IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.173/81

In the matter of

PHILLEMON DLOVUNGA NGWENYA	APPLICANT
and	
DEPUTY SHERIFF OF THE MANZINI DISTRICT	FIRST RESPONDENT
NGUVANE DLAMINI	SECOND RESPONDENT
DOUGLAS D. MLOTSHWA	THIRD RESPONDENT
CORAM:	HANNAH, C.J.
FOR APPLICANT:	MR. S. EARNSHAW
FOR SECOND RESPONDENT:	MR. D. LUKHELE

JUDGMENT

(20/3/87)

Hannah, C.J.

In 1981 the second respondent sued the applicant and the third respondent jointly for damages. His action succeeded against the third respondent only and he was awarded E6,000 and costs. A writ of execution was issued on 2nd February, 1982 and when the Deputy Sheriff visited the third respondent to enforce it the third respondent claimed that the only possessions he had of any value were cattle which were in the care and control of the applicant. On 3rd April, 1986 the Deputy Sheriff, acting on this information, seized nineteen head of cattle from the applicant. The applicant maintained that these cattle did not belong to the third respondent but were part of the estate of his late father, Mafa Ngwenya. His attorneys wrote to the Deputy Sheriff setting out this contention but nonetheless the Deputy Sheriff proceeded to make arrangements for the sale of the cattle seized. The applicant thereupon applied for an interdict restraining the Deputy Sheriff from proceeding with the sale and for an order directing him to return the cattle to him.

The Notice of Motion refers only to eleven head of cattle but leave

has been granted to amend by substituting nineteen for eleven. A rule nisi was issued together with an interim interdict and on 5th September 1986 an order was made referring the matter to trial, the affidavits to stand as pleadings. I have now heard evidence led by both the applicant and the second respondent, the other two respondents choosing to take no further step in the application save, in the case of the third respondent, to give evidence on behalf of the second respondent.

The application has two unusual features. Firstly, it is unusual in my experience to find a judgment debtor allying himself with the judgment creditor in a matter such as this. It is more usual to find an alliance between judgment debtor and the person who claims ownership of the goods on which the Sheriff seeks to levy execution. Secondly, it is unusual to find a matter such as this being dealt with by way of application. The normal procedure would be for the Deputy Sheriff to take out an interpleader summons and in a case such as the instant one, in which the property in issue was taken from the possession of a

person other than the judgment debtor, it would be the judgment creditor who would be the claimant in such a summons and who would bear the onus of proving his claim. In the present application the r61es are reversed and the applicant's attorney concedes that it is his client who bears the onus of proving his claim.

At the outset of the hearing I raised the question of the applicant's locus standae with both attorneys in view of the fact that the applicant's claim to be executor of his father's estate is based in customary law only. Both attorneys agreed that this was not an issue and that the only issue was the ownership of the cattle.

The applicant gave evidence that all the family cattle had been owned by his father, Mafa, and registered in his name. Although some of these were in his custody at Malandzela where he lived they were not registered with the dipping tank authorities in his own name. His

father lived at Bhekinkosi but before his death in 1983 he joined the applicant at Malandzela and brought his cattle with him. From that point on there was, as I understand the applicant's evidence, a substantial herd of Ngwenya cattle at Malandzela but in April 1986 when the Deputy Sheriff executed the writ there were only twenty five at the area dipping tank at Ntima and it was from these twenty five that the nineteen were seized. The explanation may be that twenty five were at the dipping tank and the remainder of the herd was elsewhere in the area. One difficulty in cases involving cattle is that witnesses, and I suspect attorneys too, make unjustified assumptions that the Court is as familiar as they are with the manner in which cattle are traditionally kept in Swaziland.

The applicant was adamant that the cattle seized were part of his late father's herd and had no connection whatever with the third respondent He first came to know the third respondent, he said, in 1981 when they were jointly charged with causing malicious injury to the second respondent's cattle and he denied the suggestion that he had purchased cattle on behalf of the third respondent when the latter was working in the mines in Johannesburg.

The applicant called a cousin, Aaron Ngwenya, who gave evidence in general terms that the cattle kept at the Ngwenya kraal at Malandzela all belonged to Mafa Ngwenya. He also testified that prior to Mafa bringing his cattle from Bhekinkosi no cattle had been kept at the applicant's homestead at Malandzela, testimony which conflicts with that of the applicant, but in view of the evidence of the veterinary officer this piece of testimony is clearly wrong and must be put down to faulty recollection. The evidence of Aaron Ngwenya does not assist one way or the other in determining the dispute.

The evidence of the veterinary officer, Joseph Zikalala, is of some importance. He was also called by the applicant and produced certain records. He came to Ntima dipping tank ten years ago and when he arrived Mafa Ngwenya already had cattle registered there. Since then, he said, there have been numerous transfers into Mafa's kraal and all the cattle in the custody of the applicant were registered in Mafa's name. The veterinary officer accepted Mr. Lukhele's suggestion that it would have been possible for the applicant to have registered in his father's name cattle purchased by him for the third respondent if this was agreed by the three.

The third respondent maintained that contrary to the evidence of the applicant the two of them were related and knew each other much better than the applicant was prepared to accept. In the 1970's he was working in Johannesburg and sent money to the applicant to buy cattle on his behalf. The largest sum sent was E800 and this was sent in 1977. In the winter of 1978 he went to the applicant's homestead and was shown twenty four head of cattle as being those purchased for him. Thereafter he saw them again but he was a little vague about this. He last counted them in 1981 when there were twenty six and since then three or four have died. At the time of the execution in April 1986 the applicant had custody of twenty to twenty five of his cattle.

The third respondent was asked to describe the twenty six beasts seen by him in 1981 and he did so by reference to gender and colour. In cross-examination he was asked how many were bullocks and he said ten. When giving his description he had mentioned two bullocks. There was, however, a possibility that he had misunderstood the question and when it was put again he said that there were ten oxen. In his description he had in fact referred to ten oxen.

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I have already mentioned that it is unusual to find a judgment debtor such as the third respondent being so willing to render assistance to the judgment creditor. Without the information volunteered by the third respondent to the Deputy Sheriff there would have been no reason for the Deputy Sheriff or the judgment creditor to suspect that he had cattle in the custody of the applicant. If the information was correct such forthrightness was highly commendable but the question I have to decide is whether it was correct.

The third respondent's assertion that the applicant had custody of cattle owned by him must be examined in the light of his general behaviour over the years. Was his behaviour that of a man who had cattle in the custody of another? Certain factors lead me to the conclusion that it was not. On his own evidence he has shown no interest in the cattle he claims to be his since 1981 when he says he last checked them. Since then he has not visited the applicant's homestead to see their state of health and today can only give vague evidence of their numbers. Since the present application was launched he has been aware that the applicant contests that he has any of the third respondent's cattle in his care and yet, despite the third respondent's contention that the applicant still has at least one, possibly six, head of cattle belonging to him, he has done nothing to recover them. Further he has shown no interest in ascertaining whether the cattle seized by the Deputy Sheriff and presently at the pound at Manzini are his cattle and although he knew that his cattle were registered in the name of the applicant's father and that the father died in 1983 he took no steps to apprise the next-of-kin of this fact as might be expected. While it is understable that he should no longer have a postal order counterfoil after ten years neither he nor the second respondent has troubled to enquire of the post office whether their records might evidence a payment of E800 in 1977 and generally his evidence regarding the alleged payment of E800 was

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vague. When cross-examined about the payments the third respondent appeared to me to be ill-at-ease.

Despite the indications that the third respondent never did have cattle in the custody of the applicant Mr. Lukhele nonetheless submits that there is material to suggest that the applicant has been untruthful in dealing with the history of this matter. He submits that the applicant should be held to have lied when he denied that he and the third respondent were related. He relies in particular on the evidence of the second respondent's witness, Tsabedze, that the mothers of the applicant and the third respondent were sisters. Quite apart from the fact that this evidence was obviously hearsay Tsabedze gave some curious evidence concerning the sisaing of cattle by the third respondent to Mafa Ngwenya in 1970 or 1971. The third respondent made no mention of this. Having considered the matter I am not persuaded that the applicant was lying when he disclaimed knowledge of being related to the third respondent.

Mr. Lukhele also relies on the apparent ability of the third respondent to describe the cattle he claims to be his and the fact that in the case of ten cattle the description he gave corresponded with the description of cattle seized by the Deputy Sheriff. However, not only were the descriptions of a general nature but I entertain considerable doubt whether a man could accurately describe the colours of twenty six head of cattle last seen by him six years ago particularly when he says he only saw such cattle occasionally.

I accept Mr. Lukhele's contention that the fact that the cattle in issue were registered in the name of the applicant's father is by no means conclusive of their ownership but having regard to the lack of interest shown by the third respondent in these cattle over the years I have concluded that the applicant's account of their ownership is to be preferred. I suspect that the third respondent's claim to ownership, which in my judgment fails, is connected in some way with the fact that

the original action brought by the second respondent against both the third respondent and applicant was successful only against the latter. I suspect that for reasons not canvassed he regards that result as unfair and has endeavoured to ensure that the applicant should meet the judgment which the second respondent obtained.

Accordingly, there will be an order that the nineteen head of cattle seized by the Deputy Sheriff from the applicant be returned to the applicant. The costs of the application must be paid by the second respondent.

N.R. HANNAH

CHIEF JUSTICE