

SOUTH AFRICA / JUDGMENT

De Sa Miranda v True Ruby Trading 1035 CC and Another (20548/2023) [2024] ZAWCHC 430; [2025] 1 All SA 645 (WCC) (30 December 2024)

[2024] ZAWCHC 430

COURT

Western Cape High Court, Cape Town

BEFORE

P Farlam

CASE / FILE NUMBER

20548/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN

Case

No: 20548/2023

In

the matter between:

FRANCISCO
JOSE DE SA MIRANDA
Applicant
and
TRUE
RUBY TRADING 1035 CC
First Respondent
(registration
number 2011/066694/23)
JOSE
ANDRE DE
JESUS
Second Respondent
Coram: Acting
Justice P Farlam
Heard: 7 August
2024
Delivered
electronically: 30 December 2024

JUDGMENT

FARLAM AJ

INTRODUCTION

[1] The applicant (De Sa Miranda) and the second respondent (De Jesus) acquired the first respondent (True Ruby) as a shelf corporation in 2012 for the purposes of holding a property in Voortrekker Road, Parow (the Property). De Jesus procured a 78% share in True Ruby, with De Sa Miranda holding the remaining members' interest (22%). The two are related by marriage (the applicant is married to the second respondent's sister) and at the time had a very friendly relationship, in the course of which De Sa Miranda had sold De Jesus a convenience store and bakery business known as La Ponte Rose, which was the anchor tenant of the Property.

[2] For various reasons, their relationship has deteriorated appreciably. De Sa Miranda has also effectively been excluded from, and until recently denied knowledge of, the operations of True Ruby. After

various interactions and ultimatums, the applicant decided to launch an application in mid-November 2023 seeking to wind up True Ruby on just and equitable grounds; alternatively on the basis that the corporation was unable to pay its debts (or, in other words, was insolvent). The alternative winding-up ground, which was only ever tentatively advanced, has not been pursued – correctly so, as it has been shown by De Jesus that True Ruby can, and has, paid its debts. What must thus be considered is whether it would be just and equitable to wind up True Ruby, notwithstanding its solvency.

[3] Before addressing that question, it is however necessary to address the interlocutory application brought by De Jesus for the striking out of various matter in the applicant's founding and replying

affidavits, and the admission of a further answering affidavit in the event that the strike-out is not successful. That application must logically be considered first, as it will determine the factual matrix against which this application is to be adjudicated.

THE SECOND RESPONDENT'S STRIKE-OUT APPLICATION

[4] The second respondent applied on 2 August 2024, less than a week before the hearing, to strike out various paragraphs of the applicant's founding affidavit, as well as various paragraphs of and certain annexures to the replying affidavit. The second respondent alleged that the material identified in the notice to strike out involved either scandalous and vexatious allegations; or hearsay and opinion evidence; or new matter impermissibly adduced for

the first time in reply. In the event of the strike-out application not succeeding, whether in whole or in part, the second respondent

sought leave to file a further (answering) affidavit, by a Mr Pravin Kalidas Vassen – a registered accountant, who was appointed as the accountant for True Ruby in October 2023 – to which various annexures were attached.

[5] By the time that this interlocutory application was brought, the applicant had already (on 24 July 2024) filed his heads of argument, which had, as a consequence, been prepared on the basis of the allegations in the affidavits as filed in the ordinary course, and oblivious of any strike-out application which might be directed at the founding affidavit (of 13 November 2023) or the replying affidavit (of 3 July 2024). Even the second respondent's heads, which accompanied the interlocutory application on 2 August 2024, did not motivate the strike-out application or the request for leave to file Mr Vassen's affidavit. The strike-out application was however argued at some length, together with argument on the merits, on the day of the hearing (7 August 2024), when the second respondent's counsel also handed up a short note which addressed the grounds of the striking-out. Despite the unsatisfactory timing of the interlocutory application, and the inconvenience occasioned thereby, I shall therefore grant the second respondent's request to have this application considered, and address each of the paragraphs of the applicant's affidavits attacked in the second respondent's counsel's note, before turning to the conditional prayer for the admission of Mr Vassen's affidavit. For the avoidance of doubt, I should record that I have also had regard to the other paragraphs impugned in the notice to strike-out (i.e., the paragraphs in the applicant's affidavits which were identified in the notice to strike out, but not referred to in second respondent's counsel's written note or his oral argument) and consider the challenge to them to be unsustainable.

[6] Paragraphs 72 and 75 of the founding affidavit:

6.1. The second respondent seeks to strike out these paragraphs on the basis that they are scandalous and vexatious. He does so with reference to Uniform Rule 6(15), which provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

6.2. As that rule indicates, a court must be satisfied that a party seeking to strike out the identified allegations will be prejudiced if the allegations remain. The second respondent cannot demonstrate prejudice in this instance, given that he delivered an answering affidavit in response to the founding affidavit back on 18 April 2024 and did not in that affidavit contend either that paragraph 72 or paragraph 75 needed to be struck out, or that he was prejudiced by those paragraphs continuing to be included in the founding affidavit.

6.3. The second respondent instead dealt with paragraph 72 in a blanket response to paras 63 to 72 of the founding affidavit which read as follows: “The allegations contained in these paragraphs are argumentative speculation coupled with unwarranted hyperbole. For the

reasons

as stated aforesaid, I deny the allegations contained in these paragraphs as if individually traversed”. He responded to paragraph 75 in an almost identically worded answer covering paras 74 to 78. In neither instance was it contended that the paragraphs now in question should be expunged.

6.4. While the applicant’s allegations of suspected tax evasion in paragraphs 72 and 75 of the founding affidavit are serious ones, they moreover merely reflect what appears to be the applicant’s genuinely held views, and should be considered in that context. In addition, the applicant’s suggestion in paragraph 72 that Mr Vassen did not appear to have any intention of assisting the applicant to gain a full appreciation of True Ruby’s financial position can be addressed by admitting Mr Vassen’s affidavit, as indeed the second respondent’s attorney’s affidavit in

support of the strike-out application unintentionally acknowledged.

6.5. Prayer 3.1 of the notice to strike out, which is directed at these paragraphs of the founding affidavit, is accordingly refused.

[7] Paragraphs 10.6 to 10.8 of the replying affidavit and annexures “RA1A” and “RA1B” thereto:

7.1. These paragraphs contain allegations about interactions between a former candidate attorney / professional assistant (Niel Hamman) employed by the applicant’s former attorneys, FPS Attorneys, and De Jesus in April 2021, with reference to what is contained in emails appended to the replying affidavit as “RA1A” and “RA1B”. An obvious difficulty with those allegations is that there is no affidavit from Mr Hamman, who apparently left FPS Attorneys at the end of his practical legal training, or from Rika Steenkamp who is indicated to have sent the email appended as “RA1A”

on 13 April 2021 and appears to have spoken with Mr Hamman prior to doing so; or indeed from anyone else at FPS Attorneys. The

allegations about what De Jesus apparently told Mr Hamman are thus (double or even triple) hearsay.

7.2. The second respondent has sought to strike out these paragraphs and the annexures on that basis. The applicant has, in response, sought to justify the absence of affidavits from Hamman and Steenkamp on the basis that they are no longer employed at FPS Attorneys, and that FPS Attorneys were apparently unable to confirm Hamman’s whereabouts. He has also sought to bolster that evidence by means of an email from Mr Louis Lourens, of FPS Attorneys (annexed as “RA1B”),

about what Hamman told him at the time. That is however inadequate to justify the admission of the hearsay evidence, even were I to have a discretion to admit it under section 3 of the Law of Evidence Amendment Act, 45 of 1988 in the absence of an application to do so (an issue which is therefore unnecessary to decide in the circumstances). It is not, for example, indicated what attempts were made to find Hamman; nor is it stated that any attempt was made to contact Steenkamp. Nor, as indicated, is there even an affidavit from Lourens – merely an email. That email moreover refers to “Mr Hamman’s file note”, which is not attached either. There is simply a confirmatory affidavit from Mr Matthews, the applicant’s current attorney, about what Mr Lourens said to him. But Mr Matthews should have known that an affidavit from him could hardly suffice, as well as that, without attaching Hamman’s file note, which Lourens had indicated was still available, it could not credibly be argued that the hearsay evidence about what Hamman was purportedly told should be admitted.

7.3. The applicant’s counsel submitted in argument that the second respondent could not seek to strike out the hearsay evidence without first denying it. No authority was provided in support of that submission. Nor would it seem to be justifiable where the hearsay evidence is sought to be adduced for the first time in a replying affidavit. The further submission that De Jesus has avoided dealing with these allegations and annexures is also unsustainable given that there is no obligation on De Jesus to rejoin to allegations in the applicant’s replying affidavit.

7.4. Paragraphs 10.6 to 10.8 of the replying affidavit and annexures “RA1A” and “RA1B” thereto are accordingly struck out.

[8] Other paragraphs in the replying affidavit referring to “RA1A” and “RA1B”:

8.1. The second respondent’s counsel’s note contended that “all reference to [these annexures]” should also be struck from the replying affidavit. It was not however indicated what those references were. The notice to strike out attacked various other paragraphs which made mention of the annexures, but did not refer to all such paragraphs in the reply, while insofar as impugned paragraphs did refer to either of those annexures they only did so in part, and so, because no basis was laid for striking out the rest of the paragraphs in question, a more targeted strike-out application would have been required.[1]

8.2. The second respondent’s attack on other paragraphs in the replying affidavit which seek to rely in part on annexures “RA1A” and “RA1B” is therefore too unfocused and imprecise to be granted.

8.3. In keeping with the Constitutional Court’s statements in SARFU about hearsay evidence being able to be ignored without being struck out,[2] I shall not however have regard to further references to the offending annexures in the replying affidavit.

[9] Paragraphs 11.4 and 11.5 and 33 of the replying affidavit:

9.1. The notice to strike out indicated that the second respondent sought to strike out these paragraphs on the basis that they contained hearsay and opinion evidence. By contrast, in the second respondent's counsel's note, the striking out of these paragraphs was motivated on the basis that they contained "vexatious and opinion evidence".

9.2. The paragraphs in question refer to, and comment on, a report prepared by Mr Vassen, dated 1 March 2024, which was appended to the answering affidavit (with annexures) as "RT3", and for some reason has been annexed again to the replying affidavit (without annexures) as "RA1". There can be no serious objection to the applicant commenting on that report, given that the second respondent introduced it in his answering affidavit and relied upon it. The allegations that the applicant has made in the light of that report are also not vexatious; nor do they constitute inadmissible opinions;^[3] while the earlier contention that they involved hearsay evidence was understandably not pursued. Nor, in any event, is the second respondent prejudiced by those allegations, particularly if Mr Vassen's affidavit is admitted. In my view, there is accordingly no basis for striking them out.

^[10] Annexure "RA2" and all references thereto in the replying affidavit:

10.1. Annexure "RA2" to the replying affidavit consists of a piece of A4 paper, with handwritten recordals and what the applicant has stated are the signatures of himself and the second respondent. It is stated in paragraph 14.1 to have been included to support the applicant's contentions in the founding affidavit about the second respondent's acquisition of a 78% member's interest in True Ruby, which has been placed in dispute by the second respondent in his answering affidavit.

10.2. The second respondent has objected to its inclusion, as well as all references to that annexure in the replying affidavit, on the basis that it could have been included in the founding affidavit and is "prejudicial new matter in reply".

10.3. It is correct that the document could have been appended to the founding affidavit; but this does not mean that it could not legitimately have been referred to for the first time in reply in order to explain why, in the applicant's view, the second respondent's version in his answering affidavit is untrue. It is a relevant document, of which the applicant and the second respondent would appear to have first-hand knowledge, and which the second respondent could, if he had so wished, chosen to deal with in a further affidavit. Indeed, had the document not been an authentic one, or had the second respondent not in fact signed it, the second respondent would doubtless have stated as much in a further (rebutting) affidavit which he would have sought to have admitted together with the affidavit of Mr Vassen.^[4] The claim of prejudice by the second respondent therefore rings hollow.

10.4. As the Supreme Court of Appeal has confirmed, a court has a discretion to admit new matter contained in a replying affidavit, and should exercise that discretion "with a fair measure of common sense".^[5] Insofar as annexure "RA2" and references thereto in reply might not constitute permissible responses to the answering

affidavit, it would seem appropriate to allow them. The second respondent's request that they struck out is therefore dismissed.

[11] Paragraph 26 of the replying affidavit:

11.1. The second respondent complains that this paragraph contains new matter impermissibly introduced in reply. I disagree.

11.2. The paragraph responds directly to the second respondent's assertion in paragraph 53 of his answering affidavit that he had never seen the valuation referred to in paragraph 20 of the founding affidavit and appended thereto as "FJM2". That there is also reference to "RA2" in this context is not objectionable, and indeed merely confirms that this annexure is a relevant response to the contents of the answering affidavit.

11.3. The attempt to strike out this paragraph is accordingly rejected.

[12] Paragraph 34 of the replying affidavit:

12.1. Once again, the second respondent's complaint is that this paragraph contains new matter – this time concerning Mr Vassen – which should not have been contained in a replying affidavit.

12.2. That charge is again not well-founded. The paragraph was a legitimate (albeit not entirely clear) response to paragraph 74 of the answering affidavit, to which it was indicated to be a reply. As the second respondent's counsel's note indicated, any negative insinuations about Mr Vassen's actions which might be considered to be contained therein have moreover been addressed in Mr Vassen's further affidavit.

12.3. The request to strike out this paragraph is consequently refused.

[13] The second respondent's strike-out application is therefore unsuccessful, save in respect of paragraphs 10.6 to 10.8 of the replying affidavit and annexures "RA1A" and "RA1B" thereto. I do not consider it appropriate to make a costs order in respect of this interlocutory application. Both the applicant and the second respondent, who have each had some success, should bear their own costs in relation thereto.

[14] In the light of the findings with regard to the second respondent's strike-out application, it is necessary to deal with the conditional prayer for the admission of Mr Vassen's affidavit.

[15] As I have indicated above, I consider that this affidavit is relevant. It provides a fuller picture of True Ruby's financial position and the documents germane thereto. It also addresses allegations in the replying affidavit about Mr Vassen and his firm which it is appropriate to allow him to comment on. It is therefore, in my view, in the interests of justice to allow it into evidence, pursuant to the discretion recognised in Rule 6(5)(e), despite it being tendered at a very late stage by the second respondent and the lateness of the affidavit not being adequately explained. There is also no discernible prejudice to the applicant as a result of this affidavit being allowed, as the applicant's counsel, who submitted that the affidavit was not relevant, informed the court that the applicant did not want to respond to the affidavit

(which he contended was irrelevant) in the event that it was admitted – and the applicant is accordingly not disadvantaged by not being able to reply thereto without triggering a postponement, (which the applicant was desirous of avoiding).

- [16] The second respondent is accordingly granted leave to file Mr Vassen’s affidavit (attached to the affidavit of the second respondent’s attorney in support of the second respondent’s strike-out application marked “PKV1”).

THE APPLICANT’S WINDING UP APPLICATION

- [17] As mentioned in the introduction, the applicant seeks the winding up of True Ruby on just and equitable grounds (an earlier alternative prayer for the winding up of the close corporation on the basis that it is insolvent having been abandoned).

The legal basis for the relief sought

- [18] As the winding up application has to be premised on the basis that True Ruby is a solvent corporation, the application is brought in terms of section 67 of the Close Corporations Act, 69 of 1984 (the CC Act), read with section 81(1)(d)(iii) of the Companies Act, 71 of 2008 (the Companies Act>).[6]
- [19] Section 81(1)(d)(iii) of the Companies Act simply states that a solvent company may be wound up by a court at the instance of a director or shareholder of the company, or the company itself, on the grounds that “it is otherwise just and equitable for the company to be wound up”. As was clarified by the Supreme Court of Appeal (SCA) in *Thunder Cats*,^[7] the just and equitable ground in section 81(1)(d)(iii) does not merely pertain to matters similar to the other grounds stated in section 81(1), and the word “otherwise” in the subsection does not limit what is meant by “just and equitable”.^[8] As also recently confirmed by the SCA in *Superior Macadamias*^[9] (in which the court was similarly required to apply section 81(1)(d)(iii) of the Companies Act):^[10]

“[19] This Court has explained the approach to an application contending that it is just and equitable that a company be wound up:

‘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.’^[11]

Although our courts have ‘evolved broad categories of circumstances in which they would grant a winding-up order on the just and equitable ground . . . these categories do not constitute a complete and closed list’.^[12] The facts of each case must be considered.”

[20] The five broad categories which have been accepted over the years to constitute “just and equitable” grounds, without limiting the kinds of circumstances in which a just and equitable winding up could occur,[13] have been summarised as follows by the SCA in JP Markets (which added that these remain applicable under the Companies Act, and may be extended):[14]

“(a) disappearance of the company’s substratum; (b) illegality of the objects of the company and fraud in connection therewith;

(c) a deadlock in the management of the company’s affairs which can only be resolved by winding it up; (d) grounds analogous to those for the dissolution of partnerships; and (e) oppression.”

[21] As noted in Rand Air, the grounds analogous to those for the dissolution of partnerships which can serve as a basis for a just and equitable winding up order would be relevant “[w]here the company is a private one and its share capital is held wholly or mainly by the directors and it is in substance a partnership in corporate form”.[15]

[22] Guidance as to the grounds which would justify the dissolution of a partnership, and hence, too, the winding up of companies or corporations akin to partnerships, can be found in Emphy, where Leon J inter alia stated the following:[16]

“... in Marshall v Marshall (Pty) Ltd and Others 1954 (3) SA 571 (N) BROOME JP followed Lawrence v Lawrich Motors (Pty) Ltd 1948

(2) SA 1029 (W) and applied what was said by Lindley on Partnership 11th ed at 691:

"Keeping erroneous accounts and not entering receipts... continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation, have been held sufficient to justify a dissolution... It is not necessary, in order to induce the Court to interfere, to show... any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it".

In Lawrence's case supra MURRAY J also quoted with approval what was said in Lindley on Partnership (supra) in holding that a dissolution of partnership will, inter alia, be directed when it is impossible for the persons to place that confidence in each other which each has a right to expect, and such impossibility has not been caused by the person seeking to take advantage of it. And again where the one person's misconduct is such as to render it impossible for the parties to conduct their business together according to the agreement into which they have entered.”

[23] Emphy also refers to the case of *Franckenberg v Peetz*, [17] where a partner applied on motion for dissolution of the partnership, alleging misrepresentations by his partner as to the amount of his liabilities and that those liabilities had been paid out of partnership monies. The Court found that it could not resolve those allegations on the papers; but concluded from the affidavits that “all hope of amicable cooperation and mutual confidence between the two men has disappeared”, adding:

“It is true that the respondent denies that the relations between himself and the applicant are intolerable, but in the same breath he charges the applicant with serious breaches of the partnership agreement and says that the recriminations which have taken place between the parties have been deliberately brought about by the applicant’s mala fides. The making of charges so grave and serious is utterly irreconcilable with the desire to continue the partnership. There exists, as I have said, between the parties, on the facts before me, no hope of co-operation ...”

[24] Of relevance, too, in this context is *Moosa N.O. v Mavjee Bhawan*, where Trollip J (as he then was) stated:[18]

“Dealing with the winding-up at the instance of a member of a solvent company which is in the nature of a partnership - obviously the kind of company in question here – the author [B.H. McPherson in vol. 27 (1964) Modern Law Review 282] says at p. 303:

'There are in fact two principles which guide the Court in exercising its discretion to wind up a domestic company of this kind: the first is that enunciated by Lord SHAW in *Loch v John Blackwood Ltd.*; the second derives from *Re Yenidje Tobacco*, where the majority of the Court treated as the controlling consideration the absence of any hope of reconciliation and friendly co-operation between the members in the future. And these two principles are sufficiently distinct to make it possible for a member of a domestic company, who cannot bring his case within the first principle, nevertheless to succeed by basing it upon the second.'

As *Loch v John Blackwood*, 1924 A.C. 783, and *Re Yenidje Tobacco Co.*,

(1916) 2 Ch. 426 (Court of Appeal), have both been followed here, each according to the appropriate circumstances, I think that the above thesis that the two principles are distinct and can be used conjointly or alternatively can be accepted as being a correct guide for our Courts too. As pointed out in *Marshall v Marshall (Pty.) Ltd, and Others*, 1954 (3) SA 571 (N) at p. 579F - G, the two principles very often overlap. Both principles were relied upon by the applicant in the present case.

The principle enunciated by Lord SHAW in *Loch's* case at p. 788 is that it may be just and equitable for a company to be wound up where there is

'justifiable lack of confidence in the conduct and management of the company's affairs . . . grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business';

that lack of confidence is not justifiable if it springs merely from

'dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company',

but it is justifiable if in addition there is a lack of probity in the directors' conduct of those affairs. The other principle derived from the Yenidje Tobacco Co. case, usually called the 'deadlock' principle, is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard

to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in

regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly co-operation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership."

[25] Against that legal backdrop, I turn to considering the relevant facts and contentions in the present case. As what is sought at this time is a provisional winding-up order, the test to be applied is that enunciated in *Kalil v Decotex*,^[19] where the Appellate Division held that, in an opposed winding-up application, a *prima facie* case for a provisional order is established when an applicant can show that, on an assessment of all the affidavits, the balance of probabilities is in its favour.

The just and equitable grounds contended for by the applicant

[26] The applicant essentially seeks the winding up of True Ruby on the basis that he has justifiably lost all trust and confidence in the second respondent, as a result of *inter alia* De Jesus's failure to provide him with necessary information and documentation about True Ruby, or even answer his calls or queries, over an extended period of time; De Jesus's failure to attend properly to the tax and accounting obligations of True Ruby; De Jesus's failure to pay the applicant his share of True Ruby's income for more than a decade; and De Jesus's recent assertions – repeated in his answering affidavit – that the applicant was no longer entitled to be a member of the close corporation (an allegation which, according to the applicant, is demonstrably false). The applicant also complains that the second respondent will not allow him to participate in the business of True Ruby, as he is entitled under the Association Agreement of November 2012 to do.

[27] That the applicant was kept in the dark about True Ruby's affairs for a long time is beyond doubt, and accordingly undisputed. So, too, is True Ruby's non-compliance with its tax and financial reporting obligations for many years. The second respondent does however put much of the blame for the lack of communication, absence of financial statements, and failure to file tax returns or pay tax on True Ruby's former accountant, and contends that

these deficiencies have now been addressed by the appointment of Mr Vassen in the last quarter of 2023 and the work that Mr Vassen has

done since then.

[28] It is correct that Mr Vassen's actions have done much to regularise the many instances of gross corporate non-compliance, which to a certain extent could be attributed to True Ruby's former accountant. While De Sa Miranda takes issue with the instructions given to Mr Vassen, and thus the accuracy of the statements and reports generated by Mr Vassen on the strength thereof, his suspicions in that regard would also not justify the winding up of True Ruby, not least because there would be other, less drastic, ways in which the accuracy of the information, and thus too the statements and reports which are dependent thereon, could be interrogated – and it has been held that a court should, before winding up a solvent company, be satisfied that all alternative means have been investigated and failed.[20] Had the only justification for a just and equitable winding up of True Ruby been De Jesus's non-communication with De Sa Miranda over the past decade and his failure (as the effective managing member as a result of De Sa Miranda's emigration to Australia) to ensure that the corporation complied with even its most basic obligations up to the end of 2023, I would therefore have been inclined to dismiss the application on the basis that there could potentially still have been alternative means of addressing the historical problems and current concerns.

[29] As indicated above, another key component of the applicant's case is however that the second respondent contends that the applicant is no longer entitled to be a member of the close corporation and also, relatedly, refuses to allow the applicant to participate in the management of the business of True Ruby. If the second respondent's stance with regards to the applicant's membership of True Ruby is, on a balance of probabilities, untrue, then, in my view, the applicant would be entirely justified in insisting that the trust which it is necessary to repose in the second respondent has been irremediably destroyed and that he and the respondent can accordingly no longer co-exist as members of the same corporation. It would then also seem just and equitable for True Ruby (a private company in the nature of a partnership) to be wound up, as no viable alternative remedies have been suggested by the second respondent and there is also no suggestion that the second respondent

could buy out the applicant's member's share. I therefore turn to considering that issue below, commencing with some

background

for context.

The dispute regarding the applicant's continued entitlement to his 22% member's share

- [30] In 2011, the applicant decided to sell the Property (in Voortrekker Road, Parow), which, as mentioned in the introduction, houses a building in which the anchor tenant was a convenience store and bakery business known as La Ponte Rose. The Property was then owned by a close corporation, Jose Dasa Prop CC (Dasa Prop), of which De Sa Miranda was the sole member. The applicant asked De Jesus whether he would be interested in buying the property, and De Jesus indicated that he was.
- [31] According to De Sa Miranda, he had obtained a valuation of the Property and the rental enterprise conducted thereon in 2010 from Divaris Property Brokers, which had advised that the value of the land and the business was R5.9 million. There is a dispute as to whether De Jesus was asked to pay that amount, though it anyway seems clear that De Jesus would not have been able to do so. What is however common cause is that the Property was sold by Dasa Prop to De Jesus in March 2011, in terms of a written deed of sale, for R4.5 million. The deed of sale makes no mention of the rental enterprise being sold; only the immovable property (erf 7470 Parow).
- [32] The sale agreement was conditional upon De Jesus obtaining a mortgage bond for R4.5 million (i.e., 100% of the purchase price) within 60 days of the signing of the agreement. De Jesus could not obtain a bond for that amount. Sometime after the 60-day period had expired (seemingly in 2012), an entity called Business Partners agreed to provide De Jesus with finance of R3.5 million, against the security of a bond. That left a shortfall of R1 million between the finance and the purchase price. De Jesus did not have that amount of money available at the time, and so De Sa Miranda agreed to loan the R1 million needed to complete the purchase from Dasa Prop. De Jesus's inability to come up with all the funds for the purchase of the Property also meant that the purchaser would now be a corporate entity (True Ruby) in which De Jesus and De Sa Miranda would hold members' interests proportional to their contributions to the purchase price. As De Jesus has pointed out, R1 million is 22% of the total purchase price of R4.5 million; hence De Sa Miranda acquiring 22% of True Ruby in March 2012; and De Jesus (who would be responsible for repaying Business Partners) having a 78% member's interest.
- [33] The involvement of De Sa Miranda and De Jesus in True Ruby was regulated by the Association Agreement that they concluded on 27 November 2012. That agreement inter alia:
- 33.1. Recorded the percentage interests of the two members;
 - 33.2. Recorded the extent of each member's financial contributions to the R4.5 million purchase price payable by the corporation for the Property, and that De Sa Miranda would make his contribution in cash, while De Jesus would borrow his contribution from a financial institution and that he would be solely responsible for servicing that loan;
 - 33.3. Stated that the members would be entitled to interest on their loan accounts at a rate as may from time to time be agreed;

33.4. Stated that, unless otherwise provided, the quorum at a meeting of members shall be both members; that meetings could take place telephonically due to De Sa Miranda spending a substantial amount of time overseas; and that resolutions at meetings of members shall be decided by a consensus between the members;

33.5. Stated that a member could not dispose of his member's share without first making an offer to sell that interest by means of a written notice to the remaining member, which shall be irrevocable for 30 days after receipt and state the price required and the terms of payment;

33.6. Stated that the members will decide annually on the payments to members, and that they could also from time to time make such members' payments as they may deem fit;

33.7. Required that the members ensure that proper books and records, as described in section 56 of the CC Act, be kept, and that the members prepare financial statements for the corporation within nine months of the end of its financial years, in accordance with section 58 of the CC Act;

33.8. Stipulated that each member "is legally in a relationship of trust with the Close Corporation", and must act honourably and bona fide towards the corporation, and use their abilities to its benefit and advantage, as well as avoid a material conflict of interest between themselves and the corporation;

33.9. Stated that the members will jointly manage the business of the corporation.

[34] On the same day as he signed the Association Agreement (27 November 2012), De Jesus also signed a written loan agreement between Business Partners Limited and True Ruby, on behalf of the close corporation. As De Jesus noted in his answering affidavit, Business Partners made it a condition precedent of that loan agreement (which it signed on 23 January 2013), that there be an agreement between De Jesus and De Sa Miranda "regarding the repayment and exit strategy in respect of [De Sa Miranda's] 22% membership in True Ruby", and that the agreement "state that there will be no exit from True Ruby ... or repayment of the loan accounts for a period of 5 years from date of the first advance by Business Partners without the written consent of Business Partners" (clause 8.4.14). (A clause to that effect was inserted by hand into the Association Agreement as clause 11.9.) A further condition precedent was that De Jesus and De Sa Miranda "must subordinate their loan accounts in the borrower [True Ruby] to Business Partners" (clause 8.4.16).

[35] According to De Jesus, De Sa Miranda made his contribution towards the purchase price (R1 million) to Dasa Prop after the conclusion of the Association Agreement (i.e., after 27 November 2012), and Business Partners paid the balance upon registration of the transfer of the Property to True Ruby on or about 28 March 2013.

[36] At some point in 2012 or 2013, De Jesus paid R850 000 in cash to De Sa Miranda. The precise date of the payment, as well as the reason therefor, are the subject of dispute.

36.1. De Sa Miranda alleges that the cash was paid to him “during November 2012” and more particularly “on the same day we executed our Association Agreement [i.e., 27 November 2012]”. According to De Sa Miranda, this amount was part of the price paid for the Property and rental enterprise and was originally intended to be R1 million. Although the key paragraph of his founding affidavit is somewhat confusing in this respect, it is evident from his affidavits as a whole that De Sa Miranda’s version is that this amount was always intended to be in addition to the Property purchase price of R4.5 million. De Sa Miranda also alleges that the reason why this amount was paid in cash was that De Jesus had informed him that he had cash in that amount which had been “hidden from the tax man”.

36.2. De Jesus, on the other hand, alleges in his answering affidavit that the R850 000 was paid to the applicant “[a]fter the transfer of the Property in March 2013”, in part repayment of the R1 million loaned by the applicant in November 2012, leaving him owing De Sa Miranda R150 000. De Jesus also alleges that De Sa Miranda had insisted that this significant amount be paid in cash, as he “preferred to receive the money in cash”.

[37] According to De Sa Miranda, the only payment made to him in respect of True Ruby from March 2013 to date has been a sum of R20,000, paid in June 2013. De Jesus acknowledges this, stating that the amount related to the months of April and May 2013. De Jesus does however dispute that this was the only payment made to De Sa Miranda since True Ruby took transfer of the Property. He alleges in his answering affidavit that, in addition to the R850,000 allegedly paid in cash in March 2013, he “paid the applicant at least an additional amount of R292 000” in mid-August 2013, which “to [his] mind”, covered the capital and “any interest on the R 1 000 000.00 [loan] that could possibly be owed”, adding that De Sa Miranda was “required to then transfer over the 22% members’ interest to [him]”, albeit that this could only occur after Business Partners’ loan had been finally repaid. As purported proof of such payments, De Jesus annexed cheque counterfoils (bearing the dates 13 and 15 August 2013), reflecting payments in the total amount of R292,000 to Dasa Prop.

[38] Between 2018 and 2023, Da Sa Miranda attempted without success to get information about True Ruby’s finances and business from True Ruby’s former accountant, a Mr Raphael Berkman, and De Jesus. De Sa Miranda also alleges that, when he spoke with De Jesus between 2017 and 2020, he enquired from him about payments which he believed to be due to him (something which De Jesus denies). De Sa Miranda further alleges (this time without dispute) that he was unable even

to get hold of De Jesus telephonically from 2020 to 2023.

[39] Eventually, in September 2023, the applicant’s current attorneys sent a letter to De Jesus giving formal notice of a members’ meeting and advising him that, if he did not attend, De Sa Miranda would apply to court to have True Ruby liquidated on just and equitable grounds. The meeting was duly held telephonically on 2 October 2023. A transcript of the meeting, which De Jesus has confirmed is generally correct, has been appended to the founding affidavit.

- [40] The applicant was encouraged by that telephone call, as well as the appointment of a new accountant for True Ruby, and conveyed as much during the next couple of weeks. The applicant also continued to seek more information about True Ruby. An email sent by his attorneys to Mr Vassen on 17 October 2023 requested that Mr Vassen copy him in all communications about True Ruby, supply him with details concerning the tax and financial status of True Ruby, calculate all amounts due to him in terms of what was described as the 22% / 78% rental sharing agreement with De Jesus, and furnish him with a schedule detailing all rental income currently received by True Ruby. On the same day, the applicant's attorneys also sent an email to De Jesus requesting information of the leases in place for the Property and referring to De Jesus' obligation to ensure that De Sa Miranda is "fully compensated for the amount that is overdue for payment to him in terms of [their] agreement".
- [41] In response, the applicant's attorneys received a letter from the second respondent's attorneys on 25 October 2023, contending inter alia that:
- 41.1. De Jesus is not liable for and cannot tender the amount claimed by De Sa Miranda, as De Jesus had paid De Sa Miranda "R850 000 in cash in November 2012 in the presence of various witnesses including 3 representatives of the Bank of Madeira at the residence of Adelino Ribeiro at 22 Franschoek Street, Panorama", and "R500,000 in 3 instalments of R252,000 on 13 August 2013, R40,000 on 15 August 2023 and R208,000 on 15 August 2013 from monies received as part of an inheritance";
- 41.2. De Jesus disputes in its entirety the claim to a 22% share of all rental from 2012 to the present, as he submits "that he bought [De Sa Miranda's] share in the Closed Corporation and that [Da Sa Miranda] has not affected the transfer of the 22% share";
- 41.3. De Sa Miranda has "reneged on the agreement [between the two regarding the sale of the Property] and decided to claim additional money from [De Jesus] which [De Jesus] erroneously paid under duress but denies owing";
- 41.4. De Jesus "hereby claims transfer of the 22% share to [him] and further demands that the surplus money that he paid to [De Sa Miranda] in the amount of R350,000 and which is due and owing".
- [42] The applicant has asserted in the founding affidavit that the content of that letter "is a complete fabrication". He has specifically denied that the payment of the R850 000 in November 2012 was payment for his 22% member's interest in True Ruby, as well as that De Jesus paid him R500,000 in August 2013 (an allegation which he was challenged to prove).
- [43] According to the applicant, that letter appears was the last straw, and led him to conclude finally that he could no longer co-exist with the second respondent in True Ruby, nor trust De Jesus to act honestly or transparently in relation to True Ruby and himself.

[44] As mentioned earlier, a key question for purposes of this winding-up application is whether the version in the second respondent's

attorney's letter of 25 October 2023, as persisted with (albeit not entirely consistently) in the second respondent's answering affidavit, is indeed untrue. For if it is, then De Sa Miranda would seem to be justified in contending that it would be untenable for him to remain as a member of True Ruby together with De Jesus; while De Jesus's unwarranted insistence that De Sa Miranda's membership interest should be transferred to him would in any event preclude the corporation from functioning in accordance with the Association Agreement or indeed at all. And that being so, the applicant would have made out a case for the provisional winding up of True Ruby on just and equitable grounds (there being no plausible and less drastic alternatives[21]).

[45] As I have also explained, at this stage, when a provisional winding-up order is sought, the applicant is only required to show that, on all the affidavits, his version is more probable than the second respondent's. That there is a dispute of fact is therefore not an obstacle to a provisional winding-up order. As this is not a case in which a creditor is seeking the liquidation of a company on the basis that it is unable to pay its debts, it is moreover of no moment whether (as submitted by the second respondent's counsel with reference to Orestisolve[22]) a stricter test applies to factual disputes regarding a respondent's indebtedness.

[46] In my view, the balance of probabilities is strongly in favour of the applicant's version; or, put differently, the applicant's version is considerably more plausible than the second respondent's. Some important considerations in this regard are the following:

46.1. De Jesus did not mention during their recorded members' meeting on 2 October 2023 that he considered himself to have already paid De Sa Miranda for the latter's 22% member's interest back in 2013 and that he was accordingly long since entitled to the transfer of that 22% interest and thus also did not owe De Sa Miranda anything more.

46.1.1. On the contrary, there was the following interaction, after De Jesus had advised De Sa Miranda that the loan to Business Partners had been fully repaid [emphasis added]:

"Miranda: So did you spoke to um to Business Partners about giving you a new loan to buy me out or something like that?"

De Jesus: Uh no, I didn't. No I didn't. I didn't. I didn't speak to business. I've got a good name. I didn't skip once. You know I've battled so much. Look I can go to business partner. I'll just work extra late to pay you off and and get you off my back. You know what I mean? And and carry on.

You know what I mean? It has to be resolved. But uh yeah that's it. ..."

46.1.2. There was also the following exchange a short while later:

"Miranda: Okay. So yeah as you know as you know we've been I've been involved with you now. It's going 10 and a half years."

Okay. I mean 10 and a half years you never give me a cent. I mean you give me R20,000 when we started and then that was it.

De Jesus: Yeah yeah yeah

Miranda: So I mean I've been waiting. I mean like we've not been in contact for some time and um so how do you see how we're going to sort this out? What do you think we should do to sort this? Look when this needs to be sorted out. Okay because I mean ...

De Jesus: We must come to this. We look at this one or two options. Alright. We can between me and you make a resolve something and and and I can start paying you off. Or I can go to Business Partners. Right? And you can look and I never pay off to pay you anything, here is a lease sir [unclear], give me another loan so I can pay Josie off.

...

Miranda: So what do you think we should do?

De Jesus: we should go to Absa for a loan

Miranda: But you see Andrew (unclear) as you know as you know we tried to when I first start with you we tried to go to Absa to get a loan. As you know no one could help us only Business Partners.

As you had a loan with Business Partners I think your best option is to go to Business Partners and ask them to give you a loan. But again we have are we going to go about this? How do I know how much money you owe me? How are going to sort this out?

De Jesus: yeah we must come together and work things out.

Miranda: Yeah because I mean look I want you know I did.

De Jesus: I still got the papers that you wrote out you signed underneath, and you paid me this and this. ..."

46.2. There is moreover no indication of De Jesus or an attorney on his behalf ever having made a claim or demand of that kind between 2013 and 25 October 2023, as one would have expected De Jesus to have done had he completely repaid De Sa Miranda's loan, and made further payments to him, by mid-2013, as De Jesus has now alleged.

46.3. Furthermore, the second respondent's attorney's letter of 25 October 2023 is inconsistent with De Jesus's version in his answering affidavit. As evident from the quotations from the letter above, the letter states that the R850 000 cash payment was made "in November 2012", and thus effectively at the time that the Association Agreement was signed on 27 November 2012 – rather than around the end of March 2013, as alleged in De Jesus' affidavit. That difference is important, because, if the R850 000 was in fact paid in November 2012 (as averred in the letter), it cannot credibly be contended, in the light of the contents of the Association Agreement, that this payment was in substantial reimbursement of the R1 million loan. Nor would it have made sense

for De Sa Miranda to have made a R1 million loan in November 2012, only to be repaid 85% of it almost instantaneously by De Jesus. Any loan would instead have been only for R150 000, and De Sa Miranda's member's interest (if indeed it was considered

appropriate for him to have one) would concomitantly only have been around 3.33%.

46.4. The handwritten page dated 27 November 2012, and bearing the signatures of De Sa Miranda and De Jesus, records a payment by De Jesus of R850 000, supporting what was stated by De Sa Miranda in his founding and replying affidavits, and what was asserted in the second respondent's attorney's letter of 25 October 2023, about when that payment was made. And, as explained immediately above, it is not credible that the R850 000 was in repayment of a R1 million loan from De Sa Miranda if that cash payment was made virtually simultaneously with the loan itself. Nor would it have made sense for the transaction to have been structured in the way it was if De Jesus could pay almost all of the R1 million shortfall between the finance from Business Partners and the purchase price some months prior to the transfer of the Property.

46.5. In addition, the financial statements for True Ruby for the financial year ending 28 February 2024, as furnished by Mr Vassen to the members on 1 March 2024 (and appended to the answering affidavit) refer to De Sa Miranda having a loan to the corporation of R969 635.00 in both the 2023 and 2024 financial years. As De Sa Miranda has contended, that appears to be incompatible with De Jesus's contention that De Sa Miranda's entire loan was repaid, together with any interest that might have been owing, by August 2013; and there is notably no suggestion as to how such a large loan could otherwise have come about.

46.6. As De Jesus has himself highlighted, the loan agreement with Business Partners not only subordinated the members' loans to True Ruby, but did not allow repayment of De Sa Miranda's loan account for a period of five years of the first advance by Business Partners (in January 2013) without the written consent of Business Partners. There is no suggestion that Business Partners' consent was requested or obtained. Had De Jesus repaid De Sa Miranda's entire loan by the third quarter of 2013, he would thus have breached his commitments to Business Partners, which could in turn have resulted in his finance from Business Partners being withdrawn, and Business Partners foreclosing on their bond over the Property. That is not a consequence that one would have expected De Jesus to have lightly entertained, more particularly when there was no necessity, or even any particular reason, to repay De Sa Miranda's loan within so short a time.

46.7. As the Property and the rental enterprise conducted thereon had been valued in 2010 at R5.9 million (and a value of R5.9 million had also been confirmed in the handwritten note of 27 November 2012), it is hard to believe that even a benevolent brother-in-law would sell the whole enterprise for R4.5 million (i.e., R1.4 million less than the valuation) in 2011/2012, while it is anyway more plausible that the price would effectively have been R5.350 million (R4.5 million plus R850,000).

46.8. The second respondent's attorney's letter of 25 October 2023 is also at variance with De Jesus's answering affidavit with regard to De Jesus's alleged repayments. The letter alleges repayments of R500,000 in three instalments in mid-August, whereas the affidavit only alleges

repayments totalling R292,000 in two tranches. De Jesus's version on oath is therefore undermined in this respect as well. It is also difficult to believe that, if only R150,000 was really owing to De Sa Miranda as of March 2013 (with R850 000 of his R1 million loan having been paid off within about four months of the loan having been made), De Jesus would have paid even R292,000, let alone R500,000, to De Sa Miranda in August 2013 to cover the balance of the loan and "any interest" thereon.

[47] I therefore find that, on the balance of probabilities, the applicant has made out a case for the just and equitable winding up of True Ruby.

order

[48] I accordingly make the following order:

A. As regards the second respondent's interlocutory application:

1. The application to strike out is dismissed, save in respect of the portion of prayer 3.3 of the notice to strike out which pertains to paragraphs 10.6 to 10.8 of the replying affidavit and annexures "RA1A" and "RA1B" thereto.
2. The second respondent is granted leave to file the further affidavit of Mr Pravin Kalidas Vassen, deposed to on 1 August 2024, which was annexed to the founding affidavit in the strike-out application marked "PKV1".
3. There is no order as to costs.

B. As regards the main application:

4. The first respondent, True Ruby Trading 1035 CC (reg. no. 2011/066694/23), is placed under a provisional order of winding up in the hands of the Master of the High Court.
5. A rule nisi is issued calling upon the respondents and all interested persons to show cause, if any, on Wednesday, 26 March 2025 (subject to confirmation with the registrar; alternatively such return date as the registrar allocates), as to why:
 - a. The first respondent should not be finally wound up in the hands of the Master;
 - b. The costs of this application should not be costs in the liquidation; alternatively paid by the second respondent.
6. Service of this Order is to be effected:
 - a. On the first respondent;
 - b. On the Master of the High Court;
 - c. On the South African Revenue Service (SARS), at 22 Hans Strijdom Avenue, Cape Town, Western Cape;

- d. On any and all employees of the first respondent and any registered trade union(s) that may represent such employee(s);
- e. By publication once in in the Government Gazette and once in a newspaper circulating in the Western Cape.

ACTING JUDGE P FARLAM

For applicant:

Adv LN Wessels

Instructed by: Matthews Enslin Inc. c/o Bezuidenhout Lak Attorneys

For second respondent:

Adv Dale Lubbe

Instructed by: Ashraf Mahomed Attorneys

- [1] See the comments of the Namibian High Court (per Levy AJP) in *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1993 (2) SA 12 (Nam HC) at 27I-28D.
- [2] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para [105], where reference was made to *Langham and Another, NNO v Milne, NO and Others* 1961 (1) SA 811 (N) at 817 A – F, and the cases cited there.
- [3] While the applicant was to some extent speculating about the causes of matters referred to in Mr Vassen's report, those allegations are, to my mind, within legitimate bounds. (As in *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C) para [79], the applicant is advancing contentions as to the inferences which it is believed could be drawn from irregularities referred to in a financial statement). The allegations are in any event of limited value as it is for the court itself to decide what inferences can appropriately be drawn on the basis of the evidence.
- [4] In circumstances where a respondent does not seek to rebut allegations of that kind made in reply, an inference can even be drawn that the allegations are accurate: see, for example, *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) para [63]; *Commissioner of Customs and Excise v Rennies Group* 1999 (3) SA 771 (SCA) at 784E-F, *Da Mata v Otto N.O.* 1972 (3) SA 858 (A) at 869A-B; *Marshall v Marshall (Pty) Ltd & Others* 1954 (3) SA 571 (N) at 576C-D.
- [5] *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para [15].
- [6] An insolvent corporation could be wound up on just equitable grounds in terms of section 344(h) of the Companies Act, 1973, read with section 66(1) of the CC Act – which states that the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act apply to

the liquidation of corporations to the extent not otherwise provided for in the CC Act. In terms of item 9(2) of Schedule 5 of the Companies Act, section 344 of the Companies Act, 1973, among others, does not apply to solvent companies. As the Supreme Court of Appeal made clear in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA); [2014] 1 All SA 507 (SCA); [2013] ZASCA 173 para [20], the winding up of solvent companies is instead regulated by Part G of Chapter 2 of the Companies Act, and particularly

sections 79 to 81 thereof – and thus the Part of the Companies Act referred to in section 67(1) of the CC Act.

[7] *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA); [2014] 1 All SA 474 (SCA); [2013] ZASCA 164 para [14].

[8] Subsections 81(1)(d)(i) and (ii) refer, respectively, to a situation in which the directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock, and a situation in which the shareholders are deadlocked in voting power and have failed to elect successors for a period which includes at least two consecutive annual general meetings.

[9] *Superior Macadamias (Pty) Ltd and Others v Emvest Agricultural Corporation (Mauritius) Ltd and Another* (865/2022)

[2024] ZASCA 182 (24 December 2024).

[10] *Ibid* para [19] (footnotes in original, but with numbering consecutive to previous footnotes herein).

[11] *Cuninghame and Another v First Ready Development* 249 (Association incorporated in terms of section 21) 2010 (5) SA 325 (SCA); [2010] 1 All SA 473 (SCA); [2009] ZASCA 120 para [3]

[12] *Ibid* para [14].

[13] The SCA reiterated this in *Thunder Cats* (para [15]) in the following passage [footnotes omitted]: “Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case

came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground. In *Sweet v Finbain* [1984 (3) SA 441 (W)] it was said: ‘The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not *eiusdem generis* with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words “just and equitable”’.

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“The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not *eiusdem generis* with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words “just and equitable””

[14] *JP Markets SA (Pty) Ltd v Financial Sector Conduct Authority* 2002 (4) SA 94 (SCA) para [31].

[15] *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350G.

[16] *Emphy and Another v Pacer Properties (Pty) Ltd* 1979

(3) SA 363 (D) at 366A-D

[17] 1934 NPD 162 – which was referred to with apparent approval by the Appellate Division in *Fortune v Versluis* 1962

(1) SA 343 (A) at 349.

[18] *Moosa N.O. v Mavjee Bhawan (Pty) Ltd and Another* 1967

(3) SA 131 (T) at 137B – 138A.

[19] *Kalil v Decotex (Pty) Ltd and Another*

[1987] ZASCA 156; 1988 (1) SA 943 (A); [1988] 2 All SA 159 (A) at 976-982; see, too, *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783F-H.

[20] *Muller v Lilly Valley* [2012] 1 All SA 187 (GSJ) para [33]; *Robson v Wax Works (Pty) Ltd and Others* 2001 (3) SA 1117 (C) paras [38]-[53]; *Recycling and Economic Development Initiative of South Africa NPC (Redisa) v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para [116].

[21] The second respondent’s counsel did not strongly press the existence of alternative remedies, despite my raising this issue

during oral argument. Such potential alternatives as were mentioned – e.g., the applicant raising his concerns with Mr Vassen “directly or through a mediated process”, or suing De Jesus personally for any claim he might believe he has against him – would in any event not be adequate.

[22] Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC) para [7].

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