IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.3437/02

In the matter between:

MAHAWUKELA SIMELANE VS	**APPLICANT**
AARON MAMBA	
MANYOVU FARMERS ASSOCIATION	**I[ST] RESPONDENT 2[nd] RESPONDENT**
CORAM	**SHABANGU AJ**
FOR THE PLAINTIFF FOR THE RESPONDENT	**MR. MKHATSHWA MR. FLYNN**

JUDGMENT 22[nd]

January, 2004

The applicant has approached this court seeking the relief which is formulated in his

notice of motion as follows:

"1. The first and second respondents are hereby ordered to vacate forthwith a piece of land 13.5 hectares in extent part of the Manyovu Farmers Association project at Manyovu kaNacamphalala under Chief Mbawu Nacamphalala;

2. That first and second respondents give access to the applicant to (description of premises) for the purpose of carrying on farming;

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3. That first and second respondents pay the costs of this application."

The basis of the applicant's claim appears on his founding affidavit at paragraph six to be stated as follows.

"6. The first respondent and myself entered into a written agreement dated 12th June, 2001 (Annexure A) the essential terms whereof are:-

6.1 That I was obliged to prepare virgin land measuring approximately 33 hectares allocated to first respondent for cane sugar farming. The preparation involved amongst others:-

6.1.1 *clearing a bush in an area approximately 12 hectares in extent.*

6.1.2 *removing rocks and other impediments on the land set aside for the sugar cane farming project, some 33 hectares in total extent.*

6.1.3 *Arranging for the acquisition of water rights for the sugar cane farming (the project).*

6.1.4 *Advising on all that was necessary to bring the project to a success.*

6.2 The first respondent undertook to provide me as soon as the project started with some 13.52 hectares of the prepared ground as compensation for the services rendered. "

From the above the applicants' claim to the right to have the respondents ejected from the land is based on the aforementioned alleged agreement. It is also clear from paragraph ten of the applicant's founding affidavit that the land is under the occupation of the second respondent. Actually the extent of the land which is under the second respondent's occupation measures thirty three hectares in total extent. The applicant seeks to have the respondents evicted from a portion of the land which is described in the notice of motion as measuring 13.5 hectares in extent. This land as appears from paragraph 6.2 above forms part of the larger land measuring 33 hectares.

The applicant seeks eviction of the respondents from some 13.52 hectares of the 33 hectares of the land without properly and specifically identifying this land on the ground by a fuller description, which description is necessary to lend certainty and eliminate vagueness in the order sought. As it is the prayer sought in failing to describe and identify the porting measuring 33 hectares means that this court is being asked to grant an order that is vague with perhaps a possibility that the parties will have to agree on which

portion of the 33 hectares will the respondents have to vacate. If the parties do not agree on which part of the thirty three hectares, (a portion which will have to measure 13.5 hectares,) should the respondent vacate, a further dispute may arise between the parties relating to this. The other possibility may be that the applicant expects that the respondents will have to choose which portion of the land will they vacate. I am not certain that it would be appropriate for this court to grant an order in the form as sought in the notice of motion because from the notice of motion it is not possible even to know with certainty which land or portion thereof is being referred to, which the respondents are required to vacate. Some indication may be discerned from a reading of the founding affidavit but even then there is as already stated no certainty. This would be one reason the application cannot succeed.

In so far as the first respondent is concerned there is nothing in the applicant's affidavit to indicate that he is in occupation of the land. On this basis even though having regard to the alleged agreement an order directing him to award 13.52 hectares of the 33 hectares of the land referred to in paragraph 6.1 of the applicant's founding affidavit may appropriately be sought, it cannot be said that an order directing the first respondent to vacate land which he does not even occupy can appropriately be granted. This is die second reason as against the first respondent why the order sought cannot be granted against him.

Further in so far as the second respondent is concerned it appears to be common cause that the land is under the occupation of the said second respondent which is conducting farming operations thereon. What the applicant's founding affidavit does not state is its understanding of the basis upon which the second respondent occupies the land. In paragraph five of the founding affidavit the applicant avers that "the first respondent has been allocated land on Swazi Trust land in Siphofaneni for farming in terms of Swazi law and custom." There is no allegation and evidence of the rules of Swazi law and custom which govern the allocation of land. It seems to me that it would have been necessary for the applicant to allege and prove (a) the relevant rule of Swazi law and custom which govern the allocation of the land which is the subject of this proceedings,

which facts would show that the land was allocated in accordance with Swazi law and custom. It does seem however that the respondents do not deny the allegation drat the land was allocated to the first respondent in terms of Swazi law and custom even though such allegation is made baldly. The explanation as to how the land came under the occupation of the second respondent is contained in paragraph five of the answering affidavit filed on behalf of the respondents wherein it is stated -

> *"The first respondent was allocated 36 hectares of land at kaNgcamphalala area, Lubombo region in 1958. In 1995 the first respondent approached the Chief and sought permission to give the land allocated to him in 1958 to the second respondent. On 29th July, 1995 Chief Mhawu Ngcamphalala certified that the land was given to the second respondent for the purpose of growing sugar cane. I annex hereto a document marked annexure "M.F.A.I" which records that the land was given to the second respondent."*

In support of this allegation the first respondent himself has deposed to an affidavit in which he states the following:

> *"I did not have any authority to enter into any contract on behalf of the second respondent. The land in question was allocated to me in 1958 and thereafter in 1995 it was allocated to the second respondent. I accordingly have no right to dispose of any of the land which was allocated to the second respondent."*

The explanation therefore of how the land is under the occupation of the second respondent is that it was allocated by the Chief or transferred from the first respondent's possession by him to the possession of the second respondent by the concurrence of wills of the two aforesaid parties accompanied by the approval of Chief Mhawu Ngcamphalala and the "umphakatsi". In the circumstances there is no proof or sufficient evidence that the first respondent possessed some title over the land which he could by annexure "A" transfer or dispose to the applicant in such a way that the applicant could acquire a right to the said land or a portion thereof.

Finally the respondents deny that there was agreement between the applicant and the first respondent that the applicant's remuneration for having rendered the services alleged in paragraph six of the founding affidavit, would be to grant use of 13.52 hectares to the applicant. On this aspect of the matter there seems to be a serious dispute of fact. At

paragraph six of its answering affidavit (deposed to by the applicant's own son) the

second respondent supported by the first respondent states, as follows:

> *"6.1 In 1997 the second respondent approached the applicant to clear the bush on a twelve hectare portion of the land. The balance of the land had been cleared. The first respondent, in his capacity as Vice Chairman of the second respondent, represented the second respondent in this regard.*

6.1.5 *The applicant agreed to clear the twelve hectares of land and prepare for planting a total of twenty eight hectares. From 1998 the second respondent started planting sugar cane on the land.*

6.1.6 *The remuneration of the applicant for the work done would be to allow me, the son of the applicant, to become a member of the second respondent. I was allowed to become a member of the second respondent.*

6.1.7 *The applicant thereafter demanded payment from the second respondent of an amount of E52,000-00 at a meeting with the executive committee of the second respondent in 1997 and he denied that the agreement was that remuneration consisted of me becoming a member of second respondent.*

> *6.6 The applicant was paid the following amounts for work he performed."*

Then there follows evidence of the payments made by the second respondent to the applicant on 24th October, 1997 amounting to E27,000-00 (twenty seven thousand Emalangeni). It appears from Annexure MFA2 (the applicant's invoice) and MFA3 and MFA4 that the amount was paid to the applicant by the Swaziland Development and Savings Bank which made the payment on behalf of the second respondent. The second respondent's deponent to the answering affidavit goes to state that the balance of E25,000-00 (twenty five thousand Emalangeni) was paid in three instalments of cash thus fully remunerating the applicant in respect of the services rendered. The first respondent denies that annexure "A" to the founding affidavit constitutes the agreement and says that he did not know the contents of annexure "A" which he says was not read to him. He further says he was told that the letter indicated that the applicant was going to assist the second respondent whenever necessary. The first respondent does not say why it was necessary that annexure "A" be read to him because ordinarily he himself ought to have read the document before signing same. However judging by the fact that he signed annexure "A" and the affidavit in these proceedings by his thumbprint it is possible that

he is illiterate. This should have been made clear in the affidavit. In light of this dispute of fact, however, and in any event, the applicant who has not replied to these allegations or proposed that the dispute be cleared by oral evidence has not proven and I am unable to find that the applicant has proven the alleged term relating to his remuneration for the services rendered. This would be a fourth reason for refusing the relief sought by the applicant.

On the basis of the aforegoing the application is dismissed with costs.

A.S. SHABANGU