**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE, MTHATHA)**

**CASE NO.: 1178/2009**

In the matter between:

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| **MASIZENZELE PRIMARY CO-OPERATIVE LTD** | **1st Applicant** |
| **UNCEDO PRIMARY CO-OPERATIVE LTD** | **2nd Applicant** |
| **LAPHUMIKHWEZI PRIMARY CO-OPERATIVE LTD** | **3rd Applicant** |
| **NCEDULUNTU PRIMARY CO-OPERATIVE LTD** | **4th Applicant** |
| **ITHEMBA PRIMARY CO-OPERATIVE LTD** | **5th Applicant** |
| **SIYABULELA PRIMARY CO-OPERATIVE LTD** | **6th Applicant** |
| **UKUKHANYA PRIMARY CO-OPERATIVE LTD** | **7th Applicant** |
| **KUYALUNGA PRIMARY CO-OPERATIVE LTD** | **8th Applicant** |
| **ZOLILE PRIMARY CO-OPERATIVE LTD** | **9th Applicant** |
| **XOLANI PRIMARYCO-OPERATIVE LTD** | **10th Applicant** |
| **MKATE TRADING ENTERPRISE CC** | **11th Applicant** |
| **IRIS NONKOSINATHI MBODLELA** | **12th Applicant** |
| **BENNETT PUMELELE BANZANA** | **13th Applicant** |
| **QANGULE SIKHOLIWE** | **14th Applicant** |
| **NOTHEMBA THEODORA SEPTEMBER** | **15th Applicant** |
| **ANDILE MANYIFOLO** | **16th Applicant** |
| **MBANA LIVI** | **17th Applicant** |
| **NOKWALI THULANI** | **18th Applicant** |

**And**

**KING SABATA DALINDYEBO LOCAL**

| | |
|---|---|
| **SECONDARY CO-OPERATIVE LTD** | **1st Respondent** |
| **CROSS BAR BORDER AGENCIES t/a** | |
| **AMANDLA FOODS COMMODITY SUPPLIERS** | **2nd Respondent** |
| **MEMBER OF THE EXECUTIVE COUNCIL FORTHE** | |
| **DEPARTMENT OF EDUCATION, EASTERN CAPE** | **3rd Respondent** |

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**JUDGMENT**

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**BESHE, J:**

[1] Following the launching on urgent basis of an application by the applicants, the following order was issued by consent on the 2nd of July 2009.

> 1. That this court dispenses with the Rules of Court relating o service, time periods and declaring this matter to be heard as one of urgency in terms of Rule 6(12)(a) of the Uniform Rules of this Court.
>
> 2. That a Rule Nisi is hereby issued calling upon the Respondent to show cause on 23rd July 2009 at 10H00 why an order in the following terms should not be made final:-
>
> 2.1 That the third respondent is directed to pay the amount in the sum of four million rands (R4 000 000-00) or any amount due by the third respondent to the first respondent into Bahle and Associates Trust Account No-621 710 66 030 held at First National Bank, Mthatha within (ten) 10 days from the date

of service of this order.

2.2 That the second and third respondents be and are hereby directed to stop any payment due to the first respondent, being in respect of services for school nutrition programme pending proper appointment of a new board of directors of the first respondent.

2.3 That the old board of directors of the first respondent are hereby directed to convene a special general meeting for the purpose of appointing a new board of directors within five (5) days from the granting of the final order failing which the first to tenth respondents are granted leave by this court to convene a special general meeting of the first respondent and in both instances the notice of the meeting shall be served upon the respective firm of attorneys not later than five (5) days before the meeting.

2.4 That the respondents are directed to pay costs of this application on attorney ant client scale only on opposition of this application.

3. That costs of today are costs in the cause.

4. That paragraph 2.1 of this order shall operate as an interim relief pending the finalization of this application.

5. That the first respondent is directed to deliver its answering affidavit not later than 10 July 2009.

6. That the applicants are directed to deliver their replying affidavit(s), if any, not later than 20 July 2009.

[2] After being postponed on numerous occasions the matter served before me on

the 3rd of August 2010 wherein the court was called upon to decide whether the *rule nisi* issued on the 2nd of July 2009 should be confirmed or discharged.

[3] The dispute between the parties appears to be a long standing one. At the centre of the dispute is what the deponent to the founding and the replying affidavits describes as "a dispute or feud and in-fight between certain sections of the first respondent hence there is this application". [1] This is as a result of a belief held by the applicants that the monies paid by the 3rd respondent to the 1st respondent for services rendered and goods supplied towards the implementation of a school nutrition program operating within the King Sabata Dalindyebo Region are mismanaged and embezzled by the board of directors of the 1st respondent.

[4] Although the papers filed in this matter are not a model of clarity, hence the amended notice of motion and the filing of supplementary heads of argument by the applicants, all of which contributed to the delay in delivering this judgment, what comes out is that the applicants contend that their *locus standi* derives from the following factors:

> Several Primary co-operatives including 1st to 10th applicants were formed in order to be able them to tender for government tenders as legal entities. The 1st to 10th applicants together with other primary co-operatives came together to form a secondary co-operative which resulted in the formation of the 1st respondent. That the members of 1st to 10th applicants have rendered services for the "realization and success" of the school nutrition tender that was

1 Replying affidavit page 288 of the record

awarded to the 1st respondent by the 3rd respondent and that they are therefore the beneficiaries of an amount of ± R4 000 000-00 to be paid by the 3rd respondent to the 1st respondent.

[5] 11th to 18th applicants contend their *locus standi* to derive from the fact that they were sub-contracted by the 1st respondent to supply goods such as bread, jam, soup, transport etc. to be used in the school nutrition program in question and that payment for these services is still outstanding. Applicant number 11 has since filed a notice of withdrawal.

[6] The 1st respondent which is the only party opposing this application, sought to assail the applicants' *locus standi in judicio* on several grounds. I am however of the view that the applicants have shown that they have *locus standi* to apply for the relief sought because as a general rule the requirements for *locus standi injudico* are that:[2]

(a) the plaintiff/applicant for relief must have an adequate interest in the subject matter of the litigation which is not a technical concept but is usually described as a direct interest in the relief sought;

(b) the interest must not be far removed;

(c) the interest must be actual, not abstract or academic;

(d) the interest must be a current interest and not a hypothetical one.

2 See Erasmus , Superior Courts Practice, Service 37, 2011 B1 – B 126

[7] As indicated in paragraph 3 *supra*, the applicants no longer trust the members of the board of directors of the 1st respondent on the basis that they believe there is widespread maladministration and embezzlement by the board of directors of subscription monies as well as payments made by the 3rd respondent in respect of the tender awarded to the 1st respondent. This is denied by the 1st respondent.

[8] So long standing is this dispute that an attempt was once made to oust the board of directors by putting first an interim board in place and later a new board of directors. This attempt to oust the "old board of directors" culminated in an urgent application that served before *Miller J*.

[9] In his judgment in June 2009, *Miller J* found that the election of the new board was unlawful and set it aside. The effect of *Miller J's* order was that the "old board" remained in place.

[10] It is that "old board" that the applicants seek this court to direct that they should convene a special general meeting for the purpose of appointing a new board of directors within five (5) days from the granting of the final order filing which the 1st to 10th respondents should be granted leave to convene a special general meeting of the 1st respondent for the purpose of appointing a new board of directors.

[11] In its opposition of this application in July of 2009, the 1st respondent filed an answering affidavit deposed to by Khululwa Qilingane in her capacity as the secretary of the 1st respondent, wherein she purported to have been authorised to do

so by means of a resolution of the 1st respondent's board of directors.

[12] According to Ms Qilingane, the term of office of the board of directors having expired in March 2008, and after experiencing difficulties in appointing a new board of directors, in that a general meeting could not be convened for this purpose due to infighting, a new board of directors was ultimately appointed on 23rd of July 2008.

[13] I have no doubt that it is the emergence of this factor i.e. the appointment of the new board o the 23rd of July 2008 that has prompted the amendment of the notice of motion to include a prayer that "that the meeting and the results thereof of which was held on the 23rd of July 2009 (*sic*) in which a purported new Board of Directors was appointed be and is set aside as null and void and of no consequence". I assume that the reference to "2009" in the prayer is a mistake as the meeting to appoint new board of directors was held in 2008.

[14] I fail to see how it can be argued on behalf of the applicants that the board of directors appointed n the 23rd of July 2008 resulted in them pretending as if they are oblivious of *Miller J's* judgment which was delivered in June 2009.

[15] Be that as it may, the applicants dispute that a new board of directors was appointed. In paragraph 15 of the replying affidavit they state as follows:

> "Our understanding is that at no stage did the old board or the first respondent

under the control of the old board convene any meetings for its members, in substantiation of this allegation, given the prescripts of the statute, the first respondent should have furnished us with details of where the meeting was convened, how the notices were issued, the quorum and the attendance register. Until the book in which such resolution or original minute has been shown to us, the minutes are disputed. Until the original attendance register and agenda is produced for copies and inspection. The meeting remains disputed."

[16] It has to be borne in mind that 1st to 10th applicants are but some of the ± 32 co-operatives forming membership of the 1st respondent. I fail to understand what they mean by saying "it is surprising that the old board was continuously conducting meeting excluding the general membership". I doubt that they represent the entire membership of the 1st respondent. I say so mindful also of the fact that the deponent to the founding affidavit Ms Ncebakazi Madyibi was a co-opted member of the "old board". There is no indication of what role Ms Madyibi as a member of the "old board" which had been "re-instated" by *Miller J* judgment did to normalise things.

[17] On the other hand, members of the "old board" being Mr Mangwana, Mr Sonteya, Ms Qilingana and Ms Maliphale were present at the meeting where the new board was allegedly appointed on the 23rd of July 2008.

[18] As indicated earlier the deponent to the founding affidavit was part of the "old

board" that is alleged to be guilty of complicity in the embezzlement of monies. Although she is one of the members of the "old board" she denies that she is also tainted in the manner she alleges against the board. I am not certain how this is possible if she was also serving on the same board. It is also noteworthy that apart from this bare allegation of maladministration and embezzlement of funds by the "old board" nothing more is said to show that this is the case.

[19] In paragraph 11 of the founding affidavit, applicants state that – "... ... all we shall be embarking on as the primary co-operative is a proper removal of the said board by the general membership of the first respondent ... ...."

[20] In my view the applicants have been overtaken by the events in that this process has already been embarked upon and new board of directors appointed in July 2008.

[21] To resolve the apparent dispute that has arisen as to whether or not the proper procedure was followed in convening a meeting and in conducting the meeting where the members of the new board of directors was allegedly appointed, I will adopt the approach that was formulated by ***Van Wyk J*** in ***Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (c) a235 E – G*** as follows: *"... where there is a dispute as to facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order."*

[22] Commenting on this rule, it was stated in ***Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A) at 1971 A – D*** as follows:

> "For my purpose it is enough to say that in motion proceedings as a general rule, decisions of fact cannot be founded on a consideration of probabilities, unless the court is satisfied that there is no real and genuine dispute on the facts in question, or the other parties allegations are so farfetched or clearly untenable as to warrant their rejection merely on the papers or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits."

[23] Applicants' denial of the fact that a meeting took place where a new board of directors was appointed seems to be conditional upon "original attendance register and agenda being produced for copies and inspection". I am therefore not persuaded that this raises a genuine dispute of fact.

[24] I am also unpersuaded that the applicants have succeeded in making out a case for the confirmation of the rule.

**Accordingly the application is dismissed with costs.**

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**N G BESHE**

**JUDGE OF THE HIGH COURT**

**APPEARANCES**

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Date heard: 3 August 2010

Date Reserved 3 August 2010

Date Delivered 10 November 2011