

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No HBC 353 of 2022

BETWEEN

MOHAMMED ALI MAQBOOL of Namadi Heights, Suva.
Legal practitioner.

PLAINTIFF

AND

NASINU LAND PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED a
limited liability company having its registered office at Suva.

DEFENDANT

Counsel - Mr. S. Singh for Plaintiff
Mr. R. Singh for Defendant
Date of Hearing - 20th April 2023
Judgment delivered - 09th August 2023

JUDGMENT

- [1] The Plaintiff brought this action pursuant to the provisions of the **Co-operatives Act 1996** by way of an Originating Summons seeking following orders;
- I. A declaration that the Plaintiff's membership was unlawfully terminated by the Defendant on 06th April 2022.
 - II. That the Plaintiff be reinstated as member of the Defendant together with all his membership benefits.
 - III. Such further orders Court deems just and necessary.
 - IV. Cost of this application be paid by the Defendant to the Plaintiff.
- [2] The Originating Summons was supported by an affidavit sworn by the Plaintiff and filed in Court on 16.12.2022. The Defendant opposed the action by filing of their Affidavit in Opposition on 23.02.2023 and a Supplementary Affidavit filed with consent on 01.03.2023. The Plaintiff then filed his reply on 21.03.2023.
- [3] The Defendant is a Co-operative Society registered under the Co-operatives Act 1996 [hereinafter referred as Act]. It states that they are one of the largest land developing unit and acts in accordance with its by-laws and the provisions of the Act. The Defendant currently has a membership of 74 members.
- [4] The Plaintiff has been a Legal Practitioner by profession. He has been a member and also a board member of the Defendant.
- [5] He admits that his law firm represented 4 clients in the Co-operatives Tribunal who were trying to establish their membership with the Defendant. The Plaintiff states that he

reviewed evidence and the applications filed by the clients. Subsequently Plaintiff appeared before the Tribunal and managed to settle it with the representatives of the Defendant. The Plaintiff states they have agreed to have the matters withdrawn without costs. However it appears that one of the 4 clients continued the action in person.

- [6] On 30.12.2021 the Defendant wrote to the Plaintiff informing that his conduct has breached the by-laws of the Defendant and demanded him to appear before a disciplinary committee. He was given two months' notice. The Plaintiff objected to the referral on 21.02.2022 stating that the committee members would be biased towards him.
- [7] However the committee proceeded with the referral and the membership of the Plaintiff was terminated on 06.04.2022. Plaintiff states that he was not given a copy of the report on findings and the Defendant in their affidavit refuses to accept this proposition.
- [8] On 19.04.2022 the Plaintiff made an appeal to the Board of the Defendant. The Board decided to uphold the decision of the disciplinary committee. Thereafter the Plaintiff states that he had made an appeal at the Defendant's Annual General Meeting. On 19.10.2022 the Plaintiff's termination was upheld at the Annual General Meeting.
- [9] The Defendant argues that the Plaintiff's action has given rise to a 'conflict of interest'. The Plaintiff being a member of the Defendant was well aware of the cases from the Defendant's point of view, yet appeared against it at the tribunal. It appears from the correspondence that this conduct of the Plaintiff has taken place on another occasion prior to this incident and was on a final notice by the Defendant. However the Plaintiff disputes this prior incident.
- [10] One of the main points raised at the hearing by the learned counsel for Plaintiff, was that the inconsistency between section 43 of the Act and by-law 9 of the Defendant's Co-operative Society.
- [11] Section 43 states;
- (1) The expulsion of a member may be ordered by the Board or by the General Meeting if a member carried out or attempted to carry out an act seriously detrimental to the co-operative or if he or she failed to respect any or all the duties stipulated in Section 39 of this Act.
- (2) The procedure for expulsion of a member shall be set out in the by-laws and shall include:

- (a) a period of notice of at least two months;
 - (b) a written notification thereof stating the reasons for the expulsion; and
 - (c) the member's right to defend himself or herself before the Board or the General Meeting prior to the decision.
- (3) If the expulsion was decided by the Board, the expelled member may appeal to the next General Meeting whose decision shall be final: Provided that such appeal shall not suspend the effects of the decision.
- [12] By-law 9 of the Defendant states ' A member may be expelled for any action which is held by the Board and confirmed by the Annual General Meeting to be dishonest or contrary to the stated objects of the or the interests of cooperation'.
- [13] The learned counsel states that by-law 9 has made it mandatory for a decision to expel a member to have concurrence of the Board and the Annual General Meeting when the statute has made it optional. He submits that the relevant by-law is inconsistent with the Act, hence there is a dispute on interpretation of by-law 9.
- [14] There are several other points raised by the Plaintiff at the hearing relating to the events and the procedure followed for his termination. Before I move further I would like to resolve a very pertinent issue, whether the Plaintiff has jurisdiction to make this application before this Court.
- [15] The learned counsel for the Plaintiff states that under Order 12 Rule 7 of the **High Court Rules 1988** any dispute as to the jurisdiction must be applied by way of a formal application to the Court by the Defendant. Plaintiff states that the Defendant has submitted to the jurisdiction by filing of their Affidavit in Opposition.
- [16] The Court is of the view that Order 12 has two parts to it. The applicability of the Order to an Originating Summons is limited to Rule 8 and 9. Rule 7 applies to an action instituted by way of a Writ. Therefore I will proceed to have further consideration on the issue of jurisdiction.
- [17] Parties addressed the Court on dispute resolution methods provided in the Act. Mainly in Part 13 under section 115 of the Act. The Section states;
- 115.-(1) If a dispute concerning the by-laws, election of officers, conduct of meetings, management or business of a co-operative arises-

- (a) among members, past members and persons claiming through members, past members and deceased members;
- (b) between a member, past member or persons claiming through a deceased member, and the co-operative, its Board or any other officer of the co-operative;
- (c) between the co-operative or its Board and any other officer of the co-operative;
- (d) between the co-operative and any other co-operative,

such dispute may be referred, after due attempts to settle the issue by local informal mediators, to the Registrar or directly to the Co-operative Tribunal constituted under Section 116 of this Act for decision.

(2) Without prejudice to the generality of subsection (1) of this Section-

(a) a claim by a co-operative for a debt or demand due to it from a member, past member or the nominee or legal representative of a deceased member, whether such debt or demand is admitted or not; and

(b) a claim by a member who was a guarantor of a loan against the member whose loan he or she guaranteed resulting from the repayment by the guarantor of the loan to the co-operative, for the repayment of the amount by the borrower, shall be deemed to be disputes concerning the business of the co-operative within the meaning of subsection (1) of this Section.

(3) The Registrar shall, on receipt of a reference under subsection (1) of this Section have regard to the nature and complexity of the dispute, and decide whether-

(a) to settle the dispute himself or herself; or

(b) to refer the dispute to the Co-operative Tribunal.

(4) Where the Registrar decides to settle the dispute himself or herself and gives a ruling thereon which aggrieves a party to the dispute, that party may, within 30 days of the date of the Registrar's ruling, appeal to the Co-operative Tribunal and the Co-operative Tribunal shall make a decision within two months of receiving the appeal and that decision shall be final and conclusive.

(5) Where the Registrar decides to refer the dispute to the Co-operative Tribunal according to the provision of subsection (3) of this Section, the Co-operative Tribunal shall deliberate on the case and make a decision within two months and that decision shall be final and conclusive.

(6) Where the parties to a dispute refer a case to the Co-operative Tribunal directly according to the provisions of subsection (1) of this Section the Co-operative Tribunal shall deliberate on the case and make a decision within two months and that decision shall be final and conclusive.

[18] Any dispute concerning the by-laws, election of officers, conduct of meetings, management or business of a co-operative would be referred to the Registrar of Cooperatives or to the Co-operatives Tribunal established under section 116 of the Act.

[19] However the language used in subsection 1 is 'such dispute may be referred'. The Plaintiff therefore takes up the view that it is not mandatory but optional. It prompted me to look at other related provisions of the statute.

[20] Subsection 1 of section 115 provides several types of disputes. Disputes concerning the by-laws is one of them.

[21] It is equally important to note provisions provided in Section 18 of the Act. More importantly section 18(2) where it states;

(2) A dispute arising out of the interpretation of a by-law shall be referred to the Registrar for his or her decision. Such dispute shall be considered to be a dispute touching the co-operative and shall be settled either by the Registrar or he or she may refer the case to the Co-operative Tribunal which shall make a ruling according to the provisions of Sections 115 and 116 of this Act.

[22] According to this if a dispute arising out of the interpretation of a by-law, then it shall be referred to the Registrar for his /her consideration and to follow provisions in section 115 and 116. The use of word 'dispute' has no distinction under section 18 and section 115. Therefore a dispute between a member and the cooperative on a matter of interpretation of a by-law can be included in the scope of section 18 (2).

[23] There is another consideration under this subsection, the dispute shall be considered to be a dispute touching the co-operative. In my view the dispute itself must relate to the functioning of the co-operative.

- [24] In the present case the Plaintiff is now challenging the only procedure laid down by his cooperative for expulsion of its members for a cause. If the view of the Plaintiff is upheld, that would result the Defendant's by-laws inconsistent with section 17(2) of the Act due to the absence of a procedure for expulsion which is mandatory under subsection (2). In my view that is sufficient material to conclude whether the dispute of the Plaintiff touches the functioning of the co-operative.
- [25] Therefore, I am of the view that the provisions provided under section 115 (1) should be read with section 18(2) of the Act. If a dispute fulfills the requirements in section 18 (2) then it shall follow the dispute resolution mechanism provided in section 115.
- [26] I arrive at this finding with the assistance of the referrals made to the Hansard Reports in February 1996. The legislature by presenting the Co-operatives Bill intended to have a robust, autonomous, and swift decision-making Co-operatives system in the country. The Bill was presented twice in the Parliament before it was enacted. It is clear from the perusal of the Act that it did not encourage intervention by the Courts in the dispute resolution.
- [27] For example, section 112 has taken away the jurisdiction of the civil Courts on matters concerning dissolution of Co-operatives. It states 'Save in so far as expressly provided in this Act no court shall have any jurisdiction in respect of a matter concerned with the dissolution of a co-operative in this Act, and no appeal shall lie to a court from an order of the liquidator, the Registrar or the Co-operative Tribunal'.
- [28] Section 115 (4), (5) and (6) any dispute resolution shall be done according to a strict time frame and the decision would become final and conclusive.
- [29] Furthermore **N S Bindra's Interpretation of Statutes [twelfth edition]** provides very relevant material and I wish to have it cited here. 'As a general rule the word 'may' is permissive and operative to confer discretion; and especially so, where it is used in juxtaposition to the word 'shall', which ordinarily is imperative as it imposes a duty. Cases however, are not wanting where the words 'may', 'shall', and 'must' are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect'.
- [30] Similar to the issue before the Court in **Siddheshwar Sahakari Sakhar Karkhana Ltd v. CIT Kolhapur** [2004] 12 SCC 1 it was argued that expression 'may' followed by the words 'convert such deposits into shares after repayment of loans ect' provided in by-law 61A

under the Maharashtra Co-operatives Societies Act 1960, connoted that the provision was only directory. The Court held that it would be appropriate to read the expression 'may' as 'shall', observing that discretion is always coupled with a duty and that a discretion cannot be used to circumvent an obligation cast by law.

- [31] The word 'may' in section 115 (1) has been coupled with a 'duty' to refer disputes to the Registrar or to the Tribunal after attempts were made in relation to mediation.
- [32] The Act has provided the legal framework for the administrative and operational aspects of co-operatives in the country, without it the Co-operative Societies are very much similar to any other private societies with voluntary membership. The Courts very rarely intervene with the internal affairs of private societies. However when there is a statute governing the affairs of the co-operatives, Courts must not defeat the intentions of the legislature.
- [33] In conclusion I hold that the jurisdiction for Plaintiff's cause of action lies with Registrar and the Co-operatives Tribunal pursuant to section 115 of the Act.
- [34] For the foregoing reasons the Court declines to hold in favour of the Plaintiff.

ORDERS

1. Originating Summons seeking declaration and reinstatement hereby dismissed.
2. Parties to bear cost.



Yohan Liyanage

JUDGE

At Suva on 09th August 2023