IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CIVIL CASE NO.4227/10

In the matter between:

**Sandile Myalo Dlamini** **Applicant**

**And**

**Major General Jeffery Tshabalala** **1st Respondent**

**Attorney General** **2nd Respondent**

Coram Hlophe J

For Applicant Mr. B. J. Simelane

For Respondents Mr. Zwan

JUDGMENT

HLOPHE J

[1] It is common course that the Applicant was, on the 8th November 2010, elected into the position of Chairman of the

Cooperative Society called Hlalawati Savings and Credit Cooperative Society Limited.

[2] Hlalawati Savings and Credit Cooperative Society Limited (Hlalawati or The Cooperative Society) is a Savings and Credit Cooperative Society formed or established in terms of the provisions of The Cooperative Societies Act, No. 5 of 2003. This particular Savings and Credit Cooperative Society comprises of members of the Umbutfo Swaziland Defence Force. Notwithstanding this fact, it is not in dispute that the operations or the day to day operations of this Cooperative Society are governed in terms of the Cooperative Societies Act 5 of 2003 or in terms of the Cooperative Societies Regulations of 2005. I have not had sight of the by-laws of this Cooperative Society and I am uncertain if they exist.

[3] The parties are agreed further that sometime back, and before the November 2010 Elections of New Office Bearers, the members agreed to establish a position of a patron in Hlalawati Cooperative. It is not in dispute that this position was then to be

occupied by the First Respondent who occupied the position of Deputy Commander in the Umbutfo Swaziland Defence Force. There is however no consensus on what the purpose of this post was. This lack of consensus on this aspect of the matter is not material as the matter does not in my view turn on this point at all.

[4] According to Section 53 (1) of the Cooperatives Societies Act, 2003, the following are the positions that each Cooperative Society should have; Chairperson, Vice Chairperson and Treasurer.

[5] The holders of these positions are to be elected by secret ballot at the Annual General Meeting in accordance with the procedures laid down in the by-laws according to Section 53 (1) of the Cooperative Societies Act.

[6] Other than the provision for the position of the Secretary General in terms of Section 53 (2) who shall be appointed by The Annual General Meeting, and need not be a member of the

Management Committee, the Act does not provide for any other position as forming part of the Management Committee. Of course Section 50 (1) (A) states that the number of members of the Management Committee of a Cooperative Society shall be determined by the relevant by-laws. I was not referred to any by-law indicating the existence of any other position including that of a Patron but in this particular Cooperative Society I can see from Annexure "B[M] to the application that there were also elected members for the positions of Deputy Chairperson, Credit Committee, Education Committee and Supervisory Committee.

[7] The position of a patron does not appear to have been one of those for whom an election was held nor are its functions spelt out anywhere in the establishing documents as referred to above.

[8] According to the Respondents the position of a Patron was established to promote or safeguard the interests of the Umbutfo Swaziland Defence Force particularly because the Cooperative Societies' membership comprised members of the army. I presume this is because discipline is key in the army and

therefore this position was said among other things to be there to ensure that its members uphold the discipline at all times. Indeed according to the Respondents papers the First Respondent was appointed into this position to ensure that its interests do not run counter to the mandate of the Defence Force. It is not denied by the Applicant as alleged by the Respondent that it was members of Hlalawati Cooperative Society themselves who approached the administration of the army and requested from the Army Commander that a Senior Army Officer be appointed into Hlalawati Cooperative Society and occupy the position of a patron so that such an Officer can take the necessary decisions on behalf of the army. Notwithstanding this fact, it is not in dispute that the said post was never incorporated into the by-laws of Hlalawati and to that extent appears to have been a private arrangement.

[9] It was within the foregoing background, according to the Applicant, that on the 16th November 2010, and following his election into the post of Chairperson of Hlalawati Savings and Credit Cooperative Society on the 8th November 2011, he was called to a meeting with the First Respondent in the presence of

one Brigadier Gwalagwala Dlamini and Lieutenant Colonel Derrick Nkambule. The Applicant does not give much detail on what transpired at the said meeting (this I say for purposes of determining whether he was given a hearing) except to say that he was told by the Respondent to relinquish his chairmanship in Hlalawati Savings and Credit Cooperative Society Limited. The reasons for such an instruction were said to be his alleged poor discipline as well as his net pay which was allegedly below a third of his earnings. Applicant was later served with a letter which confirmed the revocation of his chairmanship in the said Cooperative Society.

[10] The Applicant alleged that the First Respondent purported to revoke his (Applicant's) chairmanship in the said Cooperative Society in his (First Respondent's) capacity as its Patron. It was contended that the Patron of the Cooperative Society had no such power in terms of the establishing documents. It was alleged further that the supreme body in Hlalawati Savings and Credit Cooperative Society is the general meeting whose decisions or resolutions guide the Management Committee. It was contended

further that the expulsion of a member of the Cooperative Society could legally be done by the Management Committee or by the General Meeting comprising the entire membership and not by the patron who had no such powers in terms of either the Act, Regulations or By-laws.

[11] It was contended further that there was no legal provision for the expulsion or revocation of a member's election into office by a patron. By taking the decision he took in revoking Applicant's election into the position of Chairman, the First Respondent had misconceived his powers or duties and functions and had acted ultra vires his mandate and authority and therefore his actions or decision was *void abinitto.*

[12] The Applicant went on to dispute that there was in law any sound reasons for the purported revocation of his election into the said office. According to him there was no law or legal provision in the Act or Regulations which required him to earn above a third of his salary as chairman in order to retain or

maintain his position. Section 51 of the Act only prohibits an insolvent from taking office in the said organization. As insolvency can only be declared by a Court of Law: he has never been so declared. In any event he denied that his salary was below a third as alleged and as proof of this contention he annexed his salary advice which showed that he was correct.

[13] On the contention he had a poor discipline record, he denied such and contended that if such were true the First Respondent as his senior would have disciplined him in accordance with the existing laws and established structures. I must say that I was taken aback by this contention because other than Respondent's alleged say so no demonstration of such a poor discipline record has been established or proved nor has there been demonstration on how such a poor record, if it does exist, impacts adversely on Applicant's membership in or chairmanship of Hlalawati Cooperative Society or even the legislation^that prohibits same.

[14] Because of the foregoing contentions the Applicant instituted the current proceedings seeking *inter alia* the following orders:-

14.1 Declaring Respondent's revocation of Applicant's chairmanship of Hlalawati Savings & Credit Cooperative Society Limited to be null and void.

14.2 That Respondents pays the costs of the application.

14.3 Any further or alternative relief.

[15] The First Respondent signed and filed a Notice of Intention to oppose the application personally. This was subsequently followed by an application to intervene in the proceedings filed by the Attorney General who asked this Court to allow him to intervene in the proceedings alleging mainly that he had an interest therein by virtue of the fact that whatever actions the First Respondent took in Hlalawati Cooperative Society (which include his purported revocation of Applicant's chairmanship), he did so on behalf of the army which had appointed him into the position of patron to take decisions on its behalf. By this contention it was claimed that the Army or Defence Force had the right to be represented by the Attorney General.

[16] The intervention by the Attorney General was allowed following its not being opposed by the Applicant. This called for a rearrangement in the citation of the Respondents as the hitherto Respondent became the First Respondent whilst the then intervening party became the Second Respondent.

[17] The Respondents raised certain points *in limine,* which it was agreed at the commencement of the argument, were to be argued simultaneously with the merits. The points aforesaid are the non-joinder of Hlalawati Savings and Credit Cooperative Society Limited as a party; that this Court has no jurisdiction to hear this matter as such a dispute had, in terms of Section 98 (1) (b) of the Cooperative Society Act 2003, to be referred to the Tribunal established in terms of Section 99 of the same Act as well as the failure by the Applicant to exhaust the Local Remedies which is a point closely related to that of this Court having no jurisdiction to hear this matter. I shall now deal individually with the points raised in the manner hereinafter set out. It suffices to mention at this point that as concerns the merits, the Respondent applied that in the event the points aforesaid were not being

upheld, it was to then apply for leave and an opportunity to file an opposing affidavit to deal fully with the Applicant's contention. This application I shall deal with later on in this judgment.

Non loinder

[18] As indicated above, the Respondents contended that Hlalawati Savings and Credit Cooperative Society, to which the Applicant was chairman before his contested removal by the First Respondent, should have been cited and served as a party in these proceedings. It was contended that the said Cooperative Society had an interest in the proceedings and therefore had to be cited and served. The failure to cite and Cooperative Society with the papers instituting these proceedings, it was contended, necessitated that they be dismissed on this point alone.

[19] It was argued further in this regard that Hlalawati Cooperative Society would be prejudicially affected by the carrying into effect of an order of this Court and it was contended that in such a case it became imperative for such a party to be

cited and served with the papers. I was in this regard referred to an excerpt in the case of **Amalgamated Engineering Union vs Minister of Labour 1949 (3) SA 637 (A) at 659** which reads as follows:

> "*If a party has a direct and substantial interest in any order the Court might make in the proceedings, or if such order cannot be sustained or carried into effect without prejudising that party he is a necessary party and should be joined in the proceedings unless he has waived his right to be joined.*"

[20] It is contended that the order sought by the Applicant herein cannot be carried into effect without prejudising the interests of Hlalawati. The feared prejudice is however raised in a speculatory manner in the heads as follows,

> "*It is submitted that prejudice man arise where an order is granted by this Honourable Court only to find that another person has been elected into the position of the Applicant. Further there may be another person acting as Chairman in the absence of the Applicant.*"

[21] It was further argued that Hlalawati's interest also arises from the fact that it was the one required to comply with the order that may be issued by this Court.

[22] Since it was not a party to the proceedings, so the argument went, it would not be bound by an order granted in these proceedings. If this order would not be binding on Hlalawati, it would be *Brutum Fulman,* and this Court cannot grant such an order.

[23] I was further referred to **Khumalo v Wilkins and Another 1972 (4) SA 470 (N) at 475** where the position is stated as follows:-

> "*In my view, once it is shown that a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before Court and that his right may be affected by the judgment of the Court, the Court will not deal with those issues without such a joinder being effected, and no question of discretion nor convenience arises.*"

[24] In response to the point on the non-joinder of Hlalawati the Applicant argues that the test whether or not a party alleged to be a necessary party has a substantial interest in a matter is whether the interest of such a party may be prejudicially affected by such a judgment or order.

[25] It was argued on behalf of the Applicant that no prejudice would be suffered by Hlalawati Cooperative Society if the matter is heard with an order being issued against the First Respondent. It was argued that in fact Hlalawati had indicated its full confidence in Applicant as opposed to prejudice because he had just been elected into the chairmanship of the organization on the 8th November 2010, when his chairmanship was supposedly revoked by the First Respondent on the 16th November 2010. Furthermore, immediately prior to the said election, the Applicant served Hlalawati as a Deputy chairperson. It was said these were indicators that Hlalawati had confidence other than prejudice in the Applicant.

[26] Having considered the submission by both Counsel including having read the papers filed of record as well as the Heads of Argument, I have no hesitation that the position stated in the authorities cited by the Respondent's attorneys is correct. This however does not decide the matter as the excerpts from the **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 at 659** and that stated in **Khumalo v Wilkins 1972 (4) SA 470 (N) at 475** are not applicable in the matter at had. The judgment that may be granted in this matter is not shown to be prejudicial to the Cooperative Society. If it cannot be shown from the facts that Hlalawati will be prejudicially affected by the order, then it means the latter has no direct and substantial interest in the matter or even that the order can be granted as no harm is envisaged.

[27] I in fact agree with Applicant's Counsel that Hlalawati is shown from the facts as having indicated its confidence in the Applicant as opposed to prejudice when one considers the Applicant's repeated election into the Management Committee

together with the lack of complaint by Hlalawati against the Applicant leading to the revocation of his appointment by the First Respondent.

[28] On the speculation by the Respondents that it could be that someone has; already been appointed chairman by the Cooperative Society I must say that I find that to be too speculative to be relied upon and secondly, I do not believe that any prejudice in that case would be to Hlalawati as opposed to the person who would have been so appointed. In any event the Respondents cannot be heard to be saying that because even though First Respondent's role and functions in Hlalawati are not covered in any statutes, regulations or by-laws, it is clear that he is closely associated therewith and; would have informed the Court specifically if there was any such likely prejudice to Hlalawati.

[29] In any event it has to be borne in mind that, Applicants chairmanship was revoked on the 16th November 2010 and on the 18th November 2010 Applicant filed this application under a

certificate of urgency. It would therefore be very clear to me that if Hlalawati would have gone on to appoint or elect someone into the position of chairman in the face of the undetermined challenge by the applicant to the revocation of his election into the same position, the said Hlalawati would have been trying to defeat the possible order against the revocation of Applicant's chairmanship. By so doing the said Hlalawati would have acted in a manner that does not attract any sympathy to it from the Court because prudence would have called upon it to await the outcome of the matter before attempting to fill-in the said position.

[30] I am therefore convinced that in the circumstances of this matter, and whilst it could have been neater to cite and serve Hlalawati Savings and Credit Cooperatives Society with the application, it was not legally necessary for that to be done given the conclusion I have come to that the latter did not have a substantial interest in the judgment or order as its execution would, in my view, not prejudicially affect it.

[31] Consequently the point on the non-joinder of Hlalawati be and is hereby dismissed.

The Court has no jurisdiction to entertain this matter

[32] It was argued on behalf of the Respondents that this Court has no jurisdiction to hear and determine this matter because in terms of Section 98 of the Cooperative Societies Act 2003, a dispute like the current one has to be referred to the Commissioner who shall refer it to the Cooperative Tribunal established under Section 99 of the Act for determination.

[33] The Applicant's Counsel argued otherwise and in fact stated that Section 98 was not applicable in the present matter because the Section envisages a dispute between a member and the Cooperative or its Management Committee or any other officer. The First Respondent was not shown to be a member nor a past member of the Cooperative just as he was not an Officer of it. It was argued that since the office of patron was not established in terms of either the Act, by-laws or regulations; the current dispute

was between the Applicant a member and Officer of the Cooperative Society and a stranger. The dispute to be resolved in terms of Section 98 and 99 is that between a member and the Cooperative or its officer and a past member and not one between a member or officer and a stranger. It was contended, that the First Respondent was neither a member, past member nor an Officer of the Cooperative Society. It was further argued that the nearest First Respondent could be in the Cooperative, was an officer. This however could not be when considering the fact that in terms of the definition Section of the Act, an "officer" of the Cooperative Society, was a term of art, whose parameters are set out in the said section where the list of position holders in a Cooperative Society is set out without a patron being included as one of them.

[34] Section 98 of the Cooperative Societies Act 2003, provides as follows in so far as it may be relevant to this matter:-

*Settlement of Dispute*

*"98 (1) If a dispute concerning the by-laws, election of officers, conduct of meetings, management or business of a Cooperative arises -*

*(b) between a member, past member, and the Cooperative, its Management Committee or any other officer of the Cooperative,*

*Such dispute may be referred, after due attempts to settle the issue within the Cooperative or by local informal mediators have failed, to the Commissioner who shall refer the case to the Cooperative Tribunal established under Section 99 of this Act for decision."*

[35] It is therefore not every dispute that arises in the Cooperative Society that should be resolved following the provisions of Section 98 of the Act. As I understand it and for a dispute to qualify for resolution in terms of the Act, such has to arise either among members or between a member, past member on the one hand and the Cooperative, its management or any other officer of the Cooperative on the other hand.

[36] Is this dispute between a member, on the one hand and the Cooperative or an officer of the Cooperative on the other, which

would necessitate that it be resolved through the provisions of Sections 98 and 99 of the Act? My answer to this question has to be in the negative. This is because, as submitted by Applicant's Counsel, the First Respondent is neither a member nor a past member of the Cooperative and is also not an officer of the same. Although at a first glance one would be tempted to think that by being appointed to the position of Patron, which was indisputably established at the request of the members of Hlalawati, the First Respondent was an officer in the Cooperative Society, a closer look clarifies that that cannot be the case in this matter for, as indicated above, the term officer, is used as a term of art and its true meaning is set out in the interpretation Section, which provides as follows:-

> "*Officer of a Cooperative includes a Chairperson, Vice Chairperson, Secretary, Treasurer, Manager or any other person empowered by this Act, the Regulations or the by-laws to give directives in regard to the business of the Society or to supervise such business.*"

[37] Clearly whilst this dispute is between a member or officer of the organization on the one hand and the Patron of the Cooperative on the other, such is not the dispute envisaged by Section 98 of the Act because the position of patron is not that of a person empowered by the Act, or the by-laws or the Regulations as provided for in definition. This therefore means that in revoking the chairmanship of the Applicant, the First Respondent misconstrued his powers and acted ultra vires the enabling documents listed above.

[38] Consequently and on this point alone, the contention by the First Respondent that this Court does not have jurisdiction to hear and determine this matter cannot be sustained and the point aforesaid is hereby dismissed.

Failure to exhaust local remedies

[39] The First Respondent further contended that Applicant should not have instituted these proceedings before exhausting the local remedies or the remedies availed it by the Act. The Act,

it was argued provided machinery for the resolution of disputes in the Cooperative. This point is in my view closely related to the foregoing one with the result that a decision of that one, also affects this one.

[40] It has just been decided that the dispute between the Applicant and the First Respondent is not one between the persons or entities envisaged by Section 98 and 99 of the Cooperative Societies Act 2003. If this is the case it simply means that one cannot even talk of the need to exhaust local remedies because the remedies referred to apply to the persons or entities envisaged in the Sections aforesaid. This is to say since a patron is not a person empowered by the Act, the Regulations or the by-laws to give directives in regard to the business of the Society, there are no local remedies set out in terms of the Act to exhaust in his case. This further means that since the dispute is between a member or officer and a non member same is not one to be settled in terms of Section 98 and 99 of the Act and if that is the

case, there are no applicable remedies set out in terms of the Act.

[41] Mr. Simelane for the Applicant argued further that even if Applicant were an officer of the Cooperative Society envisaged in Section 98 of the Act, the question of the exhaustion of the local remedies by the Applicant would still not arise because there is no general rule of law which precludes a person from having access to a Court of Law so that his matter could be dealt with by a certain Tribunal.

> In **Welkom Village Management Board v Leteno 1958 (1) SA**
>
> **490** the position was expressed in the following terms:-
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> > "*Whenever domestic remedies are provided by the terms of a statute, regulation or Conventional Association, it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the courts is thereby excluded or deferred.*"

[42] The Court went on to assert the position that even in those instances where the applicability of the limitation statute (that is

a statute in the realm of Section 98 of Cooperative Societies Act 2003) can be assumed, "there is no general rule of law that a person who considers that he has suffered a wrong is precluded from having recourse to a Court of Law while there is hope of extrajudicial redress:" See also **Bindura Town Management Board v Desai and Company 1953 (1) Sa 358 (AD) at 362.**

[43] The position that has evolved over the years is that set out in **Shames v South African Railways and Harbours 1922 AD 228** which is to the effect that an aggrieved Applicant who had certain remedies availed him by statute was not entitled to have recourse to the Courts except on the ground of some illegality or irregularity in the proceedings, and even then only when such irregularity or illegality had been persisted in until the final stage and he had exhausted his statutory remedies.

[44] In **Jockey Club of South Africa and Others v Feldman 1942 AD 360 at 351 - 2** the rule set out in Shames v South African Railways and Harbours (Supra) was interpreted to read that the Courts' jurisdiction was excluded only if that conclusion

flows by necessary implication from those particular provisions under consideration and even then only to the extent indicated by such necessary implication.

[45] In a case where the legislation or regulations provide (s) that an aggrieved party might appeal or take the matter to some local remedy, there is no reason to imply an intention in the particular regulation or legislation that the jurisdiction of the Court should only be limited to those instances where the aggrieved person shall have exhausted his remedies under the regulations or legislation. In fact in **Golube v Oosthuzen and Another, 1955 (3) SA 1 (T)** the position was put as follows:-

> "*The mere fact that Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of Law should be barred until the aggrieved person has exhausted his statutory remedies.*"

[46] As observed by **Ogilvie Thompon AJA in the Welkom Village Management Board v Leteno (Supra) at page 503**

**B-C,** "the mere existence of a domestic remedy did not conclude the question (whether or not the jurisdiction of the Court is excluded,) since it is in each case necessary to consider all the circumstances in order to determine whether a necessary implication arises that the Court's jurisdiction is either wholly excluded or at least deferred until the domestic remedies have been exhausted."

[47] The implication whether the Court's jurisdiction has been excluded through the provision of domestic remedies in a given setting, does not arise in a case where the aggrieved person's complaint is the illegality or fundamental irregularity of the decision he seeks to challenge.

[48] In the **Johannesburg Municipality Council v Maserowitz and Maserowitz 1914 TPD 439,** it was held by the Transvaal Provincial Division that an aggrieved person whose grievance was the failure by the Municipal Council to give him a hearing was not to be precluded from approaching Court for a remedy, simply because of a provision in the Legislation or Regulations to the

effect that his dispute ought to be resolved through some domestic or other suggested remedy. The position was in fact put as follows:-

> 'This *Court has the inherent right, as has been laid down in various cases, to take cognisance of an application against a public body like a Town Council, where that body has come to a decision contrary to the fundamental principles of our law, namely, by having refused an application and condemned a person without giving him a hearing. That jurisdiction which the Court has, has not, in mu opinion, been ousted bu the fact that the legislature has given the applicant a right of appeal to a Magistrate when his application is refused. Assuming that Mr. Feetham's contention is correct, that the Magistrate would have been bound, on appeal to Him by the Respondents, to have set aside the decision of the Town Council and to have ordered the licence to be issued, nonetheless it seems to me that the right, which the Respondents had to come to this Court for relief is not taken away by that provision. They have been condemned unheard.*"

[49] In the matter at hand, it has become clear therefore that the provision calling for the settling of disputes by a tribunal is not only not obligatory and it not being necessary in the circumstances of this matter to determine whether or not from the facts a necessary implication arises that the Court's jurisdiction is either

excluded wholly or deferred until the domestic remedies have been exhausted, but that in so far as the Applicant's complaint is the illegality in the actions of the First Respondent (which I must add seems to be well grounded), the jurisdiction of this Court is not excluded and it therefore has the jurisdiction to hear and determine the matter.

[50] In any event, the rule that requires a party to first exhaust local remedies before resorting to the Courts, is applied sparingly because "generally an aggrieved person should have unrestricted access to the Courts to seek redress." There certainly is no general rule that "a person who considers that he has suffered a wrong is precluded from having recourse to a Court of Law while there is hope of extra-judicial redress." Furthermore, the mere fact that a legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of Law should be barred until the aggrieved person has exhausted his statutory remedies." See in this regard

**Ntame v MEC for Social Development Eastern Cape 2005 (6) SA 248.**

[51] Consequently I have come to the conclusion that the point on the exhaustion of local remedies cannot be upheld in the circumstances of this matter and particularly on the grounds that the Applicant is complaining about the illegality of the First Respondent's decision in revoking his election as the chairperson of Hlalawati Savings and Credit Cooperative Society Limited, given what has already been stated above to be the effect of an illegality in the action of the Applicant in this matter.

Merits

[52] The First Respondent's attorney also made an application, that if his points *in limine* are not upheld his client should be allowed an opportunity to file an answering affidavit where he was going to bring some further facts to the attention of the Court. It was argued that not all the necessary information had been put pefore this Court at this stage.

[53] This application was opposed by the Applicant's attorney who contended that this Court ought to dismiss this latter request by the First Respondent. The Respondents, it was argued had no justification not to file all their papers together with their Notice to raise points of law or points *in limine* so that all the facts of the matter are placed before Court so as to enable it deal with the matter in its entirety should the points *in limine* not be upheld.

[54] As indicated above the First Respondent did not file any opposing papers and instead of doing so, there was filed an application to intervene by the Attorney General who stated in such application what the Respondents' defence was to the application. It would appear that notwithstanding such, the Respondents want to file further affidavits. Whilst this could be their right, it cannot be disputed that such right has to be exercised within the framework established in terms of the Rules of Court, which include the manner and time limits of filing such papers.

[55] It is also important to bring to bear the fact that the matter came before this Court as an urgent application on the 18th November 2010**),** following a decision of the First Respondent purporting to revoke Applicant's election as chairman of Hlalawati Cooperative Society on the 16th November 2010.

[56] In line with the provision of the Notice of Motion, where it was stated that the matter be heard on the 25th November 2010 if no opposing papers would have been filed by then, the First Respondent entered his Notice of Intention to oppose on the same date. } The Notice of Intention to oppose was filed together with the application for intervention by the Attorney General. Although indicated that a full answering affidavit would be filed in due course, none ended up being filed, resulting in the Respondents filing a document called a Notice in terms of Rule 6 (12) (c) on 16th December 2010. The said Notice raised points of law only. The Notice concerned stated as follows in the very last paragraph before the date line.

> *"In the event this Honourable Court does not uphold the points of law in limine, the Respondents beg leave to file their answering affidavit on the merits."*

[57] On the 31st March 2010 I heard the application and noted that there was still no opposing affidavit filed except for the Respondent to ask to be give an opportunity to file a further affidavit in due course, which request was vigorously opposed by the Applicant's Counsel.

[58] As this application was made, the Respondents did not disclose what this defence they intended to raise after four months was rior even justification why the intended affidavit could not have been filed earlier. In fact their defence as repeatedly raised in the affidavit accompanying the application to intervene was that the First Respondent did not act personally but on behalf of the Army and that the action taken was because of Applicant's undisclosed poor disciplinary record. About this other defence I am still in the dark today.

[59] A party who raises points of law, also needs, in my view, to file an answering affidavit so that in the event his points are not upheld he is in a position to proceed to the merits. The position in my view, becomes even more compelling where a considerable period has passed between the filing of the point of law and the time of the argument.

[60] I must hasten to clarify that I should not be understood to be saying that it can never happen that a party be allowed to file an affidavit after arguing points *in limine.* I believe it is a discretionary issue for that discretion to be exercised judicially and judiciously by the Judicial Officer involved.

[61] As concerns the matter at hand I have noted that the Respondents did state their defence *ex facie* the Founding Affidavit to the application to intervene as such affidavit had a portion where the Respondents' case was set out. Other than the gaps that appeared when the matter was being argued forcing the First Respondent's Attorney to ask for an opportunity to file an affidavit later, clarifying such gaps, I do not think that when this

party approached Court for arguing the matter there was ever a belief that the case was incomplete. This being the case, and as I am of the view that I have a discretion to exercise, I would not exercise it in favour of the Respondents in this case as they appear to be engaged upon what I would call a fishing expedition.

[62] Furthermore, **I** genuinely do not think that a party would not file an opposing or answering affidavit in an application brought under a certificate of urgency for a period exceeding four months, sunder the guise of reserving a right to file an answering affidavit after the disposal of points *in hmine* against him. It perhaps would be a different case if such affidavit had already been filed as at the hearing date with the only issue being whether or not to accept it in view of its having perhaps been filed out of time.

[63] It is even worse in my view where the central issue is really crisp points of law to which a further affidavit can neither add nor delete anything as that seems the case in this matter. There can be no doubt in this matter that the issue is simply whether or not the First Respondent, who occupies a position (of Patron) which is

not established in the terms of the Act, Regulations or By-laws, including its functions not being spelt out in terms of the said enabling documents, can have the authority to act in the manner he did, which supercedes even the resolutions of the highest body in Hlalawati called the General Meeting, and revoke its election of a Chairman.

[64] When considering who an "officer" is in the definition Section of the Act there can be little doubt that in the circumstances of this matter that the First Respondent did not have the power to take the decision he did as he is simply neither an officer nor member of the Cooperative Society in the sense mentioned in the Act.

[65] I can only add that in my view, and on the material before me which is not disputed, I am very much doubtful that anything would have changed in this matter even if the First Respondent was shown to be an officer in Hlalawati, given the principle of legality which goes beyond the possession of power by a Public Officer including the Applicant's entitlement to a hearing before a

prejudicial decision is taken against him. I must however clarify that I am not making any decision on the issues contained in this paragraph, but I am merely commenting in passing on what I am seeing on the material before me.

[66] Otherwise on the point in issue after the disposal of the points *in limine,* which is whether or not the application to file a further affidavit is being granted in favour of the Respondents, I have considered several judgments on the question. These include the cases of **Standard Bank of South Africa Limited v RTS Technique & Planning (Pty) Limited 1992 (1) SA 432 at page 441 A - H** of the Law Report concerned, where Daniels J, whilst quoting Corbett J in **Bader and Another v Weston and Another 1967 (1) SA 134 (c) at 136** stated the following which I find to be apposite in this matter:-

> *"It seems to.me that, generally speaking our application procedure requires a Respondent, who wishes to oppose an application on the his case oh the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures*

*prescribed by the Rules of Court. Having done so it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally, it is proper for such a Respondent not to file opposing affidavits but merelu to take the preliminary point. I say "normally" because situations may arise where this procedure is unexceptionable. For example a Respondent who is suddenly and without much notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits, might well be permitted there and then to take such a preliminary point. Generalhj speaking, however, where a Respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection .... [I]t is interesting to note that Rule 6 (5) (d) of the Uniform Rules of Court appears to contemplate a Respondent in motion proceedings, who wishes to oppose the application, giving notice of his intention to do so and then delivering his answering affidavits within 14 days. It is only where he intends to raise a question of law onlu that he is directed to within the same time limit to deliver a Notice of this Intention setting forth the question of law."*

[67] By analogy, the provisions of the Rules and practice of the South African Courts is similar to ours and I am convinced that as a general rule, it is not open to a Respondent to file only a Notice to raise points of law on the understanding he will file an Opposing Affidavit after such a point shall have been dismissed. My observations are that the facts of this matter do not point me to any exceptions to the general rule aforesaid.

[68] In fact in **Randfontein Extension Limited vs South Randfontein Mines Limited and Others 1936 WLD 1 at 5,** the Court per Geenberg J stated the position as follows:-

> *".... (A)nd I do not think the court would countenance a procedure which*
>
> *would enable a Respondent to delay the case and get a postponement by raising unsuccessful preliminary points. One cannot ask the Respondent to assume that his point will be successful; he must be prepared for the possibility of his point failing.*"

See also: (i) **Lipschitz and Schwarts NNO v Markowitz 1976 (3) SA 772 (w) at 776**

**(ii) Bader and Another v Weston and Another**

**1967 (1) SA 134**

[69] Reluctant as t am to continue with the matter without the Respondent having filed the affidavit it was said they required to, and for the reasons set out above, I cannot help but refuse the application and proceed with the matter because I do not think the Respondents are ever real to ask for a postponement of the matter to enable them file an opposing affidavit after 4 months. Furthermore as indicated above, the circumstances of the matter do not justify a postponement of the matter in my view as this matter concerns a crisp legal issue.

[70] Consequently I cannot grant the Respondents application that they afforded an opportunity to file an opposing affidavit after all the time it has; taken them to do so and in my view they only seeks the postponement because their points in *limine* have been dismissed.

[71] As concern the merits of the matter and in view of the approach I have adopted, I have no hesitation to agree with the Applicant that the First Respondent misunderstood his powers in the manner he dealt with the

matter and that he had no such power in law to revoke the Applicant's few-days-old election into the chairmanship of Hlalawati Cooperative Society. I also find action the First Respondent, in so far as they are not supported any legal foundation in the form of the Act, regulations or by-laws ought to be set aside which I hereby do. Consequently I make the following order.

**71.1** The Respondent's revocation of Applicant's Chairmanship of Hlalawati Savings and Credit Cooperative Society Limited be and is hereby declared null and void.

71.2. The respondents are to pay the costs of this application.

**Delivered in open Court on this the 28th day of April 2011.**

**N.J. HLOPHE**

**JUDGE**