

FRANCIS RATEYIWA
versus
KAMBUZUMA HOUSING COOPERATIVE
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 5 April and 23 May 2007

Opposed Court Application

T Manjengwa, for the applicant
W P Zhangazha, for the respondent

GOWORA J: The first respondent is a cooperative body set up in terms of the Co-operative Societies Act [*Chapter 24:05*], (“the Act”). The second respondent is the local authority responsible for the maintenance and administration of urban land. Although it was cited and served with the application, it has not seen it fit to respond thereto. The appellant respondent will therefore in this judgment be taken to refer to the Kambuzuma Housing Cooperative Society. The applicant was one of its members. In 2001 certain allegations were leveled against him as a result of which he was suspended from being a member of the respondent. Further allegations were made in 2002 that he had authorized an agreement of sale of one of the stands being developed by the respondent without knowledge of the general membership. The sale was in effect to himself. On 4 June 2006 he was again suspended from being a member of the respondent. He was thereafter called to attend a meeting to decide his membership. He did not attend and a decision was made to eject him from the respondent. The meeting was held on 23 July 2006 and on 25 July 2006 a suitable letter was written to the applicant advising him of the decision.

There is some dispute as to whether he is a member or whether he was properly relieved of his membership.

In my view the resolution of this matter does not turn on the status of the applicant as regards the membership within the respondent. The issue as to whether or not the applicant was properly expelled from the membership of the applicant is irrelevant in determining whether or not the applicant is entitled to the prayer for specific performance. The prayer for specific performance is premised on an alleged agreement of sale to the applicant which would have been concluded prior to his expulsion. I did not understand his claim to be based on continued membership of the respondent.

Mr *Zhangazha*, on behalf of the respondent, raised two points in *limine*. The first was that in terms of the provisions of s 115 of the Act, where there is a dispute between a co-operative society and a member, and such dispute concerns the business of the co-operative society, then the dispute shall be referred to the Registrar of Co-operative Societies. He argued that therefore the applicant had approached the wrong forum and should have exhausted his domestic remedies before approaching the High Court. On the other hand, counsel for the applicant appeared not to have addressed the provisions of the enabling Act. He was, as a consequence, unable to proffer any meaningful response to the contention made by Mr *Zhangazha*. His emphasis was based on the dicta in *Moyo v Forestry Commission*.¹

Section 115 provides as follows:

1. If any dispute concerning the business of a registered society arises-
 - (a) within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory committee; or

¹ 1996 (1) ZLR 173 (H)

(b) (not relevant)

and no settlement is reached within the society or between the societies, as the case may be, the dispute shall be referred to the Registrar for decision.

A claim by a member for a debt, whether admitted or not, according to the meaning ascribed to the term in terms s 115 (2), is a dispute for the purposes of s 115. It then follows that the claim by the applicant for specific performance is a dispute within the ambit of the operation of s 115 and therefore should be dealt with in accordance with the requirements of the section.

The cardinal rule in construing statutes is that words and phrases should be given their ordinary meaning unless to do so would lead to or result in an absurdity. Section 115 (1) provides in no uncertain terms for a dispute between the society and its members to be referred to the Registrar for his decision. The dispute envisaged under this section is that of the claim and not the expulsion. The referral of the dispute to the Registrar is provided for in terms which are peremptory in and admitting of no discretion in the manner in which the dispute is to be resolved.

Mr *Zhangazha* sought to distinguish the situation in *Moyo v Forestry Commission (supra)* from the present on the basis that what was at issue in the former was the operation of domestic remedies within an internal process provided for in a code of conduct, whereas in *casu* the statutory requirements are contained in an Act of Parliament, and that since the section is expressed in peremptory terms, then the requirements of the provision must be complied with. It is correct as argued by Mr *Zhangazha* that the section is peremptory. I did not however hear him argue that the jurisdiction of this court has necessarily been ousted in determining the dispute. In terms of s 13 of the High Court Act [*Chapter 7: 06*], this court has full jurisdiction over all persons and over all matters in Zimbabwe. Such jurisdiction is ousted only when Parliament has specifically provided

for its ouster. Even where an Act seeks to provide for the ouster of the jurisdiction of this court, this court will only admit to such ouster where the legislation in question ousts the jurisdiction in no uncertain terms. It is trite that the High Court, being a superior court with original jurisdiction justifiably and rightly so guards such jurisdiction jealously. In my view, the Act with which I am concerned with does not oust the jurisdiction of this court.

However, having said, it is obvious that the Legislature intended, in s 115 to create domestic remedies for the speedy resolution of disputes concerning the business of the societies without the parties necessarily having to approach the courts for such relief. It is necessary to determine whether or not the applicant should have exhausted the domestic remedies provided for in the Act before approaching this court for relief. This court has the discretion, where such a course is found to be warranted, to withhold its jurisdiction to a litigant even where there is no ouster of jurisdiction. In *Zikiti v United Bottlers*², GILLESPIE J stated as follows:

“It might seem anomalous that the High Court should, by an exercise of discretion, withhold jurisdiction from a party who, on established authority, is entitled to claim relief. Although not expressed, the jurisprudential basis for such discretion is not hard to find. It is an instance of the inherent jurisdiction of this court to regulate and control its own proceedings so as to prevent injustice or abuse of process. This equitable discretion underlies many of the recognized instances where the court will stay or dismiss proceedings. The defence of *lis pendens* is itself such an instance. Other examples include staying of proceedings pending an arbitration or payment of accrued costs, and the dismissal of frivolous or vexatious proceedings. The power is, of course sparingly exercised since the courts of law are open to all, and it should be only in exceptional circumstances that these doors should be closed upon a litigant³. The existence of such discretion in the present specific instance is recognized by the Supreme Court⁴”.

² 1998 (1) ZLR 389 at 393

³ See SOLOMON JA in *Western Assurance Co v Caldwell's Trustees* 1918 AD 262, 274

⁴ In *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) 613 (S) 617H-618C

An examination of s 115 shows that the Act gives the registrar very wide powers in relation to the resolution of the dispute. The registrar may refer the dispute to arbitration, to the Minister or settle it himself. If he settles it himself, under s 114 of the Act he has to summon a member, officer, employee or agent to provide information and or produce a document or books of accounts. The procedure provided for therefore is akin to a hearing of the matter. I would go as far as saying that the section gives the registrar the powers of a hearing officer. Section 115(5) provides that the Arbitration Act applies to a matter referred for arbitration by the registrar under this section. An appeal against a decision by the registrar lies to the Minister or the arbitrator in settlement of a dispute.

The applicant has stated in his affidavit that he had not referred the matter to the registrar as he had already found that the applicant had not been guilty of misappropriating funds belonging to the respondent. It is obvious that the examination of the books of accounts by the registrar was in all probability conducted in terms of s 114 of the Act. Such examination in my view did not constitute a dispute as envisaged in s 115 of the Act. It is pertinent to note that the applicant has not taken the court into his confidence and indicated why he has not referred his dispute with the respondent to the registrar. There is thus no explanation before me from the applicant as to why this dispute was not referred to the registrar for resolution.

In deciding whether or not the court should withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for a court has to have regard to a number of factors. Amongst these are the subject matter of the statute, the body of persons who make the initial decision and the bases on which it is to be made, the body of persons who exercise appellate jurisdiction and the manner in which that jurisdiction is to be exercised including the ambit of any rehearing on appeal, the powers of the appellate tribunal, including its power to redress

or cure the wrongs of a reviewable character, and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. See *Lawson v Cape Town Municipality*⁵. The procedures provided for in the Act would have adequate remedies to resolve the dispute between the applicant and the respondent. In the instant case, the powers conferred upon the registrar in resolving the dispute are quite wide. Such powers give him the discretion to effectively conduct a hearing on the circumstances surrounding the dispute. More often than not parties to disputes, taking into account the formal and restrictive nature attendant upon procedures brought before the courts, are opting for resolution of disputes through the informal and cheaper arbitration process. From the provisions of section 114 it is clear that the powers bestowed on the registrar in determining the dispute are so wide that there would be no room for a party to allege a dispute of fact as has been averred in this instance. The procedures are also informal and in my view would afford the parties to the dispute a cheaper and more effective remedy than is available in the application procedure adopted by the applicant instead. The Act does not state what forms of relief are available when a dispute is settled by the registrar but it is not the case by the applicant that there is no effective relief afforded under such process. Section 115 permits the registrar to refer the matter to arbitration. In the event that he decides not settle the dispute himself he has the further discretion to refer such dispute to an arbitrator or to arbitrators, in which event the provisions of the Arbitration Act [*Chapter 7:02*] would apply. An appeal against a decision of the registrar or arbitrator as the case may be lies to the Minister. A final appeal against the decision by the Minister lies with the Administrative Court.

The remedies provided for in terms of the Act are in my view more than capable for the provision of adequate redress to an aggrieved party. They are also in my view a cheaper form of dealing with disputes arising

⁵ 1982 (4) SA 1 (C) at 6-7

between the parties, which is commendable given that the intent in having formalities attaching to co-operative societies was an appreciation that they served those amongst in society without adequate means to embark on projects requiring capital outlay without assistance. It is in my view proper that in this instance the court withhold its jurisdiction on the basis that the applicant has not exhausted his domestic remedies. There is however a further point in *limine* raised on behalf of the respondent which I believe ought to be decided.

It is contended on behalf of the respondent that the transaction that the applicant bases his claim for relief is an illegality in terms of the Act. The applicant seeks to enforce the terms of a contract of sale relating to a plot of land, wherein the respondent represented by the applicant in his capacity as chairman of the respondent, sold the plot to the applicant. The applicant not only signed as buyer, he was also the signatory for the seller. The respondent argues that the applicant, in seeking to enforce the agreement, is not relying on an allocation of plots done by the respondent but on the alleged sale.

Section 80 of the Act is in the following terms:

1. Subject to subsection (2) no registered society, and no member or employee of any such society, shall sell, donate or otherwise dispose of any movable or immovable property owned by the society without the prior approval of the registrar.

There is no suggestion on the papers that the property allegedly purchased by the applicant was property held by the respondent for purposes of disposal or as security for a debt or that it was stock in trade. As such the sale was illegal and null and void from inception. Anything done contrary to the direct prohibition of the law is void and of no legal effect. See *Schierhout v Minister of Justice*.⁶

⁶ 1926 AD 99 at 109

In the premises the applicant is non suited and the application must fail. The application is therefore dismissed with the applicant being ordered to pay the costs of the application.

Wintertons, legal practitioners for the applicant.

Chinamasa, Mudimu, Chinogwenya & Dondo, legal practitioners for the respondent