THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 171/11

In the matter between:

LA LUCIA SANDS SHARE BLOCK LTD	**Appellant**
and	
FLEXI HOLIDAY CLUB	**First Respondent**
TRAFALGAR HOLIDAY RESORTS	**Second Respondent**
STAR VACATION CLUB	**Third Respondent**

Neutral citation: *La Lucia Sands Share Block Ltd v Flexi Holiday Club* (171/11) [2012] ZASCA 53 (30 March 2012).

Coram: MPATI P, HEHER and MALAN JJA and BORUCHOWITZ and NDITA AJJA

Heard: 1 March 2012

Delivered: 30 March 2012

Summary: **Voluntary association – club operating time-share scheme – whether club illegal association having regard to sections 30 and 31 of Companies Act 61 of 1973 – whether club formed or permits the carrying on of business that has for its object acquisition of gain.**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Van der Reyden J) sitting as court of first instance:

1. The appeal is dismissed with costs including the costs of two counsel where employed;
2. The separated issues identified in the Order of Court dated 28 February 2006, and as amplified in the Order of Court dated 15 May 2009, are decided in the first respondent's favour with respect to first respondent and no order is made with respect to those issues in so far as the second and fourth respondents are concerned;
3. The appellant is ordered to pay the first respondent's costs of the hearing and the separated issues from the date of the application to the date of this order including any reserved costs in relation to the separated issues;
4. All other questions of costs are reserved for the trial court.

JUDGMENT

BORUCHOWITZ AJA (MPATI P, HEHER, MALAN JJA and NDITA AJA concurring):

[1] This is an appeal from a single judge of the high court, in action proceedings, with leave of that court. The issue on appeal is whether the first respondent is to be recognised in law, having regard to the provisions of ss 30 and 31 of the Companies Act 61 of 1973 (The Act).

[2] The first respondent is a voluntary association known as Flexi Holiday Club (the club). It operates a property time-sharing scheme and has approximately 60 000 members. The second and third respondents are also clubs which conduct time-sharing schemes but they no longer have any interest in this appeal.

[3] The appellant is a share block company as defined in the Share Blocks Control Act 59 of 1980. It owns an immovable property and a holiday resort in KwaZulu-Natal where it operates a share block scheme. At all material times the club held shares in the appellant which entitled it to the exclusive use of the units in the share block scheme. These shares were disposed of by the appellant when the club failed to pay certain levies. Following such disposal the club instituted an action against the appellant in the KwaZulu-Natal High Court in which it claimed return of the shares, alternatively damages arising from the cancellation of the use and occupation rights which attached to its membership in the appellant.

[4] One of the principal defences raised by the appellant was that the club had been formed for the purpose of gain, or subsequent to its formation had pursued gain in contravention of the prohibition contained in s 30 of the Act and that, consequently, it had no lawful existence. The high court, acting in terms of rule 33(4), ordered that this question be determined separately by way of a trial hearing. The court below (Van der Reyden J) before whom the matter was ultimately heard, held that there was no merit in the appellant's contention and that the first respondent had the requisite *locus standi in judicio.*

[5] The club operates within a group of companies known as the Club Leisure Group (the Group). The Group is effectively controlled by the founding members of the club, Mr Stuart John Lamont and Mr Anthony Nicholas Ridl. Lamont is the chairman of the group and Ridl its managing director. They exercise such control through a holding company, ie Club Leisure Holdings (Pty) Ltd the shares of which are held equally by Lamont and Ridl through trusts controlled by them. In turn, Club Leisure Holdings holds the entire issued share capital of Club Leisure Group (Pty) Ltd, which has three subsidiaries Club Leisure Sales (Pty) Ltd, Vacation Properties (Pty) Ltd and Club Leisure Management (Pty) Ltd. The latter has a subsidiary known as First Resorts

Management (Pty) Ltd. The club has two subsidiaries, namely Club Management Holdings (Pty) Ltd and Flexi Club Management Services (Pty) Ltd.

[6] Each of the companies in the Group has a different function. The developer of the time-share scheme operated by the club is Vacation Properties (Pty) Ltd. It acquires holiday accommodation and time-share interests which it introduces into the club and in return acquires from it in exchange, points which it sells at a profit. Club Leisure Sales (Pty) Ltd sells the points for Vacation Properties (Pty) Ltd and generates a profit in doing that. The club is managed by Club Leisure Management (Pty) Ltd.

[7] It is common cause that the Group as a whole generates very considerable profits. The 2007 pre-tax profit of the group was R60 million, a large portion of which was generated by various subsidiaries in the group.

[8] Ridl explained that the business model which the Group adopted was purposely designed to isolate the club from the business enterprises of the Group and to ensure the existence of a risk free environment. He conceded that considerable profits were made by the companies that controlled and managed the club, but denied that any profit or gain was made by the club itself or its members.

[9] Ridl further explained that the object of the club was to acquire holiday property and accommodation for the use and enjoyment of its members in accordance with its rules. The club obtained its funds from essentially two sources (subscriptions and user charges) which were recovered from members. The user charges were utilised to pay levies which the club incurred in respect of the properties and accommodation interests held by it. The annual subscriptions were used to pay the costs and running expenses of the club. Subscriptions from members were held by Flexi Club Management Services (Pty) Ltd which in turn outsourced the management of the club to Club Leisure Management (Pty) Ltd. In order to further minimise risk to members of the club all bonded properties belonging to it were held in the club's subsidiary Club Management Holdings (Pty) Ltd.

[10] Sections 30 and 31 of the companies Act 61 of 1973 as amended provide, as far as is relevant for present purposes, as follows:

'30. Prohibition of association or partnership exceeding twenty members and exemption

(1) No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.'

'31. Unregistered association carrying on business for gain not to be corporate bodies

No association of persons formed after the thirty-first day of December, 1939, for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.'

[11] The underlying purpose of s 30, which is based upon English precedent, was stated by James LJ in *Smith v Anderson* (1880) 15 Ch D 247 (CA) at 273: '[t]o prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed'. This dictum was approved by this court in *Mitchell's Plain Town Centre Merchants Association v McLeod & another* 1996 (4) SA 159 (A) at 169I-J and *Director: Mineral Development, Gauteng Region, & another v Save the Vaal Environment & others* 1999 (2) SA 709 (SCA) para 8.

[12] The prohibition contained in s 30 extends to associations that carry on businesses that have gain as their objective as well as to associations which permit such business to be carried on. The effect of the word 'permitted' is that associations which were not formed for the purpose of gain but which subsequent to formation pursue gain, contravene the section (see *Suid-Westelike Transvaalse Landbou-Koöperasie Bpk v Phambili African Traders Association* 1976 (3) SA 687 (Tk) at 688G-H). An association which contravenes s 30 constitutes an illegal association which cannot be recognised in law (*see Wakefield v ASA Seeds (Pvt) Ltd* 1976 (4) SA 806 (R) at 809I–810A; *African National Congress & another v Lombo* 1997 (3) SA 187 (A) at 198J-199A.

[13] Section 30 is triggered when an association membership of which exceeds twenty persons is formed 'for the purpose of carrying on any business which has for its object the acquisition of gain by the … association … or by the individual members thereof …'. This purpose is referred to by Nienaber JA as 'the critical purpose'.

[14] The interrelationship between ss 30 and 31 was described by Nienaber JA in *Mitchell's Plain* at 166B-D as follows:

'Leaving aside exceptions and exemptions and dealing only with the formation of the association, the two sections can be synthesised as follows:

(1) if the membership of the association exceeds 20, the association must be registered as a company if it is formed for the critical purpose, failing which it will have no *locus standi in judicio*; if its membership is less than 20, it is not illegal if it is formed for the critical purpose and is to operate as, say, a partnership;

(2) whatever its membership, if the association is formed for the critical purpose it must be registered as a company in order to enjoy corporate personality; if it is not formed for the critical purpose it may yet enjoy corporate personality if it possesses the characteristics of a *universitas*, ie if it is to operate as an unincorporated voluntary association.'

[15] The business to which reference is made in s 30 is the business carried on by the association and not the business which may be carried on by members or entities other than the association. This is particularly relevant in the present case as the appellant seeks to place emphasis on the business activities carried on by the companies in the Group that manage and control the club's affairs. It is also evident from the wording of the section that it is not the object of the association but the object of the business that must be the focus of attention. What matters is the main object. However, a multiplicity of objects may be taken into account provided they 'are congruent and not contradictory'. See *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 at 204; *Mitchell's Plain* at 168H-I.

[16] The term 'business' is of wide import and capable of a variety of meanings. See *Mitchell's Plain* at 167E-F and cases cited therein. In the context of s 30, our courts have accepted the definition of Jessel MR in *Smith v Anderson* above that 'anything which occupies the time and attention and labour of a man for the purpose of profit is business.'

[17] The meaning to be attributed to the term 'gain' was definitively settled by this court in *Mitchell's Plain* at 169J-170B:

> 'The key word is "trading". It is the clue to the meaning of "gain". "Gain" in the context in which it appears in ss 30(1) and 31 means a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organisation, for instance, seeks to achieve. The sections are concerned with commercial enterprises and "gain" must be given a corresponding meaning (cf *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* (*supra* at 202-3). It is not a question of law; it is a matter of fact.'

[18] A practical test for the determination of whether or not a business is being carried on for gain is to be found in the following statement by Simonds J in *Armour v Liverpool Corporation* (1939) Ch 422 at 437:

> 'Neither "business" nor "gain" is a word susceptible to precise or scientific definition. The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of a business for gain … .'

[19] It is, at the outset, necessary to dispose of certain contentions advanced by counsel for the appellant. He submitted that although the club possesses the main characteristics of a corporate body under the common law (a *universitas*)[1] it was in fact not a valid *universitas* as its object was primarily the acquisition of gain. It was further submitted that the club was not a club in the true sense. An authentic club was ordinarily member owned and controlled, whereas it is the trustees who in the present case have absolute control of the club. It is neither necessary nor relevant to decide these questions. Whether the club is a *universitas* or an authentic club was not an issue before the court below.

[20] The central question which is dispositive of the appeal is whether the club was formed or is carried on for the purpose of conducting a business that has for its object the acquisition of gain by either the club or the individual members thereof.

[21] In advancing the contention that the club was indeed engaged in the acquisition of gain reliance was placed on the fact that the club has an impressive portfolio of holiday properties valued at several billion rand. These properties were revalued each year. Mr Vincent Faris, a chartered accountant, who was called as an expert witness on behalf of the appellant pointed out that there had been an appreciation in the 2006 to 2007 financial years of holiday properties held by the club from R2 274 billion to R2

---

[1] The main characteristics of a *universitas* are that it exists as an entity with rights and duties independent from the individual members' rights and duties and has perpetual succession. See *Morrison v Standard Building Society* 1932 AD 229-238; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 860-861 and cases cited therein; *African National Congress & another v Lombo* 1997 (3) SA 187 (A) at 195I-196B.

819 billion. Faris expressed the view that, although the properties were not resold and remained unrealised, they nevertheless constituted an increase in wealth for the club.

[22] Mr Ridl whose evidence was supported by Mr Craig John Davis, a chartered accountant, disputed that the revaluation of the properties each year constituted a gain or increase in wealth. They explained that the revaluation exercise was undertaken in order to take account of inflation and increased property values so as to ensure that parity was maintained between existing and new members. To that end when the value of properties appreciated, existing members would be issued with additional points to ensure such parity. They emphasised that the nett position of members always remained neutral as their accommodation rights did not change.

[23] It was also argued that members could derive wealth by disposing of or trading in points. Members could use their points to earn income in addition to the benefits of procuring cheaper annual holidays. Where additional points were allocated pursuant to the revaluation exercise, members could sell their points at a rate higher than their original purchase price and in so doing derive gain. Counsel conceded that the club per se did not operate with the object that its members could gain by selling points. That being so, such sales (and gains) arise not because of the objects of the business but because of the election of the members, uninfluenced by the objects.

[24] Counsel for the appellant submitted that in order properly to determine the nature of the business of the club reference must be made to the business operations of the Club Leisure Group. This argument is in my view misplaced. The club is a voluntary association and the purpose for which it was formed is to be found in its constitution. The rights and powers of a voluntary association are limited by the terms of its constitution which confines its activities to what is expressly or impliedly contained therein. Clause 3 of the constitution of the club expressly provides that ‘the objects of the club are to acquire holiday property for the use and enjoyment of its members’. It is the intention of the members of the club, as expressed in its constitution, and not the intention of its managers or controllers that is relevant in order to determine the nature and the object of the club’s business.

[25] Reduced to its essentials, the business of the club is to acquire holiday accommodation and time-share interests for the benefit of its members and in exchange for such acquisitions to issue members with points. The club is purely a vehicle for the holding of holiday accommodation or stock which it makes available to its members, and it does not trade in the properties held by it. It is clearly not the intention of the club to sell or dispose of the properties in order to derive a profit or gain. Members also do not join the club for the purpose of managing its affairs but rather to secure holiday accommodation and to have access to the club's extensive portfolio of properties. As Mr Olsen put it for the respondents, the members associate in the club for the flexibility that it provides. Nor do members join the club in order to sell their points at a profit or to trade-in points.

[26] In *Director: Mineral Development, Gauteng Region, & another v Save the Vaal Environment & others* 1999 (2) SA 709 (SCA) at 716 para 8, this court emphasised that the prohibition contained in s 30(1) should be kept within its proper bounds and that the underlying purpose of the section should not be overlooked, which is to prevent the mischief of trading undertakings being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting. The only persons who essentially have dealings with the club are its members and, in my view, the mischief that the Act was designed to obviate would not arise.

[27] On a proper conspectus of the evidence and the aforementioned authorities, I do not consider that ordinary persons would describe the activities carried on by the club as the carrying on of a business for gain as envisaged in ss 30 and 31 of the Act. Accordingly the appeal cannot succeed.

[28] The parties have agreed that, should the appeal be dismissed, the following order should be made:

1. The appeal is dismissed with costs including the costs of two counsel where employed;

2. The separated issues identified in the Order of Court dated 28 February 2006, and as amplified in the Order of Court dated 15 May 2009, are decided in the first respondent's favour with respect to first respondent and no order is made with respect to those issues in so far as the second and fourth respondents are concerned;
3. The appellant is ordered to pay the first respondent's costs of the hearing and the separated issues from the date of the application to the date of this order including any reserved costs in relation to the separated issues;
4. All other questions of costs are reserved for the trial court.

_____
P BORUCHOWITZ
ACTING JUDGE OF APPEAL

Appearances:

Appellant:	A J DICKSON SC with N J TEE
	Instructed by: George Wolfe Attorneys Johannesburg Matsepes Incorporated Bloemfontein
Respondents:	P OLSEN SC
	Instructed by:
	Hornby Smyly Glavovic Inc Westville Goodrick & Franklin Bloemfontein