred to as 'charitable, benevolent or philanthropic' objects, the pursuance of which is almost invariably dependent on donations or some form of public funding. It could not possibly have been the intention of the legislature that 'communal or group interests' should be restricted to charitable, benevolent or philanthropic objects. The organisation or enterprise's main object, which is tantamount to its 'principal business' invariably guides the commercial activities that the organisation or the enterprise engages itself in (Tshepo Mongalo *Corporate Law & Corporate Governance: A Global Picture of Business Undertakings in South Africa* (2003) 238) and, as evidenced by the database of non-profit companies registered with CIPRO, not all section 21 companies incorporated in South Africa are dependant on donations or public funding. In fact, a substantial number of section 21 companies registered with CIPRO have, as their principal business, objects which are unrelated to charitable, benevolent, cultural or related ambits. These associations, in pursuit of their principal business, engage in some commercial enterprise to raise income to promote their objects of promoting group or communal interests, and do not rely solely or primarily on donations in the same way as charitable entities do (as is indicated by the data made available by CIPRO). Moreover, as has already been indicated, in the case of *Grobbelaar v Van de Vyver* (supra at 255A), the court concluded that the eiusdem generis doctrine 'must not be allowed to substitute an artificial intention for what was clearly the real one'. This being the case, the conclusion that 'communal or group interests' should

be limited to charitable, benevolent or philanthropic objects is untenable. Moreover, an assessment of a number of section 21 companies undertaken by the author in August 2009 revealed that the common examples of principal business usually undertaken by these companies in the promotion of communal or group interests include:

(a) Property management services, like home owners associations;
(b) Letting/selling services for property owners;
(c) Electricity management services on behalf of residents in security complexes;
(d) Management of sectional title properties on behalf of owners;
(e) Provision of security services on behalf of organised communities;
(f) Marketing of local business, accommodation establishments and tourism products to visitors and potential visitors to a designated area for the common interest of the relevant business owners, who provide a variety of tourism related products and services;
(g) Management, operation, administration, marketing and leasing of furnished hotel apartments, conference and restaurant facilities for groups of apartment and sectional title owners.

Most, if not all, of the above main objects will invariably be undertaken at a profit and will thus not be automatically excluded from qualifying as communal or group interest activities. To conclude, as the court did, that even shareholders are a group with common interests, is to lose sight of the fact that with shareholders, the interest is always that the profits derived from the company should be distributed among them. Such an interest does not, and cannot, legally, be associated with a group for which a section 21 company is formed.

WHETHER A SECTION 21 COMPANY IS PRECLUDED FROM UNDERTAKING OR BEING CONCERNED WITH ANY COMMERCIAL OR PROFIT-MAKING ACTIVITIES

The second issue which is addressed in this note concerns whether a section 21 company is precluded from undertaking commercial or profit-making activities. This is the issue which the court seems, with respect, to have misunderstood completely. In this regard, the court appears to be making a sweeping generalisation by saying that a section 21 company undertaking a commercial object is a commercial enterprise (see para 19).

Section 21 companies are otherwise known as 'associations not for gain'. This expression is often misinterpreted to mean that these entities cannot have, as their main object, an entrepreneurial venture. This is wrong. The real meaning of the expression is that the entities are precluded from being used for the sole benefit of, or for profiting, the members or incorporators in the sense of entitling these members or incorporators to a share in the profits or distributions in the same way as shareholders of a company or partners in a partnership are entitled to a share in the profits or distributions. This seems to be the meaning ascribed by the drafters of the new Companies Act 71 of

2008, as reflected in Schedule 1 to that Act. Therefore, given the substantially similar language contained in item 1(1)*(a)*(ii) of Schedule 1 to the Act, the court's conclusion that the language of the new Act 'must . . . be understood to indicate a different intent on the part of the legislature' is without any justification.

In the March 2000 a Consultation Document of the UK's Company Law Review Steering Group (entitled 'Modern company law for a competitive economy: Developing the framework' (March 2000) vol 5) the following was stated with regard to not-for-profit organisations (NFPOs): 'NFPOs include charities, members' sports and social clubs, campaigning organisations and even small property management companies. Many of these organisations make a significant contribution to the UK economy, and have become increasingly important providers of public services.' (Ibid para 9.7 p 292.) The Steering Group made the following further observation: 'The only special treatment in company law which applies generally to NFPOs (*i.e. not just charities* [emphasis supplied]) is the privilege of not using the word "limited" in the name of the company, in accordance with the rules now set out in section 30 [of the UK Companies Act, 1985]. This requires that the company's objects involve the promotion of commerce, art, science, education, religion, charity or a profession *and that any profits must be applied in furtherance of the company's objects rather than distributed to members*.' (Ibid para 9.11 p 293, emphasis supplied.)

It must be emphasised that although the UK Companies Act, 1985, did not provide for the exact equivalent of the section 21 companies recognised under the South African 1973 Companies Act, the law regulating incorporated non-profit organisations in the UK was similar to the law in South Africa, primarily because section 21 companies are a sub-species of companies limited by guarantee, and such companies were recognised under the UK Companies Act, 1985 to which the UK Company Law Review Steering Group refers in the quotations above.

A classic example of a company limited by guarantee in South Africa is the South African Music Rights Organisation (SAMRO). In brief, SAMRO is a non-profit organisation which does not receive any donations or public funding but collects licence fees from users of music and distributes royalties to its members (composers, authors and publishers) after deducting its administrative costs.

It is therefore apparent that incorporated non-profit organisations — and indeed all types of non-profit organisations — such as the section 21 company, are not precluded from having, as their main object, the undertaking of a commercial venture, so long as the profits so derived are applied in furtherance of the organisation's objects rather than distributed to members. The upshot is that any allegation that such entities are precluded from having the undertaking of commercial ventures as their main objects must be rejected. This is underscored by the court's conclusion that even though s 21 companies may be able to make profit, their main objects should nevertheless be restricted to benevolent, charitable, cultural or social activities, which

clearly cannot constitute a closed list of main objects with which s 21 companies may concern themselves, as indicated by the data obtained from CIPRO. Moreover, it has been shown that a large number of s 21 companies which undertake commercial or trading activities do not fall squarely under the main objects as restricted by the court.

HOW DO THE COMPARABLE PROVISIONS OF THE RECENTLY PROMULGATED COMPANIES ACT 71 OF 2008 DEAL WITH NON-PROFIT COMPANIES?

The new Companies Act 71 of 2008, which was signed into law by the President on 8 April 2009, makes it abundantly clear that non-profit companies can undertake commercial activities or some form of trading (see item 1(2)*(b)*(ii) of Schedule 1 to the new Companies Act).

Following the Corporate Law Reform process which was officially launched in 2003, the Department of Trade & Industry in South Africa made it clear that the continued utility of a section 21 company could not be gainsaid (para 2.24 p 20 of the 'Guidelines for Corporate Law Reform' published in GN 1183, *GG* 26493 of 23 June 2004). That is why the resulting legislation re-enacted, although with some re-phrasing, the provisions of section 21 under Schedule 1 to the new Act as follows (all the italicised portions are for emphasis):

'1 Objects and policies

(1) The Memorandum of Incorporation of a non-profit company must —

(a) set out at least one object of the company, and each such object must be either —

(i) a public benefit object; or

(ii) *an object relating to one or more cultural or social activities, or communal or group interests*; and

(b) be consistent with the principles set out in sub-items (2) to (9).'

The most important of the sub-items contained in the Schedule are to the effect that:

'(2) A non-profit company —

(a) *must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation*; and

(b) subject to paragraph (a), may —

(i) *acquire and hold securities issued by a profit company*; or

(ii) *directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects*.

(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless [of however] the income or asset was derived to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, *except* —

(a) as reasonable —

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;

(b) as a payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.

(4) Despite any provision in any law or agreement to the contrary, upon the winding-up or dissolution of a non-profit company —

(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and

(b) the entire net value of the company must be distributed to one or more non-profit companies, external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts —

(i) having objects similar to its main object; and

(ii) as determined —

(aa) in terms of the company's Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.

4 Members

(1) A non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so. . . .'

It is clear from the above provisions of Schedule 1 to the new Companies Act that, save that the non-profit company advances its main object as reflected in its Memorandum of Incorporation, it is not prohibited from 'directly or indirectly carrying on any business, trade or undertaking which is consistent with or ancillary to its main objects'.

In brief, the new Act advances the following four important points:

(a) It clearly distinguishes the promotion of the public benefit object from the objects related to cultural or social, communal or group interests.

(b) It clearly allows a non-profit company to engage in commercial activities by engaging into two primary profit making ventures as follows:

(i) investing in a profit company by acquiring securities of such companies; and

(ii) directly or indirectly carrying on any business, trade or undertaking consistent or ancillary to its main objects.

(c) It generally prohibits direct or indirect payment of any portion of its income or transfer of any of its assets to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, unless such payment constitutes:

(i) reasonable remuneration for goods delivered or services rendered to, or at the direction of, the company; or reasonable payment of,

or reimbursement for, expenses incurred to advance a stated object of the company;

(ii) payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another;

(iii) payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company.

(d) It clearly indicates that the non-profit object of a company pursuing a 'group or communal interest' lies in the fact that the company uses its income or revenue solely for advancing such group or communal interests and does not distribute the income or revenue so derived to the members of the group in the same manner as a profit company does.

It is therefore clear that the intention of the legislature is to enable non-profit companies to engage in commercial or profit-making activities so long as the profits derived therefrom were used to advance the company's objects, including the promotion of communal or group interests which do not have to be of a charitable, benevolent, or philanthropic nature as suggested by the court .

THE EFFECT OF THE LIQUIDATION ORDER ON UNLAWFUL NON PROFIT COMPANIES

A separate issue which I raise for the sake of completeness relates to the finding of the court that 'the respondent [company] stands to be liquidated in the ordinary course' (para 35). This conclusion is startling because the court expressly refers to the 'liquidation of the company' even though from the judgment it is clear that the court was questioning the respondent's status as a s 21 company. Having concluded that the respondent's main object was unlawful and can thus not lawfully fall within the ambit of s 21, the next question which begs an answer is what, according to the court, is the status of the respondent? Does the decision of the court render the respondent to be a mere association constituted at common law, or does it make the respondent a commercial enterprise and, if so, what type of a commercial enterprise? Was it rendered to be a partnership, or a private company or a public company? These questions are important because they should have directed the court as to whether the liquidation order would have been an appropriate order in the circumstances. In terms of s 21(2)*(b)* of the 1973 Companies Act: 'Upon its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution or associations or institutions having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the Court.' This would be the effect of the liquidation order upon a s 21 company. However, this does not seem to be what the court intended when it concluded that the company stood to be liquidated 'in the ordinary

course'. The reason why I say this is because to conclude that the respondent had to be liquidated pursuant to s 21(2)*(b)* would fly in the face of the finding of the court that the main object of the company was a purely commercial one and was thus prohibited by s 21(1)*(b)*.What, then, was intended by the court when it concluded that the respondent stood to be liquidated 'in the ordinary course'? Does this mean that even though the respondent was not a s 21 company, it nevertheless remained a company, and this would justify a liquidation order? If the decision of the court was to render the respondent not to be a company, but some form of an association, then a liquidation order would be inappropriate.

In terms of s 2 of the Insolvency Act 24 of 1936 a 'debtor' means 'a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies'. This definition makes it abundantly clear that the Insolvency Act excludes a company or a body corporate from the definition. If the respondent was not a company but an association of persons constituted as a partnership, it was not capable of being 'liquidated in the ordinary course'. In this regard, the court reached an untenable conclusion.

If the respondent was not a genuine s 21 company, as the court concluded, it could at most be an association of people having, as its object, the acquisition of gain as contemplated in s 30(1). Such an association would be illegal and, thus, not be capable of operating with such an object if it had members in excess of twenty unless it was registered in terms of the Companies Act as contemplated in s30(1) of the Act.

In *Padstow Total Loss and Collision Assurance Association* (supra), Jessel MR said (at 143), in reference to an association which the respondent would seem to be in the case under discussion:

> '[A]ssuming the association to be an unlawful one, could the Court properly make the winding-up order? It appears to me to have been decided that it could not, and it seems to me on principle that it could not. . . . It seems to me, therefore, that, both on authority and principle, such an association cannot be wound up.'

In the same judgment Brett LJ, commenting in relation to an association which did not comply with statutory obligations and was thus unlawful, concluded that 'there never existed at any time any company, association, or partnership of which the law could properly take cognizance and with regard to which the Court could properly make a winding-up order' (at 148). At the same time, Lindley LJ commented that since the association could not be recognised in law, 'I am of opinion that this winding-up order ought never to have been made, and ought to be discharged' (at 150) (see also the case of *In re South Wales Atlantic Steamship Company* 2 Ch D 763 where the court was strongly inclined to the opinion that there could not be a winding-up order where an association was proved to be not in existence for failure to comply with the law).

With reference to the above decisions, the court in *Opperman NO & another v Taylor's All Africa Services & another* 1958 (4) SA 696 (C) held that the court will not grant a winding up order or any other order of a similar nature in respect of an illegal organisation.

It goes without saying that the court was clearly misguided in granting a liquidation order in respect of what it found to be an unlawful association.

CONCLUSION

This unfortunate decision of the Supreme Court of Appeal will, with respect, have serious and potentially disastrous consequences for a substantial number of registered section 21 companies which are not charitable, benevolent or philanthropic organisations, as the judgment effectively declares such organisations to be unlawful. The ripple effect of the judgment may also lead to economic ruin for such organisations. Unless this judgment is overturned soon, it may also lead to the disruptive implementation of the new Companies Act, as the comparable provisions in Schedule 1 of the Act may be subjected to an interpretation similar to the one articulated by the court in this matter.