CONE TEXTILES HOUSING CO-OPERATIVE

SOCIETY

versus

PHILSON CHISALE

and

CHRISTOPHER MWANAHANZI

and

NHAU SOLOMON KANHONDO

and

OLIVER CHIREDZERO

and

CHARLES MADZIWA

and

EDSON MADYISE

and

ONERT MUNYARADZI

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE, 10, 11, 12 and 13 July and 12 September 2012

**Civil Trial**

*P Musendo,* for the plaintiff

Ms *OT Sanyika,* for the first, second, third,

fourth and sixth defendants

KUDYA J: The plaintiff is a co-operative society registered in terms of the Co-operative Societies Act [*Cap 24*:*05*].The seven defendants were members of the plaintiff’s management committee who were suspended on 3 April and removed from office on 6 May 2006. The fifth and seventh defendants died before trial and are therefore beyond the reach of this judgment.

In terms of clause 10 of the declaration, which was not disputed by the defendants in their plea, the plaintiff was allocated immovable property in Zengeza 3 Extension Chitungwiza for subdivision and sale to its members by the Chitungwiza Town Council. The land was subdivided into 145 stands that were solely for the benefit of the plaintiff’s members.

The cause of action against the defendants was that they unlawfully and unprocedurally sold stands belonging to the plaintiff’s members to none members and converted the proceeds to their own use to the prejudice of the plaintiff and its members. The plaintiff issued summons out of this court on 13 June 2007 seeking compensation for the value of 145 stands, interest from the date of judgment to the date of payment in full and costs of suit. Initially it set the value of the stands at ZW$20 million. At the commencement of trial the amount was amended, by consent, to US$256 000-00 it being agreed that each stand had a present day value of US$2 000-00.

In their plea of 1 November 2007, the defendants denied fraudulently selling the stands and converting the proceeds to their own use. Rather they averred that the sales were with the consent of each affected registered member. They further averred that each affected member executed an agreement of sale disposing of his interest in the stand allocated to him, received the proceeds and utilised them to his advantage.

The following five issues were referred to trial:

1. Whether or not the plaintiff has *locus standi* to bring the claim before the courts;
2. Whether or not the proceedings before this court are premature;
3. Whether or not the defendants unlawfully and unprocedurally sold stands belonging to the plaintiff’s members;
4. Whether or not the members were paid; and
5. Whether or not the defendants are liable for the claim sought.

The defendants did not raise any of the alternatives to pleading to the merits such as plea in bar or in abatement, exception or striking out that are set out in r 137 other than request for further particulars. The declaration, plea and replication do not give raise to the first two issues that were referred to trial. They arise for the first time in the defendants’ summary of evidence. At no stage throughout the proceedings did the defendants take a plea in bar. In fact, when the trial commenced Ms *Sanyika* for the defendants did not seek to argue the first two issues; rather she deferred to the calling of evidence by the plaintiff and only argued the first two issues after the defendants had closed their case.

In the result, the plaintiff called the evidence of three witnesses and produced two documentary exhibits. The witnesses were the incumbent secretary of the plaintiff Tasara Zvandasara, and two members of the plaintiff, Paul Rusere and Michael Muronzi, who were allegedly prejudiced by the conduct of the defendants. Exhibit 1 was a sixty-six paged bundle of documents while exh 2 was a six paged bundle of documents. The first, second and fourth defendants together with the Acting Chitungwiza District Head in the Ministry of National Affairs, Employment Creation and Cooperatives between 1991 and 2002 Oswald Chamboko testified on behalf of all the defendants. In addition the defendants produced an eighty-eight paged bundle of documents as exh 3.

It was common cause that the plaintiff co-operative was formed in 1988 and governed in terms of “The Cone Textiles Housing Cooperative Society (CTHCOP) Limited By-Laws” made under the Co-operative Societies Act, *supra*. The by-laws are fully set out on pp 34-66 of exh 1. The aim of the cooperative was to acquire, service stands and build for members. The place identified was between Zengeza 3 and Chitungwiza Industrial area. It was rocky and had a dump site.

On formation, the co-operative opened two bank accounts with the Standard Chartered Bank and the Central Africa Building Society, CABS. It had 2 087 members whose subscriptions were deducted on a monthly basis from each member’s salary by the employer, Cone Textiles Ltd and deposited into the plaintiff’s bank account. This method of subscription stopped in 1994 when the employer was liquidated. After liquidation subscriptions were paid directly into the plaintiff’s Standard Chartered Bank account. Some members withdrew from the plaintiff and were refunded their contributions in the sum of ZW$1 800-00. The plaintiff thus remained with more stands than members. The membership has fluctuated over the years and when Zvandasara testified, it stood at 1 033.

It was common cause that the first defendant was the first chairperson while the second defendant was the first secretary of the plaintiff. Zvandasara, the first defendant, the late seventh defendant, Regis Moyo, and Tawurayi Ngoni Gumbochuma started off, according to the letter written by Chamboko on 18 November 1998 (p 8 of exh 1) as members of the plaintiff’s Supervisory Committee appointed in terms of s 3 (a) of the by-laws and s 65 (1)(a) and (3) of the Act with unlimited access to the accounts and management of the plaintiff. Zvandasara was discharged as a member of the management committee by first defendant on 18 December 1999 (p 9 exh 1).

In 2001, the members led by Njikizana formed the first pressure group. The second pressure group led by Nevaranda and the third led by Ngoshi came on board during the life of the management committee of the defendants. The pressure groups arose out of the failure by the defendants to call for general meetings and produce audited reports. A letter dated 14 June 2002 from Mrs Kwashira; the Harare district head in the overseeing Ministry of Youth Development, Gender and Employment Creation confirmed the grounds of complaint of the pressure groups.

It was common cause that the defendants were in the management committee from 1999 until 3 April 2006 when they were suspended from office by the Registrar of Cooperatives on allegations of mismanagement (p 11 of exh 1) for failing to provide receipts in the sum of ZW$86 million of stands sold, selling stands without permission, failing to surrender requested co-operative books and failing to respond to the Registrar’s orders following the meeting of 13 November 2005.

On 6 May 2006 elections for an interim management committee were conducted by officials from the Ministry of Youth Development, Gender and Employment Creation (formerly National Affairs, Employment Creation and Cooperatives). The present executive consisting amongst others of Ngoshi, as chairperson, Nyamakawo as his vice and Zvandasara as secretary and Zowa as his vice and Njikizana as treasurer in place of Muronzi who was disqualified as a non-member even though he had won the elections for treasurer with Mrs Madimbe and Murambatsvina as committee members took office. Njikizana, Chinyerere and Manyawu were elected to the supervisory committee. The interim committee was tasked to come up with a true membership register and the correct figure of stands sold and money raised by the expelled committee of the defendants within two months.

It was common cause that the procedure for the disposal of stands by the management committee required the calling of a special general meeting of members. A two-third vote of members present was sufficient to pass the resolution to sell once the members agreed to the reasons for such a sale (s 45 of Act and 25 (c) of by-laws). The sale of 17 stands was authorised by the general meeting and approved by the ministry’s Mr Chamboko in terms of s 80 (1) of Act. It was common cause that 17 of the 145 stands disposed of by the defendants were specifically authorised by members in general meeting held on 5 March 2000 (p 12 exh 1 and 79 of exh 3). The proceeds from the sale of 17 stands were banked in CABS account 9016281751 and the purchasers issued with the plaintiff’s official receipts. The money from these sales was used to purchase sewer and water pipes to service some stands. It was common cause that the issues for determination concerned 128 stands. It was further agreed that each stand was valued at US$2 000-00.

The plaintiff’s case against the defendants was that during their tenure in office they sold 128 stands without the authority of the members and converted the proceeds to their own use. It relied on the minutes of the general meeting of 6 May 2006 on pp 12-13 of exh 1 in which the first defendant indicated that the defendants sold 129 stands for ZW$86 million and the forensic audit report on pp 1-7 of exh 1 of 13 July 2010 by Gilbert Mapfumo a qualified auditor who holds a Bachelor of Accountancy (UZ) 1987, ACIS (Zim) 1998 and MBA (ZOU) 1995 degree. In their oral evidence, the defendants disputed disposing the stands in question without the authority of the general meeting and misappropriating the proceeds. They relied on the income and expenditure summary report prepared by their late treasurer and fifth defendant on pp 1- 48 of exh 3 and the minutes of the general meeting of 9 April 2000 on p 80 of exh 3.

It is clear to me that the auditor was properly appointed from a competitive bid by the general meeting held on 20 July 2008. The third and fourth defendants were present and did not object to the appointment process. On 20 August 2008 the defendants’ erstwhile legal practitioners declined to surrender membership lists, receipt books, purchase invoices, payment vouchers, bank statements and minute books in their possession to the auditor on the ground that he had been appointed by an official of the overseeing ministry who had caused the arrest of the defendants. In their oral testimony, the defendants stated that they did not surrender the bagsful of documents in their legal practitioners’ possession to the auditor for two reasons. The first was that they mistrusted him under the mistaken belief that he was a lackey of the plaintiff and the second was that they feared the loss of the bulky documents in his custody as had happened to some bank statements and minute books surrendered to the public prosecutor.

In the absence of documents, the auditor relied on the sparse information grudgingly availed to him by the defendants. He failed to access and verify bank statements for the period 1 January 2000 to 31 December 2005 from the relevant banks due to effluxion of time. He only accessed statements for the period January to June 2001 and for the same period in 2005. The defendants availed him the summary expenditure for the audit period of ZW$159 979 819-00. He was only able to verify from the available internal and external requisitions expenditure of ZW$25 796 591-00. On the figures submitted to him by the defendants, he was unable to verify expenditure of ZW$134 183 228-00. The defendants also availed to him a list of the 130 stands that they sold. The list sets out the names of the buyers, the date of sale, the stand number, the receipt number and the purchase price paid. His investigations with the legal practitioners who handled the sales revealed that a total of 145 stands were sold. The total amount receipted by the defendants for the sale of the stands was $152 716 080-00 against the total actual paid in the receipts issued to the purchasers of $193 748 403-00. After adding other income from subscriptions ($3 911 483-00), administration fees ($6 923 920-00) investments ($641 835-00) and deducting verified expenditure of $25 796 591-00 he concluded that the defendants had misappropriated $ 179 429 050-00.

It seems to me that the audit did not reflect a fair and accurate representation of the state of the co-operative under the defendants based as it was on inadequate and incomplete information. In my view, the conclusions reached by the auditor were for that reason, flawed.

The defendants relied on the income and expenditure report for the period 2000-2005. Page 1 summarises the information on pp 2 to 48 in six columns. The columns show the year, income from subscriptions, administration fees, sale of stands, total income and expenditure. The sub-totals are extracted from full and detailed information on pp 2 to 48. Subscriptions raised ZW$3 911 483-00, administration fees ZW$7 857 920-00, sale of stands ZW$161 321 080-00. The total income raised was ZW$173 090 483-00. Total expenditure was in the sum of ZW$159 979 819-00. A bank balance of ZW13 110 664-00 was indicated. In my view, though no original documents were produced to confirm the accuracy of the information on pp 2 to 48, it is apparent that source documents must have been used to do so. The subscriptions register is found on pp 5 to 28. It contains the name of each member, his or her stand number, the twelve columns of each month of the year and the amount paid in each month if any and the total paid in each respective year by each member. The stands sold are on pp 2 to 4. The name of the purchaser, the stand number, the amount paid, the receipt number and the date of payment are indicated. That the defendants deposited funds in the Standard Chartered account is demonstrated by cash deposit slips dated 13 April 2004 and 22 February 2005. The expenditure is covered from p 29 to 46. The date, requisition number, the purpose, the amount, cheque number and cash disbursement are indicated. A sample of the vouchers and requisitions to pay for expenses appear on pp 62 to74 of exh 3 for the period 2 to 30 July 2001 in the sum of ZW$738 723-78 for plumbing materials and salaries of the plumber. Zvandasara expressed satisfaction with these documents but wondered why they had not been produced to the auditors and the police. I can safely exclude creative accounting in the collation of this information and attribute failure to produce bagsful of documents to inept legal advice.

The second factual dispute that arose during the trial was whether or not the local authority authorised the defendants to reallocate undeveloped stands held by the plaintiff’s members. Whilst under cross examination, Zvandasara averred that the defendants falsely claimed that the local authority repossessed some of the stands held by the plaintiff’s members. Apparently, the defendants based their claims on the letter from the municipality of 24 April 2002, the list of 1 April 2004 and termination of lease letters dated 31 July 2004 on p 78 of exh 3 and 31 March 2010 on p 24 of exh 1. The date of termination was post-dated in each notice as 31 July 2004 and 31 March 2010 and for non-payment of municipal charges in the sum of ZW$16 200-00 and US$37 756-00, respectively. The addressee was directed to give vacant possession of the stand to the plaintiff for reallocation to other members. In his letter of 13 September 2007 (p 23 exh 1) the Chitungwiza town clerk clarified that the stands were not repossessed and that those letters merely warned the plaintiff that its members in municipal charges arrears risked loosing their stands.

The town clerk’s attitude of 13 September 2007 was understandable. The samples of the letters of repossession dated 31 July 2004 and 31 March 2010 from the local authority were vague and embarrassing. The power under which such repossession was done was not disclosed. It was not in accordance with clause 15 of the lease agreement executed between the Ministry of Local Government and the original members of the plaintiff, which provided a mechanism for cancellation of the lease and institution of court action to eject the lessee and take possession. It is clear to me that the defendants were not obliged to act under the direction of such letters. They were duty bound to follow the provisions of the by-laws in repossessing stands from their members.

I now deal with the issues referred to trial.

1. **Whether or not the plaintiff has locus standi to bring the claim before the courts**

The defendant abandoned the first issue and conceded correctly that the plaintiff had *locus standi* to bring a delictual action against the defendants. This is contemplated by s 59 of the Act and clause 38 of the by-laws. The former reads:

 “59 Liability of members of management committees

1. The members of the management committee of a registered society shall ensure that, in the exercise of their functions, they discharge their duties diligently and shall be liable jointly and severally *to the society* for any loss incurred by the society due to their negligence, default, breach of duty or breach of trust or due to any action taken by them contrary to this Act, the by-laws of the society or to a direction given by a general meeting.” (Italics my own for emphasis)
2. **Whether or not the proceedings before this court are premature**

Ms *Sanyika* however submitted that this court lacked jurisdiction to determine this matter before the plaintiff exhausted domestic remedies set out from s 114(1) and 115 of the Co-operatives Act. The two sections state:

**114 Powers of Registrar in relation to inspection, inquiry or audit**

1. For the purposes of an inspection, inquiry or audit in terms of this Part, the Registrar may—

(a) summon to appear before him any officer, member, employee or agent of the society concerned who he has reason to believe can give material information in regard to any transactions of the society or the management of its affairs;

(b) require any officer, member, employee or agent of the society to provide such information or explanation as he can provide in relation to any matter regarding the transactions of the society or the management of its affairs;

(c) require any officer, member, employee or agent of the society to produce any account, book or document relating to the affairs or transactions of the society, or any property or asset, including cash, held by or belonging to the society.

**115 Settlement of disputes**

1. If any dispute concerning the business of a registered society arises—
2. 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) between registered societies;

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.

(2) Without limiting subsection (1), any—

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

(b) claim by a member, past member or nominee or legal representative of a deceased member for a debt, whether admitted or not; or

(c) dispute concerning the interpretation of a society’s by-laws; or

(d) recourse by a member who was surety for the repayment of a loan granted by the society to another member, arising out of a default by the borrower;

 shall be regarded as disputes concerning the business of the society for the purposes of subs (1).

(3) Where a dispute has been referred to him in terms of subsection (1), the Registrar may—

(a) settle the dispute himself; or

(b) refer the dispute for settlement to an arbitrator or arbitrators appointed by him; or

(c) refer the dispute to the Minister for decision.

(4) For the purpose of settling a dispute in terms of paragraph (*a*) of subs (3), the Registrar may exercise any of the powers conferred on him under section *one hundred and fourteen*.

(5) The Arbitration Act [*Cap 7*:*02*] shall apply in relation to any reference of a dispute to an arbitrator or arbitrators in terms of paragraph (*b*) of subs (3).

(6) Any person aggrieved by a decision made by—

(a) the registrar in settling a dispute in terms of paragraph (a) of subs (3); or

(b) an arbitrator or arbitrators appointed in terms of paragraph (b) of subs (3);

may appeal to the Minister within sixty days after being notified of the decision, and the Minister may confirm, vary or set aside the decision appealed against or make such other order in the matter as he thinks appropriate.

She contended that the plaintiff was obliged to bring the proceedings before the Registrar who in turn could invoke the powers vested in him under s 114 to call witnesses and documents required to resolve the dispute. She further contended that the documents in the defendants’ possession to establish their defence were voluminous and could not for that reason be produced in evidence in this court. She opined that the registrar was better placed than this court to investigate and determine the alleged issue of mismanagement and prejudice to the plaintiff.

Mr *Musendo* for the plaintiff submitted that the registrar and officials mentioned in s 115 do not have the capacity to enforce the order sought by the plaintiff in this case. He argued that this court has inherent jurisdiction to deal with any matter where that power has not been ousted. The evidence led by the plaintiff and the defence witness Chamboko showed that the registrar was intimately involved in the dispute between some of the co-operators and the defendants before he referred the matter to the police for investigation and prosecution. He further submitted that as the trial was complete, it was fair, equitable and expedient for a determination to be made on the merits.

It does not appear to me that the claim brought by the plaintiff against the defendants is the type contemplated by s 115. Para (a) of subs (1) of s 115 contemplates disagreements within the society amongst four categories of persons. The first category is between the society on the one hand and any existing member, ex-member or deceased member on the other. The second category is a disagreement within the society amongst its member. The third is a disagreement amongst members of the management committee and the fourth is disagreement amongst members of the supervisory committee. The section does not cover a legal suit brought by the society against its own management committee as contemplated by s 59(1) of the Act. In addition, the disputes listed in s 115 (2) relate to the failure to pay subscriptions, repay loans and other procedural disputes concerning the administrative conduct of the plaintiff’s business. The section does not grant authority to the registrar to deal with contractual or delictual disputes between the society and its management committee. In any event, the registrar was intimately involved in the suspension, the appointment of auditors and criminal prosecution of the defendants after some members of the plaintiff complained to him. His impotence in resolving the present dispute since he suspended the defendants on 3 April 2006 further confirms the submission by Mr *Musendo* that the present claim falls outside the ambit of s 115 of the Co-operative Societies Act.

I find in the plaintiff’s favour that the inherent jurisdiction of this court is not ousted by the provisions of s 115 of Co-operatives Societies Act and further that the section is inapplicable to delictual claims such as the one under consideration. Again, as the matter has been fully ventilated in his court on the merits, it is only proper that a determination be made.

1. **Whether or not the defendants unlawfully and unprocedurally sold stands belonging to plaintiff’s members**

Mr *Musendo* submitted that the defendants did not lawfully and procedurally dispose of 128 stands belonging to its members. The procedure set out in the by-laws and which mirrored the Act was that the disposal of stands of the co-operative was done by the management committee only after it had first been duly authorised by members in general meeting and secondly after obtaining the approval of the registrar of cooperatives. It will be recalled that the defendants pleaded that each sale was conducted by each individual lease holder who personally received the purchase price. The plaintiff established through Zvandasara’s testimony that the investigation by his interim committee revealed that each purchaser was issued with an official receipt of the plaintiff by the defendants. The three defendants who testified confirmed that the defendants sold the stands in question.

The first defendant averred that his committee was authorised to do so by the general meeting and officials of the parent ministry. He relied on the minutes of 5 March 2000 that were signed by him and the third defendant, in their respective capacities as chairman and secretary (p 79 exh 3). The minutes in question simply proved that the general meeting adopted the motion tabled by the second defendant to sell between 16 and 20 stands at the dump site to raise ZW$720 000-00 estimated as the cost of servicing area C and D within five months. It appears to me that these minutes authorised what was to be eventually the sale of 17 stands. The first defendant shifted focus and sought to rely on the minutes of 9 April 2000. The minutes recorded that the first defendant advised the general meeting that his management led committee had sold more stands than agreed and had realised ZW$984 000-00. The minutes further recorded that the members agreed that the management committee sell some of the extra vacant stands of the plaintiff to Southern Granite Cooperative and other prospective buyers. It was at that meeting that Chinyerere was expelled from the plaintiff by a vote of 187 to 7.

The defendants were thus authorised by the general meeting of 9 April 2000, p 80 of exh 3, to sell an unspecified number of extra stands of the plaintiff. They sold 128 stands purportedly under this mandate.

The only plausible conclusion to draw from those minutes is that the first defendant reported to the general meeting of 9 April 2000 how his committee had discharged the mandate of 5 March 2000. It is inescapable that the stands that were under discussion were the dump site stands. The mandate to sell more stands referred to stands at the dump site. It must be borne in mind that the defendants could very well have sold the stands in area C and D which all fell into the category of extra vacant stands of the plaintiff. The reason for the sale of the stands allocated to members at the dump site was not only to remove the burden of clearing rubble and place it on the purchasers but also to raise funds to service the rubble free extra vacant stands in area C and D. The defendants established that they were authorised by 117 of the 128 stand holders to dispose of their respective stands. They also established that they then allocated these 117 stand holders stands in area C and D for which each stand holder signed a new lease with the local authority. The supervising ministry official, Oswald Chamboko averred that he attended a general meeting called by the defendants that authorised the sale of an unspecified number of excess stands to finance part of the project. He confirmed that the defendants thereafter acted on his advice to seek the approval of the registrar to sell the unspecified number of excess stands. He confirmed that he received the letter from the defendants seeking authority to sell the extra stands, which he forwarded to the registrar who in turn authorised the sale in terms of s 80 (1) of the Act. He, however, failed to produce the letter of request to and the authorisation from the registrar. The registrar tasked him to personally visit the project, estimate the cost and satisfy himself on the value of the stands for sale. These documents, which were now housed in the Ministry of Small and Medium Enterprises had not been requested, hence his inability to produce them. It was clear to me that having been called at the criminal trial of the defendants to testify against them, he had no reason to mislead the court in the present proceedings. It was not disputed that he supervised co-operatives in Chitungwiza during the period 1991 to 2002 before they were placed under the Harare District Office of the overseeing ministry. It was also not disputed that his office periodically inspected the plaintiff’s records once every two months and would have queried the sale had it not been approved by the registrar. I believed his oral testimony.

I am satisfied that the defendants established through the minutes of 9 April 2000 that they were authorised by the general meeting to dispose of some of the extra stands at the dump site and that they lawfully and procedurally disposed of 117 of those stands.

**Whether or not the members were paid**

It was common cause that the members did not sell their rights in the stands at the rubble site. The sale was conducted by the defendants. Contrary to their plea, the defendants conceded that the proceeds from the sale of stands were received and receipted by them. They further agreed that they did not pass the proceeds to the members who held these stands. They, however, averred that the proceeds were used to service 800 stands in area C and D. 117 of these stands were issued to those members who lost their rubble site stands. The defendants thus averred that the members whose stands were sold benefited by receiving rubble free serviced stands in area C and D. Ms *Sanyika* submitted that the members whose stands were sold were thus paid in kind and not in cash.

I am satisfied that 117 members whose stands were disposed of by the defendants at the rubble site received in exchange better serviced stands in area C and D. The fact that these 117 individuals did not join force with the plaintiff in the present action demonstrates that they were satisfied with the deal concluded by the defendants on their behalf and to their benefit.

Mr *Musendo* contended the remaining 11 out of the 128 members of the plaintiff whose stands were sold were prejudiced by the sale of their stands at the rubble site as they were not allocated stands in area C and D. Two of these adversely affected members, Paul Musekiwa Rusere and Michael Muronzi testified for the plaintiff. Paul Rusere was a founding member of the cooperative. By virtue of his membership with the plaintiff, he concluded a six year lease agreement for the development of stand 14 834 with the Minister of Local Government, Rural and Urban Development on 23 January 1995. The stand was at the dump site. The lease agreement commenced to run on 1 January 1995 at a rental of ZW$88 per annum. He was to construct a building approved by the town engineer of Chitungwiza Town Council during the currency of the lease with a minimum value of ZW$50 000-00. On completion of construction, he had the option to purchase it for ZW$880-00. He was to pay all rates and other charges levied by the local authority. In terms of clause 15, the lessor had the right to terminate the agreement, take possession of the property eject the lessee in the event that he failed to pay rent or build as agreed or committed any other breach of the terms and conditions of the lease.

Rusere did not develop the stand within six years. In 2002 he realised that the rubble had been cleared and the stand sold by the defendants without his knowledge or consent to another person. The defendants refused to replace his stand. Rather on the instructions of the defendants he paid ZW$600-00 to the local authority on 24 May 2002 before the fourth defendant allocated stand 14 618, which had been forfeited by S Maninge another member of the co-operative who had arrears of ZW$600-00, to him. The local authority registered the stand in his name as demonstrated by the payment receipt issued to him on payment of ZW$ 1 900-00 on 2 October 2002. He thereafter continued to pay municipal charges and constructed a three roomed cottage to window level. The new stand was repossessed by the defendants ostensibly on the instructions of the local authority for the reason that he was not residing at the stand. He called the aid of the Ngoshi led pressure group to help him recover his stand without success. He did not receive an alternative stand nor did he receive a refund of his contributions to the co-operative. He looked to the plaintiff to make good the deprivation he suffered at the hands of the defendants.

Exhibit 3, on p 3 line 63, p 13 line 14 indicates that stand 14 834 was sold for ZW$45 000-00 to Joseph Musemburi on 4 May 2000. This stand belonged to Paul Rusere before the disposal of stands on the rubble site. In terms of clause 21 and 23 of the by-laws membership was terminable at the instance of the general meeting or special general meeting acting on the recommendation of the management committee. The management committee was required to give the member prior written notice of its recommendation to enable the member to avail himself and make representations before the general meeting. The general meeting approved the expulsion by a two thirds majority of the members present and voting. The expelled member was then refunded the subscriptions he had paid prior to the expulsion. The nine procedural steps for expulsion set out in clause 23 of the by-laws are mandatory. The defendants, being the custodian of sacksful of documents concerning the administration of the defendant during their tenure of office had the evidentiary burden to demonstrate on a balance of probabilities that they lawfully terminated Paul Rusere’s membership. They failed to produce documentary evidence to show that he owed the local authority ZW $4 160-00 on stand 14 834. They failed to establish that his membership was terminated before or after the general meeting of 9 April 2000. Rather on p 56 line 35 of exh 3 is an inexplicable notation that his stand was sold because he failed; without disclosing the nature of the failure. Again p 60 item 92 and p 61 of exh 3 entitled ‘CTHCOP Transferred Former Members’ shows that Paul Rusere was on the waiting list-offered after he failed to pay.

It is clear to me that Paul Rusere should have benefited from the sale of his stand at the rubble site to Joseph Musemburi by receiving a fully serviced stand of similar size in area C and D. The fourth defendant, the vice-secretary of the management committee at the time confirmed in his evidence in chief that Rusere was entitled to receive a serviced stand after the sale of stand 14 834. He failed to explain why such a stand was not availed him. The explanation proffered by the first defendant was that he failed to pay ZW$2 million requested by the local authority. The first defendant failed to realise that the demand for the payment of ZW$2 million concerned new stands that were allocated to the plaintiff by the local authority on 5 April 2005. This was long after Rusere had mysteriously lost stand 14 834 and 14 618. Instead the defendants pretended to be doing him a favour by reallocating him stand 14 618. The information pertaining to stand 14 618 is found on pp 51, 52, 84 and 85 of exh 3. On 2 February 2004, the local authority wrote to the plaintiff advising it to reallocate undeveloped stands with immediate effect or risk repossession by council under clause 15 of the lease agreement. The defendants then wrote an undated letter giving 20 stand holders, amongst who was Paul Rusere of stand 14 618 directing them to report to the management committee before 28 February 2004 failing which their stands would be re-allocated to other members. On 31 March 2004 the local authority date stamped a document entitled Undeveloped Stands: Zengeza 3 Extension highlighting that Paul Rusere who had been allocated stand 14 618 on 24 May 2002 owed ZW$37 820-86 on the undeveloped stand whose lease had already expired in January 2001. On 21 May 2005 the plaintiff acting through the defendants wrote again to Paul Rusere that he was eligible for allocation of a new stand on payment of ZW$2 million by 31 May 2005 to the local authority.

Rusere’s woes in regards to stand 14 618 are irrelevant to his loss of stand 14 834. He has shown on a balance of probabilities that he was entitled to be reallocated a replacement stand in area C and D after stand 14 834 was sold to Joseph Musemburi. He must look to the plaintiff for reallocation of the stand for the dismissed management committee of the defendants unlawfully and unprocedurally deprived him of his stand. The actions of the defendants in this regard prejudiced the plaintiff.

Michael Muronzi lost stand 14 121 allocated to him in 1988. He alleged he owed the plaintiff ZW$250-00 in outstanding subscriptions up to 2001. He was out of employment between 1998 and 2001. He, of his own accord, deposited ZW$250-00 in the CABS account of the plaintiff in 2001. He approached the second defendant for water connection on the stand. He was referred to the fourth defendant who advised him that the stand had been reallocated due to delayed payments. He checked with the local authority and confirmed that it was registered in another person’s name notwithstanding that he still held the lease agreement to the stand in question. He neither received a refund nor a replacement stand. He looked to the plaintiff for a new stand as he lost his at the hands of the defendants in their capacity as the management committee of the plaintiff.

The defendants produced a letter on p 82 of exh 3 they wrote to the local authority on 10 January 2002 in which Michael Muronzi was amongst 29 members who had been expelled from the plaintiff for failing to pay subscriptions. They also produced a schedule on pp 47, 59 and 61 of exh 3 that indicated that Michael Muronzi had paid a total of ZW$1 884-00 the last payment of which was on 18 December 1998 and was in arrears of ZW$4 116-00. A more plausible explanation was proffered by the second defendant. He explained that Muronzi paid contributions of ZW$1 800-00 through the deductions made from the employer, the last of which was on 18 December 1998. The total amount due from each member in contributions was ZW$6 000-00. Muronzi therefore owed membership contribution of ZW$ 4 200-00. It was therefore incorrect for him to allege that he was indebted to the plaintiff in the sum of ZW$250-00. The stand was transferred to a new member by reason of non-payment.

Mr *Musendo*contended that the defendants did not follow clause 19 of the by-laws to expel members. Clause 19 lists five methods for expelling members. These are death or insanity, holding less than the minimum number of shares in the co-operative, disqualification by the by-laws, resignation under the by-laws and expulsion by two-thirds majority vote of members present and voting at a general meeting. Section 43 reads:

**“Section 43 Suspension or expulsion of member**

(1) A member of a registered society who contravenes this Act or the by-laws of his society or who acts in any way detrimental to the interests of his society may be suspended or expelled from the society in accordance with the by-laws of the society.

(2) Every registered society shall prescribe in its by-laws a procedure for the suspension or expulsion of a member, including provision for giving the member reasonable notice and an opportunity for making representations responding to the charge”.

The Act prescribes a mandatory mode for suspending or expelling a member. It is not automatic. The by-laws set out in clause 22 three possible grounds for expulsion from membership. These are the failure to pay any sum due to the society after judgment has been entered in favour of the society by a competent court; any action considered by the management committee to be disloyal or contrary to the interests of the society, its employees or that causes such action and any action considered by the management is likely to defeat, frustrate or hinder the objects of the society as defined in these by-laws. Indeed clause 23 sets out the procedure for expelling a member. The member may be suspended pending expulsion in terms of clause 21. Under clause 23 a special general meeting is called. All fully paid up members and the member to be expelled are given 15 days notice and advised of the time, venue, date and agenda of the special general meeting. A thorough accreditation process is carried out before commencement of the special general meeting. Only fully paid up members who have paid entrance fees participate in the meeting, there must be a quorum, the affected member is present and makes representations freely and responds to charges levelled against him and the general meeting makes a decision on the recommended expulsion.

The rules are designed to protect right of membership and do not permit automatic expulsion.

The overarching power of the general meeting over the management committee is captured in clause 4 (a), 10 (2), 11 (2), (3) and (4), 12, 24 and 25 especially 25 (c). The latter directs that the general meeting may authorise the management committee to lease co-operative property on such written terms as are best suited to the society. Indeed clause 35 subjects the powers of the management committee to exercise all powers that are necessary to achieve the objects of the society to the approval of the general meeting.

A member who defaults in paying subscriptions is called to a special general meeting and a vote for his expulsion is taken under 19 (c) and (e) of the by-laws. There was no evidence proffered by the defendants to show that Michael Muronzi was expelled from the co-operative as intimated in the letter of 10 January 2002. The minutes of the special general meeting that expelled him were not produced. Muronzi was not aware of his expulsion otherwise he would not have sought water connection from the defendants. The defendants failed to follow the by-laws of the plaintiff before they reallocated the stand belonging to Muronzi. I hold that the reallocation of his stand before the termination of his membership was unlawful and prejudicial to him. The plaintiff is vicariously liable to him for a replacement stand. The plaintiff has in turn established through Muronzi that it was prejudiced by the disposal of his stand by the defendants. It must be compensated for the value of the stand by the defendants.

The defendants are not liable to the plaintiff for the purported loss of the stand belonging to Hillary Mukulah. This is because the defendants were not obliged to allocate a stand to Hillary Mukulah as averred by Zvandasara. Mukulah joined the plaintiff and the first deduction from his salary was made on 19 November 1993. He withdrew his membership from the plaintiff and was refunded his membership contributions in the sum of ZW$982-00, as captured in the Standard Bank cheque (account number 7010000098200) and payment voucher that he signed that are on pp 53 and 54 of exh 3, by the first management committee on 11 February 1994.

The other eight members who were allegedly short changed by the defendants were not called to testify. They are Learnmore Zingwe, Molline Gwete, Godfrey Chikuwanyanga, Violet Hohlani, Naison Milanda, Joseph Maninge, Patience Munemo and Wilson Tsikanda. They appear as complainants against the defendants in the general meeting minutes of the plaintiff of 16 June 2007. Zvandasara testified that these eight were wrongfully deprived of their stands by the defendants without invoking the termination procedure set out in the by-laws. They all demanded recompense from the plaintiff. The defendants stated that the stands of these former members were repossessed after their subscriptions fell into arrears.

It is correct that amongst the 29 expelled members in the letter written by the defendants to the local authority on 10 January 2002 are M Zengwe whose stand number corresponds with that demanded by Learnmore Zengwe and M Holani whose stand number corresponds to the one claimed by Violet Hohlani. These two fell into the same category as Michael Muronzi. In terms of s 40 of the Act, a member in arrears is precluded from exercising the rights of membership until he has paid up. Neither the Act nor the by-laws provide for automatic expulsion of a member who fails to pay three consecutive subscriptions. Thus the information on p 47 of exh 3 that shows M Zengwe paid his last subscription on 3 October 1999 with an outstanding balance of $3 804-80 and T Maningi with the stand claimed by Joseph Maninge last paid on 8 September 2000 and owed subscription of $1 226-40 would not assist the defendants.

On pp 59 to 61 is information relating to the status of “former members”. The information on Timothy Maningi is that he was deceased although he had been on the waiting list after refusing a stand on the rocks that was sold to George Masango on 13 May 2002 for ZW$200 000-00. The information on Michael Zengwe is that he was deceased and had not paid ZW$3 804-80. The information in regards to Godfrey Chikuwanyanga is that he was reallocated stand 17 827 as was Naison Milanda who was reallocated stand 18 028. In regards to Sebastian Munemo with same stand claimed by Patience Munemo the indication is that he was reallocated stand 14 351. Mvelani Holani with same stand claimed by Violet was deceased and owed ZW$2 594-30 since his last payment on 9 February 2000. Patience Munemo was indicated as a non-member. According to the members contributory list of 2001 the stand claimed by Molline Gwete was being subscribed by Francis Masenda who paid his first instalment of ZW$2 250-00 in September and the second of ZW$1 000-00 in October 2001. The stand claimed by Learnmore Zengwe was purchased by Stanislaus Sanyangowe for ZW$45 000-00 in June 2000. By June 2000 George Chikuwanyanga had paid subscriptions of ZW$800-00 and in 2001 by November of that year he had paid ZW$1 100-00 for the stand he was claiming. Stand 14 472 claimed by Violet Hohlani was subscribed by Gibson Dhlala in the sum of ZW$4 136-00 in October 2000 and an additional ZW$600-00 was paid by him in February 2001. Naison Milanda had contributed ZW$1 000-00 by July 2000. The stand claimed by Joseph Maninge was contributed to by Timothy Maningi who paid ZW$2 000-00 in September 2000. The stand claimed by Patience Munemo was contributed to by Todd Chihwayi who paid ZW$300-00 in February 2000 and ZW$3 452-00 in 2001. Wilson Tsikanda was amongst 25 members discussed by the defendants and the local authority on 14 February 2002 whose stands appeared on open spaces, roads and ZESA Power lines on the 1995 master plan from the surveyor general who were up to date with their obligations to the lessor and local authority and who the local authority agreed to allocate new stands.

I cannot make any finding in favour of or against these eight in the absence of oral testimony on whether or not they were disadvantaged by the actions of the defendants. The information at hand shows that the members of the plaintiff M Zengwe and M Holani are deceased. No evidence was led on how Learnmore Zengwe and Violet Hohlani assumed their claims. Thus even though they fall into the same category as Michael Muronzi, in the absence of oral evidence from them I am unable to find that they have justifiable claims against the plaintiff arising from the conduct of the defendants.

5. **Whether or not the defendants are liable for the claim sought**

The basis for claiming US$2 000-00 for each of the 128 stands was that the defendants used the proceeds of sale for personal benefit to the detriment of the business of the plaintiff. Zvandasara alleged that the amount of ZW$984 000-00 raised from the sale of 17 stands together with the contributions of members in the sum of ZW$2.08 million in the plaintiff’s CABS account was used to service the stands in area C and D. The defendants produced an unaudited income and expenditure statement produced by their late treasurer, the fifth defendant covering pp 1 to 48 of exh 3 to show that the proceeds were utilised in the plaintiff’s business. The first and second defendant gave detailed versions on the sale of the stands, receipting, banking and utilisation of the proceeds. The first defendant averred that in 1999 his committee inherited ZW$1 000-00 in the CABS account. The defendants did not have access to this amount following the suspension of their predecessors by the registrar who directed them to open new accounts pending investigation of the old committee’s activities. The defendants opened a new Standard Chartered account number 0100251543700. This is confirmed by deposits that were made in that account on 13 April 2004 and 22 February 2005.

Contrary to the minutes of 16 June 2002 on p 86 of exh 3 in which the second defendant told the general meeting that all but 29 stands had been serviced, the first defendant stated that servicing was completed in 2004. He relied on the estimate from Survetec Registered Land Surveyors for the title survey of 16 stands 17768-17783 of ZW$17 736 000-00 dated 7 September 2004 for this averment. The estimate was for title and not servicing. It was just for 16 stands and not 800 stands. Zvandasara was correct when he stated that the Survetec invoice was for in fills.

The second defendant relied on the summary of income and expenditure complied by the late Madziwa on p 1 of exh 3. The income raised is captured in the running balances shown from pp 2 to 28 of exh 3 while the expenditure is shown on pp 29 to 46. The source documents upon which these running balances are based were not produced. The running balances are very detailed. They cover each year between 2000 and 2005. I am satisfied that they were not a creation of his imagination. He captured loans to some of the defendants including himself that do not appear to have been repaid. In my view he must have referred to the source documents for him to produce such detailed balances. I therefore accept them as a fair representation of the income and expenditure of the co-operative during that period.

That they are a fair representation is confirmed by the Zvandasara’s testimony. Zvandasara testified that the purchasers of the stands at the rubble produced official receipts issued by the defendants. It was these receipts that were used by the auditors appointed by the plaintiff to calculate the amount raised from the sale. Notwithstanding the inexplicable failure of the defendant’s legal practitioners of record to surrender the plaintiff’s documents in their custody for audit, it was apparent that the audit report did not disclose the fair state of affairs of the co-operative. Mr *Musendo* conceded that the production of bagsful of documents in the defendant’s possession may very well reduce the extent of prejudice to the plaintiff.

I agree with Ms *Sanyika* that the plaintiff failed to prove on a balance of probabilities that it utilised ZW$2.08 million from members’ subscriptions to service area C and D. It failed to establish that it was prejudiced from the sale of 128 stands. Rather, it established that it was prejudiced in the disposal of the stands belonging to Rusere and Muronzi who have a legitimate claim for recompense from it. The disposal of Rusere and Muronzi’s stands without adhering to the provisions of the plaintiff’s by-laws was unlawful. It prejudiced the plaintiff in that it must recompense the two for their loss. The prejudice is in the sum of US$4 000-00. I find the first, second, third, fourth and sixth defendants liable in the sum of US$4 000-00.

Accordingly, it is ordered that the first, second, third, fourth and sixth defendants shall jointly and severally the one paying the others to be absolved pay to the plaintiff the sum of US$4 000-00 together with interest at the prescribed rate from the date of judgment to the date of payment in full and costs of suit.

*Kamusasa and Musendo*, plaintiff’s legal practitioners

*Matipano and Associates,* first, second, third, fourth

and sixth defendants’ legal practitioners