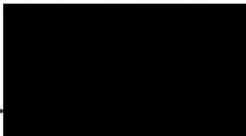


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: 
<u>11/4/24</u>	
DATE	SIGNATURE

Case No: 22/16191

In the matter between:-

PHILIP IAN TILLMAN
RAN GOLDSTEIN

First Applicant
Second Applicant

and

THE BODY CORPORATE OF
CENTRAL SQUARE

First Respondent

GOLDS GYM SANDTON (PTY) LTD

Second Respondent

JUDGMENT

KAPLAN AJ:

- 1 This is an opposed application brought by First and Second Applicants against First and Second Respondents for final relief in the following terms:
 - 1.1 Declaring that the contract between the First Respondent, the Body Corporate of Central Square ("**the Body Corporate**"), and Second Respondent, Golds Gym (Pty) Ltd ("**Golds Gym**"), for the provision of gym services by the Body Corporate to the Applicants to be an Unsolicited Service in terms of S21 of the Consumer Protection Act, 2008 ("**the CPA**").
 - 1.2 Declaring in terms of S21(7) of the CPA that the Applicants have no obligation, and have never had an obligation , to pay for the unsolicited services.
 - 1.3 Ordering Golds Gym to prepare a statement of account in respect of gym fees received in respect of each of the Applicants.

- 1.4 Directing Golds Gym to refund to the Applicants respectively, all payments made by the Applicants directly to Golds Gym, and all payments made by the Applicants to Golds Gym indirectly through the levies of the Body Corporate.
 - 1.5 That Golds Gym is ordered to immediately cease invoicing the Body Corporate for any subscriptions that they offer to either of the Applicants.
 - 1.6 That Golds Gym is interdicted from entering into a contract with the Applicants without the unanimous resolution, as defined in S1 of the Sectional Titles Schemes Management Act 2011 ("the **STSMA**") of the members of the Body Corporate supporting a contract between the Body Corporate and Golds Gym.
- 2 The case made out by Applicants in their Founding Affidavit is in summary as follows:
- 2.1 Applicants each own a unit in the Sectional Title Scheme known as Central Square Sandton ("**the Sectional Title Scheme**").
 - 2.2 The Body Corporate compels owners of units in the Sectional Title Scheme to pay a forced gym membership subscription

regardless of any owner's express request not to subscribe for the gym membership.

2.3 The Body Corporate achieves the forced subscription by contracting directly with Golds Gym purportedly on behalf of all the owners and then apportions the contracted amount to the owners via the ordinary levy structure.

2.4 The Developer Lushaka Investments (Pty) Ltd (**"the Developer"**) represented by a Mr Aquino (**"Aquino"**), by virtue of its ownership of commercial/retail units in the Sectional Title Scheme, perpetually holds a minimum of 50% vote at any meeting of the Body Corporate. This percentage affords Aquino an automatic majority vote resulting in the appointment of Trustees who act at Aquino's behest. Aquino controls the Body Corporate and uses it for his personal financial advantage through the forced subscription. Aquino is also the majority shareholder of Golds Gym.

2.5 On 6 January 2020 the Body Corporate and Golds Gym entered into a written agreement for the forced subscription. The Trustees who signed the agreement on behalf of the Body Corporate are employees of the Developer and under the control of Aquino. It is contended that the said Trustees were "severely conflicted".

2.6

2.6.1 Applicants rely on the CPA which provides in Section 21 as follows:

"S21 – Unsolicited Goods or Services

- (1) For the purpose of this Act, goods or services are unsolicited in any of the following circumstances, subject to subsection (2):*
 - (e) if any goods have been delivered to, or any services performed for, a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that delivery or performance, the goods or services, as the case may be, are unsolicited goods.*
- (7) A person has no obligation to pay a supplier for unsolicited goods or services, or a deliverer for the cost of delivery of any unsolicited goods.*
- (9) If a consumer had made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act No 55 of 1975)".*

2.6.2 Because the forced subscription is an unsolicited service, neither of the Applicants have any obligation to pay Golds Gym for the forced subscription and by extension the Body Corporate cannot lawfully levy the Applicants for the subscription.

2.7

2.7.1 Applicants rely further on Section 3(1)(a) of the STSMA which provides as follows –

“3 Functions of bodies corporate

- (1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include –*
 - (a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs –*
 - (i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);*
 - (ii) for the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land;*

- (iii) for the payment of any insurance premiums relating to the building or land; and*
- (iv) for the discharge of any duty or fulfilment of any other obligation of the body corporate”.*

2.7.2 Section 3(1)(a) of the STSMA defines the purpose for which the Body Corporate is entitled to establish and maintain the administration levy. Subsections (i), (ii) and (iii) are very specific, and a “gym service” cannot possibly fit therein.

2.7.3 Section 3(1)(a)(iv) of the STSMA entitled the Body Corporate to use the levy fund to discharge its other duties or obligations and it is inconceivable that a subscription to a third-party gym service, not requested by the Applicants or by all the Owners and contrary to Section 21 of the CPA, can be a lawful obligation of a Body Corporate.

2.8 A unanimous resolution in accordance with Section 6 of the STSMA was required to amend the Management Rules of the scheme to include the forced subscription.

2.9 The Trustees of the Body Corporate ("the **Trustees**") are in breach of Section 8(2)(b), and 8(2)(b)(i) of the STSMA in that the forced subscription contract between the Body Corporate and Golds Gym requires the Trustees to avoid any material conflict and they are in breach of these obligations in the STSMA because Aquino was a direct and indirect benefactor of the forced subscription contract and the Trustees worked for the Developer who indirectly benefited from the forced subscription contract.

3 The defences raised by the Body Corporate in its Answering Affidavit are as follows: -

3.1 The Body Corporate raises a first point in limine of *lis pendens* because the matter is pending at the community schemes Ombud Service.

3.2 The Body Corporate raises a second point in limine in regard to non-joinder, more particularly in that Applicants have failed to join their fellow members, each one of which has a direct and substantial interest in the matter.

3.3 The Trustees are lawfully entitled to agree with service providers if same is approved or directed by members.

3.4

3.4.1 On 19 September 2017 the Developer entered into an agreement with Go Health Club Group (Pty) Ltd ("GO") in terms whereof GO would offer members of the Body Corporate a reduced rate to utilize its gym facilities in return for membership fees paid and collected by the Body Corporate. This agreement was subject to approval by members of the Body Corporate at its inaugural meeting and was ratified by the members at the inaugural meeting held on 7 December 2017. (*para 5 of minutes of inaugural meeting Annexure "AA4"*). At this meeting the First Applicant, Mr Tillman was appointed as a Trustee of the Body Corporate (*para 11 of minutes of inaugural meeting Annexure "AA4"*).

3.4.2 On 10 February 2019 the Body Corporate issued a notice convening the annual general meeting. There was in the accompanying budget an allocated line item for gym memberships in the sum of R840 000.00.

3.4.3 The annual general meeting of the Body Corporate was held on 25 February 2019. At this meeting, the GO Health Contract was kept in place by a majority vote of 77%. (*para 10(c) of the minute of the body corporate on 25 February 2019 , Annexure "AA6"*).

3.4.4 The Trustees held a meeting on 22 March 2022 during which it was advised that GO Health was in financial difficulty, that Aquino decided to invest monies and save the gym facility and that a new company which became Golds Gym was used as the vehicle to restructure the gym.

3.4.5 The gym membership fees were collected pursuant to a mandate and direction given by members of the Body Corporate and that at no point was this unsolicited.

3.5 It is denied that Aquino is the controlling mind of the Body Corporate .

3.6 It is admitted that when the Sectional Titles Register was opened the Developer incorporated management rules which prescribed a minimum vote to it of 50%. In addition, the sale agreements concluded by the Applicants record that the Developer would have 50% of the vote of the owners of the residential section.

4 Golds Gym delivered an Answering Affidavit deposed to by Aquino wherein, in addition to the defences raised by the Body Corporate, it avers that:

- 4.1 The decision to enter into the gym contract with Golds Gym was a direction and mandate given by the members in prior years. It was a continuation or recordal of the existing arrangements since inception of the Body Corporate. The gym has 189 active members benefiting from the gym contract.
- 4.2 The Applicants' remedy is to requisition a meeting of the members of the Body Corporate to request the cancellation of the gym contract. Applicants know that they will not receive the necessary support.

5 EVALUATION

- 5.1 I am of the view that the two points in limine taken by the Body Corporate and Golds Gym are without merit. However, having regard to my findings on the merits of the application as set out more fully hereinafter, it is not necessary for me to deal any further with the said points in limine.
- 5.2 In Second Applicants Heads of Argument it is averred in summary that:
- 5.2.1 The Body Corporate has limited powers to spend funds for the supply of goods and services. S3(1)(a)(i) of the STSMA entitles it to use money in the administration

fund for the repair, maintenance, management and administration of the common property. Any action in excess of the Body Corporate's powers is ultra vires the STSMA.

5.2.2 Whilst it is correct that a body corporate can subscribe for services such as cleaning and securing the common property, it is not correct that a body corporate may subscribe individual owners, such as the Applicants, to a mandatory subscription for a third-party operated luxury service, such as the gymnasium operated by Golds Gym.

5.2.3 Since the Body Corporate lacked the power to enter into the first two gym contracts and the services that were provided to the Applicants were not implicitly or explicitly requested by them, they lacked a contractual justification and were unsolicited.

5.2.4 Since the Body Corporate has no power to bind the Applicants to gym membership contracts with Golds Gym, Respondents should be interdicted from entering into such a contract pending a unanimous resolution from the members of the Body Corporate which is the requirement for the establishment of a management rule permitting such a contract.

5.2.5 Aquino has failed to avoid his material conflict as a Trustee and has benefited either directly or indirectly from the second gym contract.

5.3 In the Body Corporate's Heads of Argument it is averred in summary that:

5.3.1 The minutes of the inaugural general meeting of the Body Corporate reflect that the provision of gym services and the corresponding budget allocation in respect thereof was discussed, was put to a vote and approved by the members.

5.3.2 Subsequently, at each annual general meeting the members revisited and approved the provisions of gym services and the associated budget allocation. As a result, thereof the provision of gym services was authorised by members and was not unsolicited.

5.3.3 The gym services levy in the administrative fund is not permitted by Section 3(1)(a) of the STSMA, which does not encompass a subscription to a third-party gym service.

5.3.4 The inclusion of gym services levy in the administrative fund does not in terms of the STSMA fall within the ambit of the resolutions requiring unanimous consent.¹

5.4 In the Founding Affidavit the Applicants made no mention of the prior approval by the Body Corporate of the agreement for the rendering of gym services to the Body Corporate by GO. This agreement is raised extensively by the Body Corporate in its Answering Affidavit as well as by Golds Gym in its Answering Affidavit. In reply the Applicants aver that the GO contract is irrelevant to this matter because the contract in this matter is between the Body Corporate and Golds Gym.

5.5 Applicant seeks final relief in this matter by way of motion. Accordingly, disputes of fact on the papers must be determined if the facts stated by respondents, together with

¹ Unanimous resolutions are required in the following circumstances:

- Section 5(1)(a) of the STSMA: Authorising the body corporate to alienate or let all or part of the common property.
- Section 5(1)(c) of the STSMA: To enter into a notarial agreement to extend the period of the developer's future development right in terms of section 25(1) of the Sectional Titles Act.
- Section 5(1)e of the STSMA: Requesting the delineation and cession of exclusive use rights to particular owners in terms of section 27(2) of the Sectional Titles Act.
- Section 10(2)(a) of the STSMA: The addition of, or amendment or repeal of management rules.
- Section 10(7) and (8) of the STSMA: To create and confer rights of exclusive use in the management rules.
- Section 12(2)(a) of the STSMA: To decide on the distribution of compensation of expropriation of common property.
- Section 17(1)(B) of the STSMA: To decide that the buildings are deemed to be destroyed.
- Section 17(3)(a) of the STSMA: To decide to rebuild or reinstate if buildings have been damaged or destroyed, or for the transfer of the interest of owners of sections which have been wholly or partially destroyed to other owners.
- Prescribed Management Rule 29(1): Authorising an improvement or alteration of the common property that is not reasonably necessary.
- Prescribed Management Rule 21(2)(a): To authorize the body corporate to make loans from body corporate funds.

the admitted facts in applicant's affidavit, justify the order sought (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 E–635 C).

5.6 In accordance with the test in *Plascon-Evans*, I am obliged to accept the version of the Body Corporate and Golds Gym to the effect:

5.6.1 that there was previously a contract for the rendering of gym services between the Body Corporate and GO which was accepted by the members of the Body Corporate at its inaugural meeting held on 7 December 2017 and by the majority of members (77%) at the annual general meeting of the Body Corporate held on 25 February 2019 and

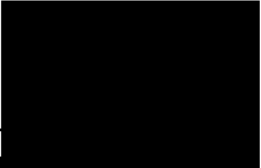
5.6.2 that the current agreement between the Body Corporate and Golds Gym is a continuation or recordal of the existing arrangements.

5.7 This version is destructive of the Applicants' contention that the gym services constitute an unsolicited service.

5.8 By virtue of the fact that I am obliged to accept the versions of the Body Corporate and Golds Gym in regard to the provision of gym services to the Body Corporate, I am unable to find that the contract between the Body Corporate and Golds Gym is an unsolicited service in terms of Section 21 of the CPA.

5.9 The question which then arises is whether it is open to me to find that the resolutions taken by the Body Corporate are invalid and fall to be ignored because the gym service is a luxury service which is not envisaged in the STSMA or that the resolutions are invalid and to be ignored because of the conflict of interest of Aquino and members of the Body Corporate under his control. I am of the view that in the absence of Applicants seeking the setting aside of resolutions taken by the Body Corporate for the provisions of gym services, it is not open to me to make such finding and it is accordingly not necessary for me to deal further with such issues.

6 By virtue of the aforesaid finding the application is dismissed with costs.



 JL KAPLAN
 ACTING JUDGE OF THE HIGH COURT
 GAUTENG DIVISION, JOHANNESBURG

Appearances:

Appearance for First Applicant:	Philip Tillman in person
Appearance for Second Applicant:	Advocate M Oppenheimer
Instructed by:	D'Arcy-Herrman Raney Inc
Appearance for First Respondent:	Advocate S Mushet
Instructed by:	S Brown Attorneys

Appearance for Second Respondent:
Instructed by:

Advocate L Morland
Warrener De Agrela &
Associates Inc

Date of hearing:

6 November 2023

Date of judgment:

11 April 2024