68/96

Case No 552/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MITCHELLS PLAIN TOWN CENTRE MERCHANTS ASSOCIATION Appellant

and

ALEXANDER JOHN McLEOD First Respondent

MOHAMED FAROUK OSMAN Second Respondent

CORAM: VAN HEERDEN, VIVIER, NIENABER, MARAIS et SCOTT JJA

HEARD: **24 MAY 1996**

DELIVERED: **31 MAY 1996**

J U D G M E N T

/NIENABER JA

NIENABER JA:

The appellant is described in its constitution as "a voluntary association known as the Mitchells Plain Town Centre Merchants Association - the 'association' being a non-profit making body with perpetual succession and with the capacity to sue or be sued in its own name." It instituted action in the Cape Provincial Division against three defendants jointly and severally. I shall refer to the appellant as the plaintiff and to the two respondents and the third defendant (who is no longer a party to the proceedings) collectively as "the defendants".

The defendants were members of the plaintiff's executive committee. The plaintiff's complaint, as related in its particulars of claim, was that they engineered for themselves, at the expense of the plaintiff, an undisclosed profit of some R2,5 million, in breach of the duty they owed the plaintiff and its members to act in good faith, honestly, in the best interests of the plaintiff and its members

and in the furtherance of the plaintiff's objects. They did so, so it is alleged, by first acquiring and then selling at a profit, through the medium of a close corporation of which they were the sole members, a property which they were meant to acquire for the plaintiff. The plaintiff's claim was for the payment of damages in the sum of R2,5 million with interest. The first defendant excepted to the plaintiff's particulars of claim on a number of grounds. The second and third defendants followed suit. Then there were three further developments. The first was that the third defendant withdrew his exception. The second was that the plaintiff and the remaining two defendants somewhat unorthodoxly agreed that the plaintiff would make certain further factual admissions which were to be treated as if they appeared as averments in the particulars of claim. The third development was that the first and second defendants filed a "consolidated notice of exception as amended" on the ground that the plaintiff's particulars of claim "lacks averments

which are necessary to sustain its action". Four separate exceptions are identified, to all of which I shall in due course refer.

The first of the exceptions was upheld by Hodes AJ. The following order was made:

> "The result is that First and Second Defendants' exception is upheld and the Particulars of Plaintiff's Claim are struck out. Plaintiff is given leave to amend its Particulars of Claim within 20 days of this judgment, failing which Plaintiff's claim will be dismissed with costs."

The issue of costs, to which I shall later refer, stood over for further argument. With the leave of the court *a quo* the plaintiff now appeals to this court against the whole of its judgment including the order as to the costs.

The paragraphs in the plaintiff's particulars of claim which are relevant to a consideration of the exceptions are the following:

6. The defendants were at all material times members of the executive committee of the plaintiff.
7. 7.1 The first and second defendants have at all times

been members of Mofal Property Developers CC ("the close corporation"), each having a one-third member's interest in the close corporation.

7.2 The third defendant was, until his resignation on 10 August 1992, a member of the close corporation with a one-third member's interest therein.

8. At all material times the defendants:

8.1 were under a duty to act in good faith towards the plaintiff and its members;

8.2 owed a duty of care towards the plaintiff and its members;

8.3 were under a duty to act honestly towards the plaintiff and its members;

8.4 were under a duty to act in the best interests of the plaintiff and its members;

8.5 were under a duty to further the objects of the plaintiff.

9. During or about 1989 and at Cape Town, alternatively Mitchell's Plain, the plaintiff and the Department of Local Government, Housing and Agriculture: House of Representatives ("the department") concluded an oral agreement ("the agreement"), the express, alternatively tacit, terms whereof were as follows:

9.1 certain immovable property, being erf 28098, Mitchell's Plain, would be subdivided in the

manner depicted on the diagram, annexure "PPC2" hereto;

9.2 the department undertook to sell certain immovable property, being erf 47935, Mitchell's Plain, and measuring 2 843 square metres, as depicted on annexure "PPC2" hereto, (herein referred to as "the property") to the plaintiff;

9.3 the plaintiff would develop and use the property in a manner which would benefit small business entrepreneurs and its members;

9.4 the property would in due course be transferred to the plaintiff and registered in its name.

10. The agreement was confirmed in writing by the department in an undated memorandum addressed by the department to the plaintiff, a copy whereof is annexed hereto marked "PPC3" (the diagram therein referred to being annexure "PPC2" hereto).

11. The defendants were at all material times aware of the agreement and its terms.

12. 12.1 During 1992, but on a date unknown to the plaintiff, the defendants caused the close corporation to purchase the property from the department for a purchase price of R1 million.

12.2 On 6 October 1992 the property was transferred to the close corporation and registered in its name.

13. During 1992, but on a date unknown to the plaintiff, the defendants caused the close corporation to sell the property to Hilmor Property Developers (Proprietary) Limited ("Hilmor") for a purchase price of R3,5 million.

    13.2 Hilmor has paid the aforesaid purchase price.

    13.3 On 10 November 1992 the property was transferred to Hilmor and registered in its name.

14. As a consequence of the aforesaid purchase and sale of the property the defendants, by virtue of their interests in the close corporation, benefitted to the extent of the sum of R2,5 million.

15. The aforesaid conduct of the defendants was wrongful and unlawful and in breach of one or more or all of the defendant's duties set forth in paragraph 8 above.

16. Had it not been for the defendants' aforesaid conduct the plaintiff would have purchased the property from the department for a purchase price of R1 million.

17. The plaintiff has as a consequence sustained damages in the sum of R2,5 million.

One of the further facts agreed to by the parties was:

"Plaintiff at all material times, i.e. from its inception in 1980 up to the present date had and still has more than twenty (20) members;"

The first exception is formulated in the following terms:

"1. (a) *On a proper construction of Plaintiff's* constitution Plaintiff is an association formed for the purpose of carrying on business that has for *its object the acquisition of gain by Plaintiff* and/or the individual members of Plaintiff:

(b) Plaintiff was formed in 1980, i.e. after 31 December 1938;

(c) Plaintiff has, and has at all times had, more than 20 persons as its members;

(d) In the premises Plaintiff is forbidden by section 30(1) of the Companies Act No. 61 of 1973 and thus has no legal existence and cannot have any members recognised in law;

(e) In any event, further, in terms of section 31 of the Companies Act Plaintiff does not possess corporate personality inasmuch as Plaintiff has not been registered as a company under the said Act, nor was it formed in pursuance of letters patent or a Royal Charter;

(f) Plaintiff accordingly has no locus standi to sue Defendants."

The sections referred to read as follows:

"30(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. 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."

I shall henceforth refer to the purpose referred to in the phrase "formed .. 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", which is common to both sections, as "the critical purpose".

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,* i.e. if it is to operate as an

unincorporated voluntary association.

In the instant case the plaintiff's membership exceeded 20 and it is not alleged that it was registered as a company. If it was formed for the critical purpose it would therefore be illegal in terms of s 30(1) and not have legal personality in terms of s 31. In either event it would lack *locus standi*: consequently the first exception would be good.

The critical issue is therefore whether the plaintiff was formed for the critical purpose.

Both sections refer in the first place to the formation of the association. Its purpose, as expressed in its constitution, must thus be determined with reference to the moment when the constitution was adopted or amended. By purpose is understood the contemplated functions and activities of the association. That purpose is determined by interpreting the constitution in accordance with the ordinary rules of construction of a document. When the

document is plain and intelligible as it stands extrinsic evidence is not required and hence not admissible. Extrinsic evidence in particular may not be adduced to obscure what is otherwise clear (*Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624J).

The constitution was annexed to the particulars of claim. There are a number of pointers scattered throughout its contents as to the plaintiff's proposed function and activities. The Department of Community Development was a founder member. The other members were the tenants who hired premises from the department in the Mitchells Plain Town Centre but excluding "major national chains" (clauses 2 and 5). Membership was automatic (clauses 2.3, 2.5, 5.2, 5.4, 5.5, 5.6, 5.7 and especially 5.9). A centre manager was to be appointed "to strive for the efficient and profitable operation of the centre" (clause 2.4). Provision is made for a committee to conduct the business of the association, *inter alia* by

fixing the annual subscriptions and special levies to be paid by members to finance the activities of the plaintiff. Clause 4 is headed "objects". It consists of 22 sub-clauses. It is necessary to quote the first four of them.

> "4.1 To act as an association of the owners of the centre and all lessees of premises in the centre.
>
> 4.2 To promote the centre as a town centre and as an integral part of the community and in this manner only thereby advancing and protecting the general welfare, success, prosperity, service and reputation of the centre and all the members of the association.
>
> 4.3 To encourage co-operation between members of the association in the conduct of their business in the centre.
>
> 4.4 To promote and enforce the popularity of the centre with patrons and others and to promote and increase the volume of trade conducted in the centre by making known the activities of the association and its members by advertising through all and any kinds of media, by decoration and by running promotional programmes, competitions, exhibitions, displays, entertainments and the like."

Clause 15.2 provides:

> "The income and property of the association shall be applied solely to the promotion of the objects of the association and no portion shall be paid either directly or indirectly to the members provided that nothing shall prevent the payment in good faith of remuneration to any member, committee member or servant of the association in return for services rendered."

The plaintiff, so it was envisaged, would conduct a business at the centre. The word "business" is used in the sense of "an occupation, as distinguished from a pleasure - anything which is an occupation or duty which requires attention ..." (per Lindley LJ in *Rolls v Miller* (1884) 27 Ch.D 71 (CA) at 88, quoted in *Cape Town Municipality v Clarensville (Pty) Ltd* 1974 (2) 138 (C) at 148C and see *Maharaj v New India Insurance Co Ltd* 1963 (3) SA 704 (D) at 707A-708D; *Singh v Provincial Insurance Co Ltd* 1963 (3) SA 712 (N) at 715E-716E; *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976 (1) SA 725 (A) at 738D-739E). That

business was to administer the activities at the centre for the good of the community and the plaintiff's members. The constitution contemplates cooperation between the members "in the conduct of their business in the centre" (clause 4.3); and that the plaintiff would strive "to promote and increase the volume of trade conducted in the centre" (clause 4.4). The activities of the plaintiff, according to its objects clause, were geared to the promotion of the centre in order to attract more potential customers and patrons for its members. Its function was to act as a sort of publicity agent for the centre. The business of the plaintiff, in short, was to improve the businesses of its members.

It is not for present purposes essential to enquire whether the plaintiff was formed for the carrying on of a business that has for its object the acquisition of gain for itself; the relevant enquiry is whether its proposed business had for its object the acquisition of gain by its individual members.

> "Neither 'business' nor 'gain'", said Simonds J in *Armour v Liverpool Corporation* [1939] Ch 422 at 437, "is a word susceptible of 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 ..."

Taking the wording of the critical purpose at face value "without a too minute or hypercritical consideration of its terms" (per Jessel M R in *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137 at 145), one can confidently say that the constitution contemplated some or other form of gain by the members. Counsel for the appellant conceded the point but raised two further arguments.

The first was that it is not possible to say, from a reading of the constitution by itself, whether the gain by the members was the plaintiff's main object or merely a subsidiary one. The main object, so it was suggested, could equally well be the improvement of facilities at the centre for the good of the community. Extrinsic

evidence would be required to determine what the main object was; and if extrinsic evidence became necessary an exception was not appropriate.

The argument is based on a *dictum* in *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 where it was said by Davis J at 204:

> "I now come to the next question: Was the object of the business the acquisition of gain either by the Association or by its members? In this enquiry the principle must not be lost sight of that we must look at 'the object'; and by this I understand that we must look at the main object, in contradistinction to objects which are merely subsidiary. In *Smith v. Anderson (supra)* it was said by BRETT, L.J., at p.279: 'But even if a transaction under those clauses is to be considered as carried on for the purpose of gain, which I doubt, yet that is such a merely subsidiary part of the transactions described in the deed that it cannot be said to be a substantial part of what they have to do; and if the substantial part of what they have to do is not a business, a merely subsidiary provision will not bring them within the Act, as was decided in *Reg. v. Whitmarsh* and several other cases.' I think the learned Judge's remarks were tinged by the

> idea that without gain there can be no business, which is, as I have already said, erroneous. I would rather thus restate the principle: if the acquisition of gain is merely a subsidiary and unsubstantial part of the activities of the association, then the latter cannot be said to be an association 'that has for its object the acquisition of gain.'"

Elsewhere in his judgment Davis J talks of "the true ultimate object" (at 207) as opposed to a "purely fortuitous and subsidiary" one (at 206).

The *dictum* appears to suggest that there can be but one main object. The word "its" in the expression "that has for its object the acquisition of gain" does lend some support to that approach. But I am by no means convinced that the word "its" is sufficiently weighty (a) to be indicative of a single dominant purpose with the implication that any other purpose is relegated to the status of a subordinate purpose which must then be disregarded, and (b) to exclude the feasibility of a duality or even a multiplicity of purposes, provided that they are congruent and not contradictory.

What the *dictum*, I imagine, seeks to emphasize is that an object so insignificant as to be trivial in the context of the rightful function of the association, e.g. when a charitable or sporting club is permitted by its constitution to charge a casual fee for tea, must not be allowed to distort the true picture. It remains, in the end, a matter of degree.

As far as this constitution is concerned there were two ultimate objects: to promote the popularity of the centre (a) "as an integral part of the community" (clause 4.2) and (b) as a means of advancing the prosperity of the centre and of the plaintiff's members. At best for the plaintiff neither object predominates. Extrinsic evidence showing that (a) ranks above (b) would not, in my opinion, detract from the conclusion that, even so, the business of the plaintiff has for its object the acquisition of gain by its members. Such evidence would therefore be beside the point. (Compare, in the context of the income tax law, what was said in

African Life Investment Corporation (Pty) Ltd v Secretary for Inland Revenue 1969 (4) SA 259 (A) at 269E-270B) about dominant and subsidiary purposes.)

The second argument was adopted by counsel for the appellant when it was put to him in the course of the debate in court. One of the objects mentioned in clause 4.4 of the constitution was the increase in the volume of trade conducted at the centre. An increase in the volume of trade would obviously benefit traders in the centre. (Incidentally, it was also argued that an increase in the volume of trade might not necessarily suit all traders, depending on the nature of their activities, and that extrinsic evidence would be required to clarify the true state of affairs. The argument is not realistic and can be discounted.) The real question is whether a benefit of this kind, a by-product as it were of the plaintiff's campaign of advertising, is the kind of benefit the sections have in mind. When the sections refer to "the acquisition of gain

... by individual members" do they have in mind a benefit derived directly from the association (such as a distribution or loan or a dividend or the rendering of a service) or is it enough when, as here, the benefit is indirect in the sense that it creates the opportunity or climate for the trader, by his own subsequent efforts, to benefit therefrom? Counsel for the appellant contended for the narrow view, the direct gain; consequently, since the gain in this case was clearly not direct (*vide* clause 15.2 quoted above), the activities of the plaintiff fell outside the scope of the sections and the exception should not succeed.

This conundrum, as far as I am aware, has not yet received the pertinent attention of our courts. In cases such as *Murray v S.A. Tattersall's Subscription Rooms* 1910 TH 35 at 38-39 and *Bruyns v Rand Sporting Club* 1919 WLD 51 at 53-54, it was taken for granted that an indirect gain for the members would none the less qualify as a gain for purposes of what was then the relevant section.

The sections themselves do not contain the words "directly" or any other word or expression indicating a restricted meaning. There is no textual warrant, therefore, for giving the wording a narrow interpretation. But the search for the proper meaning does not end there. It is always helpful to look at the mischief at which the sections are aimed. The underlying purpose of the sections, based on English precedent, has been described in the leading case, *Smith v Anderson* (1880) 15 Ch 247 (CA) at 273 per James LJ as:

> "... to 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."

The key word is "trading". It is the clue to the meaning of "gain". "Gain" in the context in which it appears in sections 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 Africn 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.

On a reading of clause 4 of the constitution it is clear that this is precisely the type of gain which the constitution has in mind for the plaintiff's members. This conclusion is reinforced by the additional facts agreed to by the parties. So, for example, the plaintiff made arrangements "to enable the members to advertise their respective merchandise"; disc jockeys were engaged to make announcements "to the general shoppers about the various products/merchandise of the members"; and security arrangements were made to monitor "the shops of members" and to remove

hawkers "affecting the trade of the plaintiff's members".

In my view the function and activities of the plaintiff fall within the phrase "carrying on any business that has for its object the acquisition of gain by the individual members of the plaintiff". I come to that conclusion purely on a reading of the constitution, without regard to the additional facts agreed on. The constitution is clear and unambiguous. Evidence of surrounding circumstances cannot be adduced in an attempt to alter that situation. It was therefore not inappropriate to test the issue by way of exception. The exception was rightly upheld by the court *a quo*. On the first exception the appeal cannot succeed.

The court *a quo* did not deal with the remaining exceptions. Because these remain as unresolved issues between the parties I propose briefly to refer to them.

The thrust of the second exception was that the plaintiff, *ex facie* its constitution, was not empowered to purchase any

immovable properties. Consequently, so it is alleged in the consolidated notice of exception, the first and second defendants in the first place owed the plaintiff no duty not to acquire the property referred to in the particulars of claim through the close corporation in which they held the interest; hence they did not act wrongfully. And in the second place the plaintiff could not suffer loss or damage "flowing from the purchase of the said erf by the closed corporation".

I leave open the question of the alleged duty owed by the defendants to the plaintiff (cf *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1132F-H). Even assuming such a duty to exist the exception, in my view, is well taken on the second of the two grounds. That ground of exception is premised on the terms of the constitution as they read at the time summons was issued. There is no averment that the constitution was amended in any way either before or thereafter. In terms of clause 4.9 one of the objects of the

plaintiff is "to accept, receive, purchase, take on leave, hire or otherwise acquire any movable property and any rights thereto". No mention is made anywhere in the constitution of the power to purchase immovable property. The inference is inescapable that the plaintiff was not invested with the power so to acquire immovable property. The appellant's counsel readily conceded that the plaintiff did not have the power to speculate in immovable properties; the point, according to counsel, was whether the plaintiff was empowered to purchase this particular piece of land which, according to the particulars of claim and the annexures thereto, formed part of the town centre. His argument was that the purchase of this property was sanctioned by clause 4.20. That clause reads:

> "To do all things as are incidental or conducive to the attainment of the above specified objects or any of them."

According to the argument it is necessarily incidental to object 4.2 (quoted earlier) that the plaintiff should have the authority to

acquire this particular piece of property. Surrounding circumstances, so it was further argued, could be led to explain the exact nature of the proposed transaction, to the extent that it does not appear from the documents annexed to the particulars of claim.

I disagree. In the first place evidence of surrounding circumstances in order to explain the nature of the transaction cannot assist in the interpretation of the ambit of the powers of the plaintiff. And as far as the interaction between clauses 4.2 and 4.20 is concerned, I do not think that the latter was designed to enlarge the powers contained in the former. Clause 4.20 specifically limits the incidental powers to the attainment of the specified objects. Nowhere in the specified objects is the power to acquire immovable property specifically mentioned.

It could of course be argued that the plaintiff was empowered to amend its constitution by following the elaborate procedures set out in clause 14 thereof. But then the averment that an amendment

was about to be sought and would be passed would at the very least have had to be made in the particulars of claim. Failing any such averment no case has been made out in the particulars of claim that the plaintiff could itself have "purchased the property from the department for a purchase price of R1 million". (Paragraph 16 of the particulars of claim.) The exception is not directed at the plaintiff's potential but against its actual power as contained in the constitution as it then stood. The allegations in the particulars of claim when read together with the unamended terms of the constitution cannot in my view support the plaintiff's claim for damages. The second exception is accordingly also good.

I do not propose to spend time on the remaining two exceptions. The third exception is pleaded as an alternative to the first exception. Since the first exception is to succeed, the third exception falls away. The fourth exception is based on the averment that the plaintiff, in paragraph 9 of its particulars of claim,

seeks to rely on an oral agreement of sale of land and that such agreement would be invalid in terms of the Alienation of Land Act, 68 of 1981. The exception is misconceived. The plaintiff does not allege a sale and the document which is annexed in support thereof does not purport to be one (cf *Jassat v Jassat and Others* 1980 (4) SA 231 (W)).

In the result the appeal must fail. That leaves the question of costs.

In its judgment the court *a quo*, having held that the plaintiff as the pleadings stood did not exist as a legal entity, allowed the matter of costs to be argued later. There is nothing on record before us to indicate when the court decided the matter and what its decision was. No order as to costs is included as part of the record. In the heads of argument of both counsel the averments are made that the court *a quo* ordered the members of the plaintiff to pay the costs of the exception jointly and severally. During oral argument

there was, however, some confusion and disagreement whether these statements were accurate and if so, on what grounds the order was made. It does strike me as odd that the court *a quo,* having granted the plaintiff leave to amend its particulars of claim within 20 days of the judgment, could have made such an order. There may be an explanation but if there is it is not apparent from the record. The notice of appeal states in general terms that the appeal is against the whole of the order, including the order for costs, but no specific argument was addressed to us on the point by either side. Nor are the members of the plaintiff before court. In the circumstances I refrain from expressing any views on whether the court *a quo* acted correctly in ordering the members of the plaintiff to be liable for the costs of the exception proceedings before it.

As to the costs of appeal, the respondents' representative asked for an order for costs similar to the one presumably made by the court *a quo*. That I am not prepared to grant, for the reasons

already stated. The only appropriate order is that the appeal be dismissed with costs. If no amendment of the particulars of claim is forthcoming within the further period of 20 days from the date of this judgment, the action in its present form will have been finally disposed of. In that event it may be that the respondents will have to pursue their order for the costs of appeal against what would then have been shown to be a non-existing entity. I express no view on whether they can do so successfully. If not, they may have to look elsewhere for the recovery of their costs.

One final matter. At the commencement of the hearing of this appeal this court was faced with the novel situation of counsel for the respondent announcing that his attorney of record would present the actual argument. And so it happened. I record, for the guidance of the taxing master, that counsel's sole contribution to the proceedings in this court was to introduce himself and his attorney and to give the court the assurance that the two of them were

appearing on an equal footing, neither leading the other, and that their arrangement as to presentation of argument in this court had the express approval of a member of counsel's bar council.

The appeal is dismissed with costs. The plaintiff is given leave to amend its particulars of claim within 20 days of the date of this judgment, failing which the order of the court *a quo* will stand.

P M Nienaber
Judge of Appeal

Concur
Van Heerden JA
Vivier JA
Scott JA

68A 196

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(APPELLATE DIVISION)

In the matter between:

MITCHELLS PLAIN TOWN CENTRE MERCHANTS ASSOCIATION — **Appellant**

and

ALEXANDER JOHN McLEOD — **First Respondent**

MOHAMED FAROUK OSMAN — **Second Respondent**

CORAM: VAN HEERDEN, VIVIER, NIENABER, MARAIS *et* SCOTT JJA

HEARD: 24 MAY 1996

DELIVERED: 31 MAY 1996

J U D G M E N T

MARAIS JA/

MARAIS JA:

I regret that I am unable to concur in the judgment of the majority of the Court in this matter.

The first exception:

It is incontrovertible that plaintiff association was not formed with the object of acquiring gain for itself as an association. It was not intended to trade, nor to provide services for reward, nor to engage in any income generating activities designed to swell its own coffers in any financially quantifiable or tangible sense. The power conferred by clause 4.11 of its Constitution to invest monies of the association "not immediately required for carrying on the activities of the association" is plainly an ancillary power and it would be absurd to suggest that this was the *raison d'etre* for its formation. To the

extent that it might acquire assets, such assets were intended to be assets which would be employed in the pursuit of its objects. Those objects did not include the acquisition of gain for the association.

The question remains whether plaintiff association was formed "for the purpose of carrying on any business that has for its object the acquisition of gain -------- by the individual members thereof". As a matter of historical record, the reference to gain by individual members in a provision such as sec 30(1) was introduced in England in the second half of the nineteenth century to bring within the ambit of the prohibition "mutual companies" and "to get rid of the effect of" the decisions in the cases of R v Whitmarsh (1850) 15 QB 600 and Bear v Bromley (1852) 18 QB 271. The effect of the cases of Whitmarsh and Bear was that unless the entity concerned was established for the purpose of acquiring gain for itself as opposed to

its individual members, it was not hit by such legislation. Bruyns v Rand Sporting Club 1919 WLD 51 at 54; *In re* Padstow Total Loss and Collision Assurance Association (1882) 20 CLD 137 at 149. I have found no reported case either here or in England where similar legislation exists in which it has been held that an inherently unquantifiable, amorphous and indirect benefit such as that which might accrue in this case to a member of plaintiff association has been regarded as the acquisition of gain by a member within the meaning of the relevant legislation. In all the cases in England which I have been able to find in which it has been held that societies or associations have been hit by such legislation because of the acquisition of gain by members, the gains have accrued to them directly and solely by reason of their membership of the society or association under consideration. There must in the nature of things

have been many unincorporated associations or societies in England with more than twenty members which were intended to provide their members with benefits which would give them some or other advantage in their own individual pursuit of gain in their own businesses and I regard it as significant that no reported case can easily be found in which so indirect a benefit has been regarded as sufficient to bring a society or association within the ambit of such legislation. The absence of any suggestion in the text books on company law in England that benefits of such a nature would have that result is also strange if the law is indeed that. Any gain in a financially, or commercially, or indeed in any other appreciable sense which might ultimately accrue to a particular member as a consequence of plaintiff association's efforts "to promote and increase the volume of trade conducted in the centre" will accrue to him, not

as a member of the association, but as a trader in his own right, and might just as easily have accrued to any other trader in the centre irrespective of whether or not he was a member of plaintiff association. While popularising the centre may well be in the trading interest of the members of plaintiff association, it is plain that they derive no gain directly from plaintiff association, and that what is required before any such gain could be acquired even indirectly, is that they succeed in their individual trading capacities in attracting into their own shops and doing business with those who come to the centre as a consequence of plaintiff association's efforts. If the interposition of so substantial and essential a causal factor is necessary before a gain will have been acquired by a member of plaintiff association, I do not think it can rightly be said that the gain emanated solely or even substantially from his mere membership of the association. If a

non-member stood to "gain" in substantially the same way, as he obviously would, it is difficult to see how it can be said that the association was formed for the acquisition of gain by its members *qua* members. Many examples may be postulated of more than twenty persons banding together and subscribing funds to be spent in a way which will enhance the prospect of each of them to make gains, not directly as members of the association so formed, but indirectly in the pursuit of each's own occupation. Fifty small business entrepreneurs may associate with one another and subscribe funds to pay for a continuing programme of business education with the avowed object of increasing their turnovers and maximising their profits but I do not think that it could be said that their association was formed for the purpose of carrying on a business that has for its object the acquisition of gain by their association or by the individual members of the

association. The fact that the purpose of establishing their association was to enable them to acquire gain in their own individual businesses does not mean that the object of their association was to acquire gain for the association or for them as members of the association.

Nor, with respect, do I think that a consideration of the underlying mischief which the relevant statutory provision was enacted to prevent, lends any support to the interpretation which the majority of the Court gives to it. If the mischief is indeed that articulated in Smith v Anderson (cited in the judgment of the majority), an association which acquires no gain for either itself or its members *qua* members and which does not trade, such as plaintiff association, is not an association of the kind described in that case. If this kind of association is hit by the provision, so would an association of traders consisting of more than twenty persons whose avowed object it is to

subscribe funds to engage for reward appropriate persons to publicise and popularise a particular holiday resort in which they trade, in order to increase their trading turnover, be hit. So too would be an association of more than twenty persons who came together to fund and produce annually a free directory listing its members and the services or merchandise which each offered in the pursuit of their individual trades or occupations. I am unable to accept that such was the intention of the legislature. And even if it is so, as has been suggested, that the mischief was too narrowly stated in Smith's case, there would be no warrant for going to the other extreme and for saying that merely because an association will have to conclude commercial transactions with the public in order to pursue its objects, it is *ipso facto* within the mischief of the section even although its manifest object is neither its own gain nor that of the members, but to

benefit third parties. Obvious examples are societies for the generation of funds for the provision of bursaries, not for its members, but others; societies for the preservation of flora or fauna, and the like.

Thus, even if it be assumed that plaintiff association was formed for the kind of purpose referred to in the judgment of the majority, I do not consider that it was an unlawful association. The first exception was therefore wrongly upheld.

The second exception:

I agree with the majority of the Court that plaintiff association had no power to acquire immovable property. Where I part company with the majority is in their reading of paragraph 16 of the particulars of claim. The allegation is not that plaintiff was at all times empowered to buy the property; the allegation is that plaintiff "would have purchased" the property if defendants had not done so.

As is well-established, an exception founded upon the alleged absence of a cause of action can only succeed *if on any* reasonable interpretation of the allegations made by the pleader no cause of action is disclosed. Unless there is some insuperable impediment in law to plaintiff doing so, when plaintiff alleges that it would have bought the property that can be taken to mean that it would have done all things which it was necessary to do in order to enable it to buy the property. There was no reason in law why plaintiff could not have amended its constitution to give it the necessary power to buy this particular immovable property. Nor would it in fact be necessary to actually do so in order to be able to invoke the cause of action which it did. If defendants' act of pre-emption prevented it from acquiring the property before it had done so itself, there would be no point in amending its constitution until such time as it is able to acquire a similar suitable

property. I do not read Bellair's case, cited in the judgment of the majority, as necessarily negativing the existence of any duty not to pre-empt the association's opportunity of acquiring the property, simply because its objects clause did not at all relevant times empower it to purchase immovable property. The decision in that case is explicble on its own special facts. This exception too was, in my view, bad.

The third exception:

This was that plaintiff could not sustain damages by way of loss of profit as it was avowedly a non-profit making association. There is no substance in the exception. Even a non-profit making body may suffer loss. If it is wrongfully deprived of an opportunity of buying property it needs, and has to pay more to acquire it or a similar property than it would have had to pay if it had not been so

deprived, it has suffered a loss. The allegation that plaintiff makes is not limited to a loss of profit; it includes an alternative averment of loss "being the difference between the purchase price the plaintiff would have paid to acquire the property and the fair and reasonable market value thereof". It is complaining that it was unlawfully deprived of an opportunity (which it would have taken) to acquire an asset at less than its true market value. Its status as a non-profit making association does not preclude it from claiming damages for such loss.

The fourth exception:

I agree with the majority that this exception is misconceived.

Whether or not the particulars of claim may be vague and embarrassing in various respects is a question which is not before us.

No notice to cure was given in terms of the relevant rule of court and no exception may be taken to the pleading on that ground. The pleading may or may not be open to an exception that it discloses no cause of action on other grounds but no such other grounds were raised and those which were raised are, in my view, unsound.

In the result I would uphold the appeal with costs, such costs to include the costs of two counsel, and substitute the following order for that made by the Court *a quo*:

"The exceptions are dismissed with costs".

R M MARAIS
Judge of Appeal