IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 931/11

In the matter between:

HLANE INVESTMENTS (PTY) LTD **APPLICANT**

and

BAMBANANI FARMER'S ASSOCIATION (PTY) LTD **1ST RESPONDENT**
CANHAM GROUP (PTY) LTD **2ND RESPONDENT**

Neutral citation	:	Hlane Investments (Pty) Ltd and Bambanani Farmer's Association (Pty) Ltd (931/11) [2012] SZHC 194 (28 SEPTEMBER 2012)
Coram	:	MABUZA J
Heard	:	24 JANUARY 2012, 26 JANUARY 2012.
Delivered	:	28 SEPTEMBER 2012
Summary	:	Law of contract – The 1st and 2nd Respondent entered into a service contract which was to run from the 16th November 2007 to 31st December 2013 - While this contract was still allegedly valid the 1st Respondent entered into similar service contract with the Applicant which was to run from 1st April 2009 to 31st March 2013 – Cancellation of service contract between Applicant and 1st Respondent – Cancellation disputed by Applicant – Contract alleged to be valid and of full force and effect – Contract between

1st and 2nd Respondent alleged by Applicant to be null and void – Too many disputes of fact – Disputes can only be resolved by viva voce evidence – matter referred to oral evidence for determination.

[1] In this application which is brought under certificate of urgency, the Applicant prays for inter alia:

a. Waving the usual requirements of the Rules of Court regarding notice and service of the application in view of the urgency.

b. Directing that the purported cancellation of the agreement between the Applicant and 1st Respondent be and is hereby set aside.

c. Directing that the purported appointment of the 2nd Respondent by the 1st Respondent to provide Haulage services to the 1st Respondent is null and void.

d. Directing and ordering that the agreement entered into between the Applicant and 1st Respondent in August 2008 is valid and of full force and effect.

e. Granting costs of this application against any of the Respondents who oppose this application unsuccessfully.

[2] The parties hereto are all companies duly registered in accordance with the laws of Swaziland. The Applicant carries on business as transporters of

sugar cane and the 1st Respondent grows sugar cane at Hlane area in the Lubombo district. The 2nd Respondent carries on business as transporters of sugar cane.

[3] The 1st Respondent is owned by a small growers' scheme of sugar cane farmers. It was formed during 1997 and draws its membership from residents of ka Khuphuka, Hlane and Malindza; its members total two hundred and fifty (250). Its core business is to grow sugar cane and hire other companies to harvest and transport the sugar cane to the sugar mill at Mhlume. This arrangement has been in place since 1998 when the 1st Respondent began growing sugar cane.

[4] The background in respect of the application is sourced from Zeni Ntshalintshali's founding affidavit is that after realizing that the 1st Respondent was paying a lot of money to service providers and its members not benefiting much, the members took a resolution that members provide these services either individually, as groups of individuals or by setting up companies. Pursuant to this resolution some members came together and formed a company called Tineyi Investments (Pty) Ltd to provide harvesting services. Zeni Alfred Ntshalintshali together with a group of twenty other

members came together and formed the Applicant Company to provide loading and haulage services to the 1st Respondent. The 1st Respondent and the Applicant entered into a written contract in terms of which the Applicant was to load and transport the 1st Respondent's cane from the latter's fields to the mill for a period of five years.

[5] The agreement was to run from the 1st April 2009 to the 31st March 2013 when it was to terminate. It was entered to on the 9th August 2008. The parties had an option to extend the agreement for a further period of two years provided they agreed on the rates to be charged. The Applicant commenced operating on the 1st April 2009 in terms of the agreement. Prior to that the Applicant in order to meet its obligations in terms of the contract obtained a loan from the Swazi Bank in order to purchase a horse-and-trailer and a loader. The agreement with the Swazi Bank was that the Applicant was to repay the loan within five years by using the proceeds from its business with the 1st Respondent. The Applicant fears that if it fails to repay the bank, the latter shall repossess the horse and trailer and the loader. As on the 25th March 2011when the deponent attested to this affidavit, the Applicant's indebtedness to the Swazi Bank amounted to E600.000.00 (Six hundred thousand Emalangeni).

[6] On the 12th March 2011, the 1st Respondent cancelled the contract with the Applicant and awarded the haulage contract to 2nd Respondent. Prior to the Applicant taking over the haulage services, the contract had been awarded to the 2nd Respondent but because the latter failed to properly carry out its mandate the 1st Respondent cancelled the contract and awarded same to the Applicant. The 2nd Respondent instituted proceedings against the 1st Respondent on the 28th April 2010 wherein it sought to be re-instated as the carrier for the 1st Respondent; I was informed that matter remains pending before the High Court. It would appear that it is the threat of litigation that caused the 1st Respondent to re-instate the 2nd Respondents contract and to cancel the contract with the Applicant at a meeting held on the 12th March 2011.

[7] The background in respect of the 2nd Respondent as sourced from the answering affidavit Vusi Mabuza is that on the 16th November 2007, the 1st Respondent awarded a five year contract or tender to the 2nd Respondent for haulage of sugar cane from its fields to the mill. The contract was to run from the 16th November 2007 and to expire on the 31st December 2013. The 2nd Respondent carried out the terms of the contract until mid-year 2008

when it was stopped by the then Executive Committee of the 1st Respondent whose chairman was Zeni Ntshalintshali from continuing to haul and transport the sugar cane. The contract was awarded to the 1st Applicant by the then Executive Committee which was headed by Zeni Ntshalintshali who was also a member of the Applicant. An agreement was entered into by the Applicant and the 1st Respondent and was to run from 1st April 2009 to 31st March 2013.

[8] The story narrated by Zeni Ntshalintshali states that the contract between the 1st Respondent and the 2nd Respondent was terminated by letter but a copy of the said letter was not attached to the papers before Court as evidence that the notice conformed to the terms in the contract between the parties. It would seem that the said contract was terminated while Zeni Ntshalintshali was chairman of the 1st Respondent and awarded to the Applicant where Zeni Ntshalintshali was a member. There is no clear evidence that the termination of the 2nd Respondent's contract was lawful. The agreement between the 1st Respondent and the 2nd Respondent (BM3) does not have a termination clause. That being the case one must invoke the common law for the solution. Clause 8.4. of the said agreement states that all notices by one party to the other shall be given in writing and delivered by hand. As I

have not been shown such notice I conclude that there was no such notice even though Zeni Ntshalintshali at paragraph 24 of the founding affidavit says that a letter terminating the 2nd Respondent's agreement was written when the 2nd failed to do its job during 2008 and failed to show up during 2009. The 2nd Respondent of course denies that its contract was terminated in any way including by letter (vide paragraph 23 of its answering affidavit).

[9] After several complaints with regard to the stoppage of its services, the 2nd Respondent instituted legal action against the 1st Respondent for breach of contract under High Court Case No. 1406/2010. I was informed during arguments of this matter that case 1406/2010 was still pending. However as the story unfolds the term of office of the committee that was led by Zeni Ntshalintshali came to an end and was replaced by one whose chairman was Vusi Mabuza. According to Mabuza his committee uncovered a lot of irregularities which included the termination of the contract of the 2nd Respondent and awarding it to the Applicant. Mabuza's committee re-instated the 2nd Respondent's contract and cancelled the Applicant's contract as having been irregularly awarded to the Applicant in that there was a conflict of interest; Zeni Ntshalintshali was chairman of the 1st Respondent when he awarded the contract to a company in which he was a member after terminating a contract that was still legally in place.

[10] As a result of the cancellation of the Applicant's contract by the 1st Respondent, the Applicant launched the present application. The Respondents opposed the application and filed their notice of intention to do so on the 22nd March 2011. A brief answering affidavit deposed to by Vusi M. Mabuza, chairman of the 1st Respondent, raised points *in limine* namely that of lack of urgency and disputes of fact. At paragraph 5 of Mabuza's affidavit, he makes the request that should his points in law be dismissed, he will apply for leave to file a substantive affidavit on the merits of the matter. This application was not heard and the respondents filed an application for an order granting them leave to file their substantive answering affidavit which was attached to the application. Their application was filed on the 1st April 2011. Even though there was no order granted thereto, at the hearing of this application before me on the 24/01/2012, it was agreed between the parties that the substantive affidavit deposed to and signed by Vusi Mabuza be used herein. The substantive affidavits incorporate the points of law raised in their brief affidavit. The parties further agreed to forgo the issue of urgency and to argue the matter holistically.

[11] I must point out at the outset how vexed I am because of the procedure followed by Mr. Simelane. The application brought by the Applicant was set down for hearing on the 25th March 2011 and the notice to oppose was filed on the 22nd March 2011. Presumably Mr. Simelane appeared in Court on the 25th March 2011 and if he did it is then that he should have applied to the judge sitting on that day for leave to file a substantive answering affidavit and for the parties to be put to terms. As it is when this application was heard there was no formal order before court allowing the Respondent's affidavit. Consequently, the applicant was unable to file a reply to the substantive answering affidavit that I allowed at the hearing.

[12] I turn now to the orders prayed for; namely prayer 2:

> directing that the purported cancellation of the agreement between the applicant and the 1st Respondent be set aside.

There are two contracts that have been filed by the parties. Annexure B is an agreement between the Applicant and the 1st Respondent. It runs from the 1st April 2009 to 31st March 2013. Annexure BM1 is an agreement between the 1st and 2nd Respondent. It runs from the 16th November2007 to 31st December 2013. There are no notices of termination in respect of either

agreement filed off record even though I have been informed that both agreements were terminated. There is no evidence before this Court that either agreement was terminated.

I have been informed that the cancellation of Annexure B was not procedural in that the notice did not comply with clause 4.4 which provides for 12 months' notice in the event each party wishes to terminate the agreement.

In the absence of a notice which complies with Annexure B I would ordinarily uphold prayer 2 but cannot do so in this instance until it has been decided which of the two contracts is the valid one.

[13] Prayer 3: directing that the purported appointment of the 2nd Respondent by the 1st Respondent to provide haulage services to the 1st Respondent is null and void.

Having stated that there are two contracts before me which have not been legally cancelled it is inappropriate for me to declare the appointment of the 2nd Respondent null and void.

[14] Prayer 4: directing and ordering that the agreement entered into between the Applicant and the 1st Respondent in August 2008 is valid and of full force and effect.

I have already stated that before me are two contracts which appear to be legally executed. In order for me to order that Annexure B is valid and of full force and effect I would first have to decide whether or not Annexure BM1 was legally cancelled. The 1st and 2nd Respondents have stated that it was not legally cancelled and yet the Applicant states that it was legally cancelled. These assertions by the litigants create a dispute which can only be decided upon hearing oral evidence.

[15] Furthermore Mr. Mabuza who deposed an affidavit on behalf of the 1st Respondent raised a defence that the formation of the contract between the Applicant and the 1st Respondent was fraught with irregularities which include fraud and corruption which would cause it to be declared *void ab initio* and set aside if known. The irregularities can only be known if oral evidence were to be heard. It appears further that Mabuza and Ntshalintshali are members of the 1st Respondent, Ntshalintshali is also member of the

Applicant. A conflict of interest is apparent and Ntshalintshali would have to explain why by leading evidence.

[16] Annexure B was entered into while Annexure BM1 was still in existence; the circumstances surrounding the purported cancellation of Annexure BM1 and those surrounding the creation of Annexure B have to be ventilated by oral evidence to enable the court to decide which contract is operative and consequently of full force and effect.

[17] In conclusion I hold the view espoused by Mr. Simelane that in order to do proper justice to this matter oral evidence should be heard in order to clear up the disputes that are apparent and to enable the Court to determine which of the parties has a valid contract.

[18] I make the following order:

(a) The point of law raised by the applicant is hereby dismissed.
(b) The point of law raised by the respondents in respect of the application being fraught which disputes of fact is hereby upheld;

(c) I order that the matter be referred to oral evidence to determine whether or not the contract between the 1st and 2nd Respondents (Annexure BM1) was lawfully terminated as of 1st April 2009 when the contracts between the Applicant and the 1st Respondent commenced (Annexure B); and if not

- to determine whether or not the contract between the Applicant and the 1st Respondent was validly entered into between the parties while Annexure BM1 still existed.

- to hear the alleged irregularities; and

- to determine whether or not the contract between the Applicant and the 1st Respondent is valid in light of the alleged irregularities.

(d) Costs to be in the cause.

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Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. Z. Magagula

For the Respondents : Mr. S. Simelane