

THE REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 21472/22

In the matter between:

BRIAN BUCKHAM

First Applicant

JOHN MILLAR

Second Applicant

WARREN ERFMANN

Third Applicant

and

PLATTNER GOLF (PTY) LTD

First Respondent

DIANE DAVIS SC

Second Respondent

THE LINKS GOLF (PTY) LTD

Third Respondent

Coram: Wille, J

Heard: 14 February 2024

Delivered: 1 March 2024

JUDGMENT

WILLE, J:

Introduction

[1] Golf is a game of honesty and integrity. In my view, this also applies to the management of golf clubs in that their personnel must act with honesty and integrity. This is an application about the alleged adverse treatment of the applicants by the first and third respondents. The second respondent takes no part in these proceedings and abides by the court's decision.¹

[2] The principal object of many golf clubs is to carry on the activities of a golf club by providing recreational and social amenities for its members as appropriate, as well as to promote and encourage the playing of golf and all things incidental to it. This is always in the spirit of sportsmanship, fair play and camaraderie.²

[3] This case involves two magnificent golf courses and one spectacular golf course. The two magnificent golf courses are owned and operated by the first respondent. The two golf courses referenced above form part of a golf course complex and this complex is owned and controlled by the first respondent.³

[4] The spectacular golf course, which is part of an exclusive golf club, is also owned by the first respondent. The spectacular golf course does not form part of the main golfing complex. It is located close by. The applicants membership in and to this golf club is the subject of this application. The guiding and controlling mind behind the first respondent is a businessman who features prominently in this application.⁴

¹ The second respondent is a well-respected senior counsel who was nominated as the chairperson for a disciplinary enquiry.

² Many golf clubs have this principal object as the introduction to their constitution and governance rules for their members.

³ These are the two golf courses named "Montague" and "Outeniqua" in the main "Fancourt" golf complex.

⁴ The third golf course is the "Links" golf club. The controlling mind referred to is - "Dr Plattner".

[5] The first respondent promulgated specific rules regulating the relationship between it and members of this exclusive third golf course. The applicants' membership in and to this golf club is entirely discrete from their membership in and to the other two golf courses in the nearby golfing complex. Their memberships are entirely separate and have nothing to do with each other.⁵

[6] This third golf course's membership is exclusive. Entry is by invitation only. The invitation is from the controlling mind of the first respondent. Once invited, a hefty non-refundable entry fee is payable, together with a not-insubstantial yearly subscription fee that must be paid. All the applicants were invited to join this exclusive club and have complied with their financial obligations towards this club. This is not disputed. They are in good standing with this club. In addition, there are no complaints about their conduct on this exclusive golf course or within this club's precinct.⁶

Rules

[7] This exclusive golf club has rules. All the members are obliged to comply with these rules. This must include the controlling mind behind the first respondent. The applicants' memberships were summarily terminated, and after that, they were summarily suspended by the first respondent almost two years ago. They have been precluded from access to this exclusive golf club ever since.⁷

[8] The rules of this golf club are unambiguous. They empower the first respondent to terminate a member's membership if it forms the opinion that the member in question behaved; (a) in an unseemly, irresponsible or unsporting manner, or (b) committed any improper or dishonest act, whether in relation to the club and its affairs or otherwise.⁸

[9] These rules have nothing to do with the rules applicable to the applicants in connection with the memberships that they hold in relation to the other two golf courses which they received because of their home ownership in the main golfing complex.⁹

⁵ The applicants' membership to the Links is separate from their membership in and to the "Fancourt" Golf Club.

⁶ The applicants are all members of the Links and have complied with all their membership obligations.

⁷ Their memberships were summarily terminated without notice at an AGM held on 25 March 2022.

⁸ Rule 28 of the rules relating to membership of the Links golf club.

⁹ The applicants own houses on the estate and by virtue of their home ownership are members of the "Fancourt" Golf Club.

Termination

[10] The first respondent avers that the applicable rules do not circumscribe its ability to terminate memberships. Instead, it claims it is also entitled to terminate the membership of a member who no longer displays:

‘...a capacity for friendship in the “Links” context...

[11] Apart from its incomprehensible nature, this expression, which is even more vague than the conduct described in the rules, appears to mean that the first respondent considers it has a discretion to terminate the memberships of those it considers have spurned its friendship, even if those members do not behave in a manner prohibited in terms of the rules when doing so.¹⁰

[12] The first respondent in a *volte face* says it formed the ‘initial opinion’ that the applicants were guilty of ‘*unseemly and irresponsible*’ conduct and also perhaps ‘*improper or dishonest*’ conduct. It seems to contend that the conduct in question (and possibly some other unknown conduct) also constituted a spurning of friendship that justified its exercising of power to terminate the applicants’ memberships.¹¹

Overview

[13] The first and third applicants became members of the exclusive golf course nearly twenty years ago. The second applicant became a member about ten years ago. The applicants are thus subject to the rules of their club. Although the rules changed over time both versions of the rules envisage members being afforded a hearing before being reprimanded, or having their memberships suspended or terminated. Most importantly, before this power under the rules is exercised the member involved shall be given an opportunity to explain his or her conduct and shall have the power to summon any member or other person to the hearing and shall have the right to cross-examine such a witness, and to tender evidence by himself or herself or anyone else. Neither party shall be entitled to legal representation.¹²

¹⁰ It is also difficult to understand how one can have a “golfing friendship” with an incorporated company.

¹¹ The applicants also contended that no procedural requirements of the rule (a hearing) were complied with.

¹² This in accordance with both sets of rules which may or may not have been applicable at the time.

[14] Further, no reasons are required to be given after a hearing has been completed. At its root was the added provision that any member whose membership was suspended or terminated shall have no right of appeal or review, claim damages, or take any other action in connection with such suspension or termination. If the membership of a member was suspended or terminated, such member would remain liable for all unpaid amounts due and would irrevocably forfeit the right to a refund of his or her membership deposit or membership fees previously paid by him or her.¹³

[15] The communal interests of the property owners in this discrete housing development (in the golfing complex) are regulated and protected by a homeowners association. This association instituted arbitration proceedings against the first respondent about two years ago. At this time, all the applicants were directors of this homeowner's association.¹⁴

[16] The first and second applicants were engaged with the day-to-day running of the arbitration against the first respondent. The arbitration concerned disputes regarding the nature of the homeowners' association's management role and the rights that members and guests enjoyed to use the two golf courses within the complex.¹⁵

[17] Before the arbitration had been finalized, the homeowners association convened its annual meeting. It was a significant meeting because the identity of the directors appointed was perceived to impact the approach to the ongoing arbitration. It was during this meeting, but before the voting for the new directors had been tallied up, when the applicants received their termination letters.¹⁶

[18] This termination was met with resistance and after correspondence was exchanged the applicants' legal representatives instituted proceedings to review and set aside the decision to terminate their memberships. Their challenge was both substantive and procedural. I say this because they complained that the termination decision had been taken by the controlling mind of the first respondent and that they had not been afforded any hearing as contemplated in both sets of the rules.¹⁷

¹³ This draconian provision goes to the issue of the remedy which is discussed later in this judgment.

¹⁴ This is the "Fancourt Master Homeowners Association" and the arbitration commenced in 2021.

¹⁵ The two golf courses known as "Montagu" and "Outeniqua" known as the "Fancourt" golf courses,

¹⁶ This was at the homeowners' association's AGM held in March 2022.

¹⁷ They had been afforded no hearing under the rules. The termination notification was from Dr Plattner.

Consideration

[19] The controlling mind behind the first respondent is also one of the directors of the first respondent. The first respondent is dependent on his money and favour. This is so because he poured considerable resources into the coffers of the first respondent by funding its expenditure on the spectacular third golf course. This is so also because the contributions made by the members do not cover the cost of maintaining this golf course. The applicants argued that the controlling mind behind the first respondent maintained and exercised a material influence over the first respondent in the running of all of its affairs. The controlling mind behind the first respondent decided (and decided alone) who would be eligible and receive invitations to become members of this exclusive third golf course and club.¹⁸

[20] This was not denied, save to state that this influence was not in any manner untoward. Thus, the *influence* of the controlling mind was not denied. In this context, in the termination correspondence, it is not the first respondent who terminated the applicants' memberships, but rather this was at the very direction and command of the controlling mind behind the first respondent.¹⁹

[21] The reason given in the correspondence to the applicants for terminating their memberships was because they spurned the friendship of the controlling mind, the friendship of his family and that of the first respondent. This was expressly stated in the so-called letters of termination.²⁰

[22] As a direct result, the applicants instituted proceedings to review the termination of their memberships, one of the grounds being the controlling mind behind the first respondent did not have the power to terminate their memberships. Following this application, the first respondent immediately re-instated the applicants' memberships but simultaneously alleged that their initial opinion was that the applicants were now guilty of conduct that was '*unseemly and irresponsible*' and '*improper or dishonest*' and suspended the applicants with immediate effect.²¹

¹⁸ The Links is rated as one of the best golf courses in the world and hosts prestigious golf tournaments.

¹⁹ Dr Plattner alone terminated the applicants' membership in and to the Links golf club.

²⁰ In correspondence dated 25 March 2022, Dr Plattner purportedly terminated the applicants' membership to the 'Links'.

²¹ This was clearly an afterthought and an attempt to 'muddy the waters' regarding the initial unlawful termination.

[23] It was not the subject of any serious dispute that the first respondent adopted the views of its controlling mind regarding the termination of the applicant's memberships in and to this third golf course. Curiously, they say that they reached the termination and suspension conclusion independently of the views of the controlling mind. This bears some close scrutiny. Undoubtedly the initial termination was at the instance of the controlling mind acting alone. The termination letters say so in terms.²²

[24] Then came the hoodwink in an attempt to alchemise what the controlling mind had done. Now the first respondent attempts to rely on new and different general unspecified conduct unrelated to the issues of the alleged spurning of friendship.²³

[25] At its core, the applicants say this case is really about bias. They contend for an extreme case of bias. They say that viewed in context, the suspension was manifestly a device to perpetuate the unlawful termination of the applicants' memberships in the initial letters of termination at the instance of the controlling mind of the first respondent. The applicants advance that the use of this device manifestly underscores the bias they complain of so bitterly.²⁴

[26] Accordingly, the applicants contend this is why they were not afforded a hearing of any kind whatsoever despite the rules providing for a hearing procedure. Thus, the argument is that the first respondent is incapable of forming an independent view on whether the conduct contemplated in the rules has been committed or an appropriate sanction, if it has. This, aside from the first respondent's misunderstanding that it has the power to terminate memberships on grounds other than those contemplated in the rules. The bottom line is that the first respondent attempted in vain to justify its suspension conduct saying the rules implicitly gave it the power to do so. This is not the basis for sophisticated reasoning and even if it was correct, no justifiable reason has been given for dispensing with a hearing in this case. The subsequent suspension for the reasons now put forward is simply cold comfort or what had taken place.²⁵

²² The notifications state in terms that the termination of the memberships is from "Dr Plattner".

²³ The immediate subsequent contrived suspension seemingly now relies on entirely different alleged misconduct.

²⁴ The applicants have been deprived of the use of the facilities at the Links for about two years.

²⁵ The applicants' membership was terminated on the basis of 'spurned friendship' without any hearing at all.

[27] A further difficulty with the alleged right to terminate based on a spurned friendship is that the first respondent conducted itself by the use of a guillotine without a hearing. Moreover, the initial termination decision was abandoned with no explanation, and a fresh complaint was recorded after that, allegedly by the first respondent. Also, the first respondent thereafter proposed that the second respondent proceeds with a conduct hearing as contemplated in terms of the rules.²⁶

Bias

[28] The applicants contended that the first respondent's misunderstanding or the belated construction of its right to terminate also underlies their contentions of bias. The first respondent says its bias is irrelevant because of its discretion, and accordingly, it is permitted to act the way it did and wants to, despite its bias. I disagree. I say this because the bias the applicants complain of is of a more fundamental kind involving a pre-judgment of the matter. This type of bias cannot be excluded by contract. Given the seriousness of the bias, natural justice will trump that contractual iteration.²⁷

[29] The first respondent argued that whatever the desires and the wants of the controlling mind behind the first respondent may be (or may have been), the board of the first respondent would apply their minds to the matter independently of his preferences. Again, I disagree, and this is cold comfort because a promise not to be biased does not eliminate the fact of bias. The very reason bias is problematic is that it cannot be 'switched off' because of the mere promise it will not present itself.²⁸

[30] The facts in support of this bias are these; (a) the first respondent describes the controlling mind behind it as the owner of this golfing complex, (b) the first respondent permitted its controlling mind to terminate the applicants' memberships at a whim without any hearing and, (c) the evidence suggests that a mandate to terminate the applicants' memberships was issued out by the controlling mind behind the first respondent.²⁹

²⁶ This was clearly a belated afterthought by the first respondent.

²⁷ *Trustees for the Time Being of the Legacy Body Corporate v BAE Estates and Escapes (Pty) Ltd* 2022 (1) SA 424 at [39].

²⁸ This is also sometimes styled as 'reactive bias'.

²⁹ A WhatsApp showed that the mandate to terminate the memberships was at the instance of Dr Plattner.

[31] At the core of this consideration of bias is the timing and circumstances of the decision to suspend the applicants' memberships. This indicates that this was done to facilitate the controlling mind's decision to terminate the applicants' memberships, irrespective of the prevailing circumstances. The protestations about lack of bias by the first respondent amounted to no more than floccinaucinihilipilification.³⁰

[32] Regarding the suspension, the first respondent said the applicants had waived the right to challenge their suspension. This reasoning is difficult to understand as the applicants always maintained that their suspension was invalid and wanted it lifted. The rules made it abundantly clear there must be a hearing before a suspension. There was no hearing at all.³¹

Remedy

[33] The applicants welcomed the belated suggestion by the first respondent for the appointment of the second respondent to determine whether their memberships should be terminated. Notably, however, the first respondent was only prepared to receive recommendations from the second respondent. The first respondent thus wanted to maintain control. This is undoubtedly at the insistence of the controlling mind behind the first respondent. The first respondent (in the form of its controlling mind) insisted on retaining the final decision for itself. The second respondent found such a dispensation to be unacceptable.³²

[34] The second respondent (correctly so), believed that she could not ethically act as chair of a disciplinary enquiry unless she was hired as a neutral officer and given the authority to conduct the enquiry following the relevant rules and the dictates of natural justice. The second respondent wanted her mandate to be clarified and amended. Put another way, the second respondent desired that it be expressly recorded that she would be entitled to make rulings, as opposed to recommendations which would merely be forwarded to the first respondent who would be left to make the ultimate decision regarding the fate of the applicants.³³

³⁰ The termination without any hearing and the suspension also without any hearing whatsoever.

³¹ The abuse of power by the controlling mind of the first respondent simply went unchecked.

³² The second respondent said the role she was asked to play was incompatible with the task of 'chairing' the enquiry.

³³ The second respondent wanted to ensure that her rulings and recommendations would be adhered to by the first respondent.

[35] At its root, the controlling mind behind the first respondent had already decided to dissociate himself from the applicants, and he considered he had virtually unlimited discretion to do so. Thus, whatever recommendations were made by the second respondent under proceedings before her, the first respondent would nevertheless terminate the applicants' memberships.³⁴

[36] It has long been accepted that certain decisions by private entities are subject to the fundamental principles of justice. This means that domestic tribunals must follow a fair procedure to afford persons a fair hearing and allow them to present their evidence. Fair play must always be observed, and this must be done honestly and impartially. The relevant tribunal must make '*fair and bona fide*' findings of fact, acting honestly and in good faith.³⁵

[37] The bottom line is that the extent of the right to natural justice will depend on what is rational and justifiable, as opposed to what the parties had notionally agreed. The rules of justice will not permit whimsical and biased decisions that will have significant effects on third parties, such as the termination and then the suspension of the applicants' memberships without a hearing, let alone a fair hearing. Further, the identity or form of the decision-maker may become immaterial. Instead, what is more significant is the effect of its decision and its implications on the subject to whom it is directed.³⁶

[38] The applicants seek to lawfully restrain the first respondent (and more so the controlling mind behind the first respondent) because of its demonstrated bias. This has been done to attempt to achieve a meaningful result and to hopefully put an end to this unfortunate litigation. The parties have agreed to the appointment of the second respondent. The disagreement between the parties concerns only the extent of her mandate. The second respondent herself has rightfully pointed out to the parties that she would be uncomfortable in chairing a disciplinary hearing in circumstances where she is not engaged as an independent and impartial chair.³⁷

³⁴ Hoexter and Penford "Administrative Law in South Africa" (3rd ed) at 605 and 606.

³⁵ *Turner v Jockey Club of South Africa* 1974 (3) 633 (A) at 646 G-H.

³⁶ *Trustees for the Time Being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* 2022 (1) SA 424 at [40].

³⁷ The second respondent stated in terms that she did not want to be answerable to Dr Plattner.

[39] Thus, I believe that granting the relief as contended for by the applicants will not be overboard and would not (in these peculiar circumstances) amount to judicial overreach. There would be no point in referring the matter to the second respondent solely for a recommendation.³⁸

Costs

[40] The applicants sought to resolve their dispute before instituting this application. They were prepared to submit to a hearing before an independent person in the form of the second respondent to investigate their alleged misconduct. The first respondent agreed that the second respondent could carry out the hearing and make recommendations to it. However, the first respondent wanted to maintain control and was not prepared to let the second respondent determine whether the applicants' had committed misconduct as contemplated following the rules, which led to a stalemate. The suspension and termination of the applicants' memberships undoubtedly failed to comply with the rules on both procedural and substantive grounds.³⁹

[41] The applicants sought to achieve a *via media* through the voluntary appointment of the second respondent to determine the proceedings, which the first respondent refused. Thus, the application was brought out of a situation of necessity, and therefore there are no reasons why the costs should not follow the result.

Order

[42] The following order is made;

1. The first respondent's suspension of the applicants' golf memberships in and to the '*Links Golf Club*' is reviewed and is, with this, set aside with immediate effect.
2. The first respondent is ordered and directed to restore the applicants' golf memberships and privileges in and to the '*Links Golf Club*' with immediate effect.

³⁸ The order must be practical. Moreover, the parties have agreed to an alternative 'decision' maker.

³⁹ The applicants were afforded no hearing at all.

3. The first respondent may not suspend or terminate the applicants' memberships or otherwise sanction them based on the conduct alleged in either annexures **FA9**, **FA10**, **FA11** to the founding affidavit (being the letters to each of the applicants dated 25 March 2022) or annexure **FA15** to the founding affidavit (being the letter from the first respondent's attorneys dated 7 July 2022).
4. It is recorded that the order in paragraph three above will not preclude the first respondent from taking such lawful steps it may deem appropriate to permit an independent third party to decide whether to suspend or terminate the applicants' memberships or otherwise sanction them based on the conduct alleged in the said annexures **FA9**, **FA10**, **FA11** and **FA15**, or suspending or terminating the applicants' memberships, or otherwise sanctioning them, based on conduct not identified in the said annexures **FA9**, **FA10**, **FA11** and **FA15** (subject always to the applicants' full rights to challenge such suspension, termination or sanction).
5. The first respondent is to pay the applicants' party and party costs of this application (including the costs of two counsel, where employed).

E. D . WILLE
(Cape Town)