IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 087 of 2023
[In the High Court at Suva Case No. HBC 353 of 2022]

BETWEEN : **MOHAMMED ALI MAQBOOL**

Appellant

AND : **NASINU LAND PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED**

Respondent

Coram : **Prematilaka, RJA**
Morgan, JA
Andrée Wiltens, JA

Counsel : **Mr. S. Singh and Ms. K. Saumaki for the Appellant**
Mr. R. Singh for the Respondent

Date of Hearing : **09 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] The appellant filed the original action in the High Court pursuant to the provisions of the Co-operatives Act 1996 by way of an originating summons seeking *inter alia* a declaration that his membership was unlawfully terminated by the respondent on 06 April 2022 and that he be reinstated as member of the respondent together with all his membership

benefits. By judgment dated 09 August 2023[1], the High Court Judge dismissed the originating summons seeking the declaration and reinstatement. The appellant appealed against the said judgment to this Court.

Factual matrix

[2] The respondent is a Co-operative Society registered under the Co-operatives Act 1996 ['Act'] and one of the largest land developing units having membership of about 74 and acts in accordance with its by-laws and the provisions of the Act. The appellant has been a senior legal practitioner by profession and was a member and also a board member of the respondent. Admittedly, the appellant's law firm represented 4 clients at the Co-operative Tribunal who were trying to establish their membership with the respondent. According to the appellant, he reviewed evidence and the applications filed by his clients, subsequently appeared before the Tribunal and managed to settle the matter with the representatives of the respondent. His clients had agreed to have the matters withdrawn without costs except one of them who continued the proceedings in person.

[3] The appellant's conduct of representing the said 04 persons against the respondent had been discussed at the respondent's Annual General Meeting on 18 December 2021. On 30 December 2021 the respondent had written to the appellant informing him that his conduct had breached the by-laws of the respondent, given 02 months' notice and demanded that he should appear before a Disciplinary Committee on 09 March 2022. The appellant had objected to the referral on 21 February 2022 stating that the committee members would be biased towards him. Yet, he had appeared before the Committee on 09 March 2022 which had given him an opportunity to make oral representations in his defence. The appellant while admitting the allegation had stated that the officials of the respondent should have pointed out to him that it was improper for him to represent the 04 members who had taken the respondent before the Co-operatives Tribunal. The Committee having proceeded with the referral found the conduct of the appellant to be in conflict of interest as a member of

[1] **Maqbool v Nasinu Land Purchase and Housing Co-operative Society Ltd** [2023] FJHC 554; HBC353.2022 (9 August 2023)

the Co-operative Society and section 9 of the By-Laws and the Committee had given two options to the respondent's Board to select against the appellant including his expulsion. The Board at its meeting on 06 April 2022 decided to terminate the appellant's membership followed by the communication of the decision to him on 07 April 2022. Although, the appellant has stated that he was not given a copy of the report on findings, the respondent has refuted that position. On 19 April 2022 the appellant had written to the Board of the respondent stating *inter alia* that the decision to terminate his membership was *ultra vires* and requested the Board to reconsider it with a warning that should the Board fail to reverse it, he would have no option but to challenge it by judicial review proceedings. But the Board having considered his letter on 05 May 2022 decided to uphold the decision of termination of his membership. Thereafter, the appellant apparently made an appeal to the respondent's Annual General Meeting which at its meeting on 19 October 2022 also upheld the termination of the appellant's membership.

[4] The High Court Judge's impugned order is primarily based on the preliminary objection over the jurisdiction of the High Court where the judge held that the jurisdiction regarding the appellant's cause of action lies with Registrar of Co-operatives and the Co-operative Tribunal pursuant to section 115 of the Act.

[5] The appellant raised the following grounds of appeal:

> *'1. The Learned Judge erred in law in holding that the Appellant's cause of action lies with the Registrar of Co-operatives and the Co-operatives Tribunal under the Co-operatives Act 1996.*
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> *2. The Learned Judge erred in law in holding that the Appellant could only have a remedy under the Co-operatives Act 1996.*
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> *3. The Learned Judge erred in law in holding that the Appellant's expulsion and the process taken to expel him was a dispute which could only be determined by the Registrar and the Co-operatives Tribunal under the Co-operatives Act, 1996 and disregarded the Appellant's constitutional right to assess to Court and fair treatment under the law.*
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> *4. The Learned Judge erred in not evaluating the evidence of the Appellant that he was unfairly and in breach of the Co-operatives By-Laws expelled from the*

Respondent Co-operative. In the circumstances, the Appellant pleads that the Judge erred in not making Orders the declaration sought by the Appellant that his membership was unfairly terminated by the Respondent and that he was entitled to reinstatement as the remedies for the unlawful termination of his membership.'

[6] I think that the 01st to 03rd grounds of appeal could be conveniently dealt with together as has been done by the appellant's counsel in his written submissions.

[7] Section 115 of the Co-operatives Act reads:

'(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.'

[8] At the heart of the issue before this court is the interpretation of section 115 of the Co-operatives Act; more specifically the following parts:

> '*…. 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….'*

[9] The High Court judge was 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. The judge has reasoned out that the legislature by presenting the Co-operatives Bill intended to have a robust, autonomous, and swift decision-making Co-operatives system in the country and the Act does not encourage intervention by the courts in the dispute resolution[2]. In further explaining his analysis, the judge has cited as an example section 112 of the Act which has taken away the jurisdiction of the civil courts on matters concerning dissolution of Co-operatives and no appeal shall lie to a court from an order of the liquidator, the Registrar or the Co-operative Tribunal and section 115 (4), (5) and (6) where any dispute

[2] See **Pepper and Hart** [1992] UKHL 3; (1993) 1 All ER 42; [1993] AC 593 for allowing reference to be made to Hansard in limited circumstances.

resolution shall be done according to a strict time frame and the decision would become final and conclusive.

[10] The High Court judge has also quoted **N S Bindra's Interpretation of Statutes** [***twelfth edition***] which *inter alia* states:

> *'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.'*

[11] As an example of 'may' having been interpreted as 'shall', the judge cited **Siddheshwar Sahakari Sakhar Karkhana Ltd v. CIT Kolhapur** [2004] 12 SCC 1 where it was argued that expression 'may' followed by the words 'convert such deposits into shares after repayment of loans etc.' 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. In his own reasoning, the judge took the view the word 'may' in section 115 (1) is coupled with a 'duty' to refer disputes to the Registrar or to the Tribunal after due attempts are made in relation to mediation and therefore 'may' in section 115 should be read as 'shall'.

[12] The High Court Judge concluded with the following remarks:

> *'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.'*

[13] The appellant's arguments challenging the trial judge's reasoning under 01st, 02nd and 03rd grounds of appeal could be summarized as follows:

> *'1. Section 100(3) of the Constitution vests the High Court with unlimited original jurisdiction to determine any civil or criminal proceedings.*
> *2. The Court of Appeal decision in **Sami Nadan v Wairuku Land Purchase Co-Operative Society Limited and two others** ABU 0044 of 1999 (01 December 2000) (unreported) had held as follows:*
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> > *'His Lordship's comments about the failure to refer the dispute for resolution under s 115 of the Co-operatives Act 1996 are not directly relevant, but we agree with Mr Ram's submission that the section is permissive only, and that a member is free to take Court action if he or she chooses.'*
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> *3. The word 'may' in section 115 gives a member the discretion to refer any dispute between a member and the Co-Operative, its Board or any other officer of the Co-Operative either to the Registrar or to the Co-operative Tribunal.'*

[14] I shall now deal with them separately. Section 100(3) of the Constitution is a general jurisdictional provision where the High Court is vested with unlimited original jurisdiction to determine any civil or criminal proceedings under any law (includes all written laws) or any other original jurisdiction under the Constitution [such as under section 98 (3) (c) read with 91(5)] or any written law (which means an Act, Decree, Promulgation and subordinate law made under those Acts, Decrees, Promulgations). Thus, not all powers exercised by the High Court are given in the Constitution. For example jurisdiction of the High Court in respect of constitutional redress applications has been conferred on the High Court by High Court (Constitutional Redress or Relief) Rules, 1990 made by the Chief Justice under section 19(7) and section 113(4) of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 as preserved by section 173(1) of the Constitution of the Republic of Fiji – 2013. Another example is Order 53 of the High Court Rules, 1988 made by the Chief Justice under section 3(2) of the High Court Act on applications for judicial review vesting jurisdiction in the High Court of Fiji.

[15] Therefore, in the absence of any provision in the Constitution, any law or written law conferring jurisdiction on the High Court to consider a challenge to the decision of the

Board of Directors or the governing body of a Co-operative, the High Court would not have jurisdiction to entertain the action instituted by the appellant by way of originating summons for a declaration of unlawful termination of his membership and reinstatement of his membership.

[16] Firstly, the appellant should have exhausted the dispute settlement process to the Registrar or to the Tribunal as stated in section 115 (1) of the Act. On a referral by the appellant, the Registrar himself could have settled the dispute or refered the dispute to the Tribunal for the Tribunal to decide [section 115(3)]. If the Registrar decided to settle the dispute, and if the appellant was aggrieved by the Registrar's decision, the appellant could have appealed to the Tribunal against the decision of the Registrar [section 115(4)]. If the appellant had referred the matter directly to the Tribunal or the Registrar had referred it to the Tribunal, the Tribunal would have made a decision [section 115(5) & (6)]. In any event, the Tribunal had to make its decision within 02 months.

[17] In all three scenarios, the decision of the Tribunal is final and conclusive which means that there is no further appeal. If still aggrieved by the decision made by the Tribunal, the appellant could have made an application for an order of certiorari, mandamus or prohibition, as the case may be, by way of an application for judicial review under Order 53 Rule 1(1) to quash the impugned decision of the Tribunal and prayed for a declaration under Order 53 Rule 1(2), of course, only upon first obtaining leave of the High Court under Order 53 Rule 3(1). Thus, the appellant's interpretation of section 100(3) is erroneous and it offers no assistance to the appellant against the High Court judge's finding. If at all, section 100(3) would have come into play after the appellant had exhausted the dispute resolution mechanism under section 115.

[18] I am of the view that the termination of the appellant's membership is a dispute within the scope of section 115. Therefore, the next question is what the word 'may' in section 115(1) means. The appellant argues that regarding a dispute between a member and the Board or the Co-operative, section 115(1) confers a discretion on a member either to invoke the

jurisdiction of the High Court or to refer the matter to the Registrar or directly to the Tribunal. I do not agree.

[19] Firstly, the word 'may' does not always indicate a discretion. There is ample authority that the use of the word 'must' or 'shall' in a statute does not necessarily denote a mandatory requirement. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. Similarly it is well-settled that the use of the word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force (see **N S Bindra's Interpretation of Statutes** 12th Edition at pp. 444, 446).

[20] **Craies on Legislation** 12th Edition at page 693 states:

> *'The word 'may' is, however, one that requires to be approached in its context, and in some circumstances it may come to be construed as conferring no discretion'*

[21] **Maxwell on The Interpretation of Statutes** 12th Edition at page 234 states:

> *'..it has been held that expressions such as 'may', or 'shall have power', or 'shall be lawful', have – to say the least- a compulsory force*[3]*, and so their meaning has been modified by judicial exposition'*[4]

[22] 'It is well established' said Pennycuick J. in **Baron Inchyra v. Jennings (Inspector of Taxes)**[5] 'that in section (1), the word 'may' should be read as mandatory.[6]

[23] Therefore, the appellant's argument that the word 'may' in section 115 must be interpreted as only directory and not mandatory is wrong. When the general purpose of the whole Act

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[3] See **R v Tithe Commissioner** (1850) 14 Q.B. 474; **Boarder R.D.C. v Roberts** [1950] 1 K.B. 716, per Somervell L.J.
[4] See **Re Shuter** [1960] 1 Q.B. 142; **R. Governer of Brixton Prison, ex p. Enahoro** [1963] 2 Q.B. 455
[5] [1966] Ch. 37, as reported in [1965] 2 All E.R. 714 at 723
[6] See **Maxwell on The Interpretation of Statutes** 12th Edition at page 235

and the scheme of dispute resolution specifically set out under Part 13 of the Act along with social, economic and political context are considered, the word 'may' in section 115 should be interpreted as introducing a compulsory requirement rather than a discretionary option to be selected by a party to a dispute between litigation in court and the resolution mechanism under section 115. If that were not the case, the whole intention of the legislature would be defeated and rendered nugatory. This is the purposive approach also known as the Golden (or purposive) rule[7] of interpretation which has become the dominant judicial interpretation technique.

[24] Secondly, on a careful analysis of section 115(1) in the context of Part 13 - SETTLEMENT OF DISPUTES of the Act, it is clear that the word 'may' in fact connotes a discretion between referring the dispute to the Registrar or directly to the Tribunal. The choice is for the parties to the dispute to make. However, the choice is not between litigation in court and referral to the Registrar and/or Tribunal. If the dispute is referred to the Registrar, and if he decides to settle it, the party aggrieved has the opportunity to appeal to the Tribunal ('a second bite at the cherry'). If a party refers the dispute to the Tribunal directly, it would not have a second chance to appeal to the Tribunal. If the Registrar refers it to the Tribunal, then again upon the Tribunal making a decision, there is no further appeal. Thus, it could be one or two tiered settlement mechanism depending on the choice made by an aggrieved party. Whichever way, the final decision is that of the Tribunal and that could be challenged only by way of judicial review. The ouster clauses in section 115(4), (5) and (6) cannot deprive the High Court of judicial review of the decision of the Tribunal. This judgment is not the place to go into that question in more detail and it is not required as well for the purpose of this appeal.

[25] The appellant in his letter dated 19 April 2022 had said that the Board's decision was *ultra vires* and he would challenge it by way of judicial review. Where he went wrong was that he could not do so in the first instance without exhausting the settlement dispute process under Part 13 of the Act involving the Registrar and the Tribunal.

[7] See **River Wear Commissioner v Adamson** (1876-77) 2 App Cas 743 at 764-5 per Lord Blackburn

[26] The appellant also relies on **Sami Nadan v Wairuku Land Purchase Co-Operative Society Limited and two others** ABU 0044 of 1999 (01 December 2000) (unreported) which had held as follows:

> '*His Lordship's comments about the failure to refer the dispute for resolution under s 115 of the Co-operatives Act 1996 are not directly relevant, but we agree with Mr Ram's submission that the section is permissive only, and that a member is free to take Court action if he or she chooses'*

[27] As far as the appellant is concerned, the supporting part of the above paragraph is '…*we agree with Mr Ram's submission that the section is permissive only, and that a member is free to take Court action if he or she chooses..'* . However, that part is preceded by the words '*His Lordship's comments about the failure to refer the dispute for resolution under s 115 of the Co-operatives Act 1996 are not directly relevant..'* referring to the High Court Judge. Therefore, it is very clear that the words the appellant is relying on is simply *obiter dictum* and not part of the *ratio decidendi*. There is absolutely, no discussion at all in the entire judgment on possible interpretations of section 115 and its scope and the decision was arrived at based on a different footing unconnected with section 115.

[28] For the foregoing reasons, I do not think that the 01st, 02nd and 03rd grounds of appeal are sustainable.

[29] In view of the above conclusion, it is not necessary and would indeed be an exercise in futility to consider the 04th ground of appeal as the High Court Judge had not gone on to consider the facts of the case at all.

[30] Thus, the appeal should stand dismissed. However, given the question of law involved and the lack of previous judicial precedent available, I do not intend to order the appellant to pay the costs of this appeal.

Morgan, JA

[31] I have read and agree with the judgment of Prematilaka, RJA.

Andrée Wiltens, JA

[32] I agree.

Orders of the Court:

1. Appeal is dismissed.
2. Costs lie where they fall.

The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

The Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

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