

ELIZABETH MASHINDI
versus
NGUNGUNYANA HOUSING CO-OPERATIVE
and
LUKE CHESANGO
and
WELLS HAMUNAKWADI
and
TIKHO SIBANDA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 18 November 21 and 9 March 2022

Point in *limine* – exhausting domestic remedies

Mr A Mugiya, for the plaintiff
Mr H Chitima, for the 1st, 2nd and 3rd defendants

CHINAMORA J:

Introduction:

This matter commenced as a trial cause with the Plaintiff issuing summons against the 1st to 4th defendants. It is common cause that the 1st defendant is a legal persona registered as a co-operative society under the Co-operative Societies Act [*Chapter 24:05*]. The plaintiff averred that she joined to be a member of the 1st defendant (hereinafter referred to as “Ngungunyana”) sometime in 2006. She added that she was allocated Stand No. 14473 Budiro, Harare, by Ngungunyana. The plaintiff submitted that on 13 February 2019, she was advised that her premises on the aforesaid stand was being demolished. In her declaration, she alleged that she went to the said stand the following day, and found that the wooden cabin she had erected had been dismantled and left at the offices of Ngungunyana, together with bricks which were on the stand. The plaintiff

also averred that the 3rd defendant had constructed a structure of concrete blocks on the stand. The 3rd defendant advised the plaintiff that Ngungunyana had allocated the stand to him.

The plaintiff alleged that, when she attended the offices of Ngungunyana, she was informed by the 2nd defendant that she had been expelled from the co-operative society resulting in her stand being repossessed. She submitted that the actions of Ngungunyana were unlawful as they violated its Constitution and the Co-operative Societies Act. She added that the 3rd defendant was, therefore, in illegal occupation of her property. In consequence, the plaintiff sought the following relief:

- (a) An order declaring her as the lawful owner of stand number 14473 Budiro, Harare.
- (b) An order declaring her expulsion from Ngungunyana to be null and void.
- (c) An order for the eviction of the defendants and those claiming through them from stand number 14473 Budiro, Harare.
- (d) Costs of suit on an attorney and client scale.

In their plea to the plaintiff's claim, the 1st, 2nd and 3rd defendants raised a preliminary objection, namely, that the plaintiff ought to exhausted remedies provided in the Co-operative Societies Act before approaching this court. In this respect, the said respondents stated that the dispute ought to have been referred to the Registrar of Co-operatives for resolution as provided in section 115 of the aforesaid Act. I decided that this point in *limine* be dealt with before going into the trial, as my view was that the determination of that point would be decisive on the course of action to be adopted by this court. Let me proceed to address the preliminary point.

Point in *limine*

The preliminary point raised by the 1st, 2nd and 3rd defendant is not new to this court, since in *Rateyiwa v Kambuzuma Housing Co-operative and Anor* HH 52-07, this court had to deal with this very issue. GOWORA J (as she then was) first referred to section 115 (a) of the Co-operative Societies Act which provides as follows:

“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

(b)

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”.

After referring to the statutory provision, the learned judge proceeded to state:

“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 ... it is obvious that the Legislature intended, in s115, 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”.

I respectfully agree with GOWORA J’S compelling conclusion. In my view, this is a proper case for this court to exercise its discretion and withhold its jurisdiction and defer to the domestic remedies provided in the Co-operative Societies Act. I find the following passage from *Rateyiwa v Kambuzuma Housing Co-operative and Anor supra* persuasive:

“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 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”.

I endorse the above reasoning as it is self-commending. Indeed, the question of effectiveness of remedies as being a factor to consider when a court decides to decline its jurisdiction has been laid down by the Supreme Court in *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 234 (S) at 249 D. See also *Muzengi v Standard Chartered Bank Zimbabwe Limited & Anor* 2002 (1) ZLR 334 S at 338 A–B. As the case of *Lawson v Cape Town Municipality* 1982 (4) SA 1 at 6H to 7A (S), the law on this subject is the same in South Africa.

There is nothing in the facts of this case which make this case incapable of resolution via the mechanism provided in section 115 (1) (a) of the Co-operative Societies Act. In this context, it is pertinent to observe that the Act gives the Registrar of Co-operatives wide ranging powers which lend themselves well to expeditious settlement of disputes referred to him. For example, section 114 of the Act allows the registrar to summon a member, officer, employee or agent to provide information and or produce a document or books of accounts. In addition, the registrar can

refer a matter for arbitration in terms of section 115 (5) of the Act. The registrar's decision can be appealed to the Minister or the arbitrator in settlement of a dispute.

I do not find anything which inherently makes the requirement to exhaust domestic remedies as stipulated in the Act less effective. Accordingly, I am satisfied that the point in *limine* raised by the 1st, 2nd and 3rd defendants is merited. Having come to this conclusion, I will make the following orders.

Disposition

1. The point in *limine* be and is hereby upheld.
2. The trial cause in Case Number HC 5249/19 be and is hereby removed from the roll.
3. The dispute between the parties is hereby referred to the Registrar of Co-operative Societies for determination in terms of section 115 (1) (a) of the Co-operative Societies Act [*Chapter 24:05*]
4. Each party shall bear its own costs.

Mugiya & Macharaga Law Chambers, Applicant's legal practitioners
Mutandiro, Chitsanga & Chitima, 1st, 2nd and 3rd defendants' legal practitioners