SHANDUKO HOUSING COOPERATIVE SOCIETY LTD

versus

LUKE MUSHANGO

HIGH COURT OF ZIMBABWE

MAFUSIRE J

HARARE, 9 September 2013

Date of written judgment 20 November 2019

**Opposed application**

Mr *S. Hashiti*, for the applicant

Respondent in person

MAFUSIRE J

[1] This was a 2012 case. It was as an ordinary opposed application. I heard it in September 2013. On 9 September 2013 I disposed of it by granting the application with costs and giving reasons *ex tempore*. I would have returned the record to the Registry and my assistant would have filed away my notebook. Judges’ assistants or clerks keep custody or track of the judges’ notebooks. I had all but forgotten about this matter. So would my assistant. In September 2016 I was transferred to the newly opened High Court station at Masvingo where I operated from until 31 October 2019. My assistant was transferred to the magistrate’s court. Since 2013 to now, the Registry at Harare has had no less than four Registrars due to promotions and transfers. These are normal operational developments. But sometimes institutional memory is inevitably compromised. For example, my notebook with my notes on the case cannot now be located.

[2] The above administrative detail is rather unusual in a judgment. But I have had to incorporate it. I am being asked to write a judgment a staggering six years after I had disposed of the matter. Not all cases are disposed of by written judgments. A great number of them are disposed of through *ex tempore* judgments as was the case in this matter. Some judgments are written on request. But the request has to be made within a reasonable time. Six years is by all accounts a very long delay. The letter from the respondent’s legal practitioners requesting the written judgment, six years, later does not explain the inordinate delay. It simply says they have been asked to appeal my decision (six years ago) and to apply for condonation for the late noting of the appeal. Something does not add up.

[3] All the reason why we are moving towards e-justice in this jurisdiction. We are establishing what are colloquially termed Digi-courts. A major component of e-justice is the electronic case management system. One of its appeals is that dormant cases will automatically be flagged and flushed out of the legal system. It is a modern system to improve justice delivery. A case will not lie dormant in the registry for six years without anything happening to it. Anyway, so much about administrative issues.

[4] The case before me was an application by a registered cooperative society to expel the respondent, one of its members, from its membership and to evict him from one of the cooperative society’s houses that he had taken possession of without the authority of the cooperative society. The basis of the application was that the respondent had for three years refused or neglected to pay the monthly subscriptions payable by members. It was also that for four years he had defaulted on attending scheduled meetings of the society. Over and above that, he had forcibly taken occupation of an unfinished structure on one of the cooperative society’s properties. The structure had been developed by the contributions from the other members. The respondent had ignored and spurned all efforts and calls upon him to regularise his membership and to vacate the structure. Eventually it had been resolved to expel and evict him.

[5] The respondent’s major defence comprised two technical objections. The first was that this court had no jurisdiction to hear the matter because in terms of s 115 of the Co-operative Society Act, *Cap 24:05*, any dispute between cooperative societies and members must be referred to the Registrar (of cooperative societies) for resolution and that therefore the applicant had not exhausted its domestic remedies.

[6] The respondent’s second technical objection was that the applicant had violated the *audi altarem partem* rule of natural justice in that he had not been given any prior notice before his suspension.

[7] On the merits, the respondent denied he had refused to pay his monthly subscriptions or that he had deliberately absented himself from meetings. He claimed he had the permission of the chairman of the cooperative society to stop paying subscriptions, having informed him of his plight. The plight was allegedly that he had lost his job and his wife had become critically ill. He said when his financial situation had improved, he had offered to resume his subscriptions but that they had been refused. On meetings, he said he had been excused by the members from attending as they readily understood that he had to attend to his sick wife.

[8] I dismissed the respondent’s defences and granted the application soon after argument because I was satisfied that the respondent was being *mala fide*. It was evident he was the black sheep of the cooperative society family. He was recalcitrant. He was trying to hide behind a finger. The technical objections were a subterfuge.

[9] Section 115 of the Co-operative Societies Act does not oust the jurisdiction of this court to determine disputes between a cooperative society and its membership. At any rate, in terms of s 69 of the Constitution, every person has the right of access to the courts for the resolution of any dispute. ‘Person’ includes juristic bodies such as the applicant.

[10] The *audi alteram partem* rule is all about justice and fair play. It holds that a man shall not be condemned without being given a chance to be heard in his own defence. In this matter, the evidence adduced by the applicant showed that the respondent had been given due notice of his suspension. At any rate, his exact protest was not that he had been given no such notice. It was that he had not signed the suspension letter. Furthermore, he had been duly notified of the meeting called upon to deliberate on his fate. He duly attended that meeting. The minutes of that meeting showed that an opportunity had been given to everyone present to make representation concerning his matters. He seemed not to have availed himself of that opportunity. His argument before me was not that he had been prevented from speaking. I was satisfied there was substantial compliance with the *audi alteram partem* rule of natural justice.

[11] The applicant’s chairman denied he had granted the respondent leave to default paying his subscriptions. Instead, he said they had on numerous occasions pressed him to pay and to attend meetings before he had eventually disappeared from the scene. The respondent’s claims about his default on subscriptions and meetings are plainly unbelievable. For example, he gave no details of when, where and by which particular chairman of the cooperative society had he been given such leave, or where and by who in particular had he been allowed to bunk off meetings. As the applicant’s deponent pointed out, no one had the right or power to excuse a member from paying subscriptions or to attend meetings.

[12] It was for the above reasons that I allowed the application with costs.

20 November 2019



*Zuze Law Chambers*, applicant’s legal practitioners