

HIGH COURT OF SWAZILAND

CIVIL CASE NO.506/99

In the matter between:

PAULOS SHABANGU PLAINTIFF

AND

AGRIPPA NYONGO MOTSA DEFENDANT

CORAM MATSEBULA J

FOR PLAINTIFF MS. Q. MABUZA

FOR DEFENDANT MR. MDLULI

27thFebruary 2004

By summons issued on 1st March 1999 plaintiff claimed the following:

- (a) Delivery of four heads of cattle valued at E7 500.00 being plaintiff's property in the wrongful possession of defendant. ALTERNATIVELY:

Payment of the sum of E7 500.00 being the value of the said heads of cattle.

- (b) Costs of suit,

- (c) Further and/or alternative relief.

Annexed to the particulars of claim is an annexure "A" which fully describes the four heads of cattle. 1 red cow without horns

2

1 red calf  
1 black bull with white dotted spots on the forehead  
1 white and black dotted bull

Paragraphs 1 and 2 of the particulars of claim are admitted by defendant. The rest of the paragraphs are denied by defendant and plaintiff is put to proof.

The plaintiff on whom lies the onus of proving his case on a balance of probabilities went into the witness stand and gave evidence.

It was his evidence that on the 4th January 1995 he drove his herd of cattle to the dipping tank. He and others of the area i.e. Diamond Dipping tank had to connect some water pump in order to get water into the dipping tank. A spanner was necessary to get the water pump working. Plaintiff was sent to go and see if he could obtain the spanner. It was his evidence that as he walked he noticed four men driving his cattle. One of these men wore a camouflage army uniform. The man in the army uniform suddenly raised a gun he was carrying and started pointing it at him and firing. Plaintiff stated he fell to the ground when a second shot was fired. He got up and a third shot was fired. He enquired what the problem was but he was not favoured with any answer. Plaintiff said he then crawled on his knees and beckoned for his companion who came and he explained to them what happened.

Plaintiff told the court that the man he alleges fired at him is the defendant. Finally when Plaintiff stood face to face with the defendant he asked again what the matter was as defendant swore at him by referring to a woman's private part. He also said if he wanted the woman's private part he must stop talking. Plaintiff then decided to keep quiet. They then proceeded to the veterinary assistant and in the presence of the veterinary assistant, defendant claimed that one of

3

his beasts was amongst plaintiffs. The beast defendant claimed was his he had exchanged it with a farm owner who gave him a female beast for an ox. This particular female was dark brown and the name of the man with whom the exchange was done is Sigi Dlamini. When Sigi was confronted, he denied that the beast he had was the one he exchanged.

Plaintiff told the court that he had the beast in his possession since the 4th October 1995 and had regularly dipped it at Diamond Dipping tank. It was his evidence that all the beasts were in his register. Plaintiff said defendant was then, and there taking possession into his possession eight from his herd. Plaintiff said the veterinary assistant protested to no avail. It was plaintiff's evidence that defendant threatened to kill him if he resisted that his eight cattle be taken. The veterinary assistant asked defendant if he had a stock removal permit. In response, defendant told the veterinary assistant that when his beast went missing no stock removal permit was used. Plaintiff said at that stage defendant said plaintiff should release the beast and its calf and two more beasts. Plaintiff said he then instructed his herdboys to do as defendant was demanding. Plaintiff described the beasts taken by defendant as follows:

1. One red cow with white hooves and its calf. He said the red cow had a white adder. The calf was red like the mother. It was a male calf.
2. The other beasts taken by defendant was a bullock with a white spot on the forehead and white tail.
3. The third was also a bullock with white and black spots.

Plaintiff said he remained speaking to the veterinary assistant and as he was speaking defendant came back and asked plaintiff if he was agreeable that the beasts he had taken be registered in his defendant's register. Plaintiff said he could not resist as he feared defendant who was still armed. Thereafter defendant took the beasts

4

away to date. Plaintiff said he then went and reported the incident to the police. He has not heard from the police since. He gave the value of his beasts taken by defendant as E5 700.00. The amount he broke down as follows:

The two bullocks he valued at E1 500.00; the value of the female E1 800.00;

He asked for the return of the beasts or alternatively payment of the E5 700.00 and also asked for the costs of the suit.

Plaintiff was cross-examined at length by Mr. Mdluli on behalf of the defendant. The cross-examination was particularly aimed at denying that defendant ever fired at plaintiff but only fired in the air and that this firing in the air had nothing to do with frightening plaintiff but merely aimed at calling those in his company that he had spotted his missing beast.

Plaintiff also admitted that when Sigi Dlamini denied that it was not the beast he had exchanged with plaintiff, he did not challenge Sigi Dlamini. Plaintiff denied that he voluntarily agreed that defendant take possession of the beasts.

Plaintiff denied that he and others had gone to defendant's homestead to apologise for having stolen defendant's beast. Plaintiff also called Sipikili Nkambule. His evidence could not take the case any further in so far as the events of the day in question are concerned. He was on leave and the only

relevant part of his evidence is that four beasts had been deregistered from plaintiff's dipping register when he returned from leave. He also confirmed that the cow in question had come to be registered into plaintiff's name through a system of bartering. He said plaintiff gave away an ox for a female beast.

Mr, Mdluli did not cross-examine the witness.

5

The court asked him a few questions regarding deregistering of the beasts by different owners thereof. It was this witness' evidence that where the owners were not in agreement a transfer would not be a feasible option.

Plaintiff also called Elphas Dlamini. In his evidence he deposed to hearing two gunshots on the day in question and shortly thereafter he heard a third gunshot and a blowing of a whistle. He and others spoke to plaintiff and as plaintiff was speaking defendant came and cocked his gun and plaintiff had to ask defendant what the problem was. Thereupon defendant said if plaintiff did not want to handle the "woman's private part" by hand he had better keep quiet. This witness also testified to the difficulty of allowing the beasts to be transferred in the manner defendant was insisting on. He saw that defendant also had the gun holding it in a shooting position until the plaintiff's cattle were taken away.

Under cross-examination this witness said defendant was not pointing the gun towards plaintiff. He said, however he saw defendant cock his gun. He formed the opinion that the reason why plaintiff allowed his cattle to be taken away was because he feared the gun defendant was carrying. He denied that he had colluded the version of his story.

Ms. Mabuza re-examined the witness and the witness said he had seen defendant taking a bullet from a belt on his waist and; further no removal permits were produced at the dipping tank. He said the veterinary assistant did not complete forms in respect of the removal of the beasts.

Plaintiff rested his case.

Defendant called Themba Dlamini. During 1995 he relieved as veterinary assistant at the Diamond Dipping tank. He knows both

6

plaintiff and defendant. On 4th October 1995 both plaintiff and defendant were at the dipping tank. Defendant was looking for beasts he alleged went missing. He left the dipping tank and came back driving some cattle and we wanted to know whose cattle were they. He claimed amongst the herd of cattle one was his - the one he was looking for. Plaintiff said the beast was his and that he had exchanged it with another beast from Sigi. Defendant insisted that the beast was his missing beast. When Sigi was confronted about the beast he disputed that it was the one he had exchanged with plaintiff.

Defendant insisted the beast was his and took it with its calf from plaintiff's herd of cattle. It was Themba Dlamini's evidence that defendant said he also missed an ox and there and then also took an ox from plaintiff's herd. Defendant then said he was not going to lay any charges against plaintiff but would punish him by taking other beasts from plaintiff's herd. He said he was doing this because plaintiff had put him into an unnecessary inconvenience by stealing his beasts. Thereupon defendant selected another bullock from plaintiff's herd.

Themba Dlamini testified that he then informed defendant that he could not do that as the beasts he wanted to take had not been deregistered from plaintiff's name into his name. Themba Dlamini then asked plaintiff if he was handing over the said beasts to defendant, according to this witness, plaintiff agreed and the witness asked further if he the witness should effect deregistration of the beasts from plaintiff's name into that of defendant. Plaintiff again answered in the affirmative.

The witness then instructed defendant to go and get the necessary stock removal permit before taking

the beasts with him. The defendant thereupon said he would drive the beasts without the necessary stock permit as that is the method used when they

7

disappeared from his herd. The witness said he told defendant to go to his office to get the necessary documents i.e. the removal permit. According to the witness that was done and according to the witness the plaintiff was not in a state of shock and that defendant and plaintiff spoke normal and no threats were made by defendant. He said he observed that defendant was carrying a gun but was unable to say in what position he carried the gun. At no stage did he see defendant point the gun at plaintiff. He had earlier heard a gunshot at the bush. It was further his evidence that he cannot allow any transfer of beasts from a person to another if the parties do not agree first to such a transfer.

At this stage plaintiff's attorney asked for an amendment to the prayer in the alternative to read E5,500.00 instead of the E7,500.00. The application was not opposed and the court granted it. On behalf of the plaintiff Ms. Mabuza cross-examined the witness relating to his period of service as a veterinary assistant.

It emerged during the cross-examination that the witness was relieving the substantive veterinary assistant for three weeks. He showed the register where he effected the transfer of the beasts to defendant's name. He admitted that what he did in his register on the 4th October 1995 was only temporary and this was not in accordance with the laid down proper procedure. He did this temporary arrangement because defendant demanded to take the cattle there and then. He admitted that defendant flouted the rules by taking the cattle in the manner he did.

Defendant himself gave evidence. He said he was employed as a police officer by the Swaziland National Court and stationed at Nhlangano.

8

He said during 1991 he was given two beasts as a fine by someone who had deflowered his daughter. He said these beasts disappeared in 1992. In 1995 he went to the Diamond Dipping tank after receiving information about his missing beasts. He went to the dipping tank in the company of three boys. He was also carrying a gun. He came upon the beasts across the Mkhondvo River not far from plaintiff's homestead. The beasts he was looking for were amongst the herd of the plaintiff. This was a cow. He fired a shot in the air to call the boys and also blew a whistle. The boys came and they drove the entire herd towards the dipping tank. He ascertained that the beasts belonged to the plaintiff. He asked plaintiff where he got the cow from and plaintiff said he was given the cow by one Sigi Dlamini. Sigi Dlamini was also at the dipping tank. Sigi denied that the beast was the one he gave the plaintiff. Defendant then told plaintiff he was going to take the beast with him.

Defendant testified that plaintiff gave the beast in question to him and another beast which had disappeared with it from his herd. They approached the veterinary assistant and in the presence of the veterinary assistant, plaintiff gave defendant altogether four beasts. The veterinary assistant witnessed all this and recorded it in his books.

According to him plaintiff gave him altogether four beasts and he took them home.

He admits that he was carrying a gun and it faced upwards as he carried it. He admits too that when he drove the beasts away he did not obtain the necessary documents. He denied ever firing three shots and denied that he forced plaintiff to release his beasts to him.

It was his evidence further that on a Thursday morning plaintiff paid him a visit in the company of others and he named them. He says

9

they had come to apologise on behalf of plaintiff for having stolen the beasts.

Defendant states that he advised them to come on another day and he and others will then listen to them. They came back on a Saturday in the company of others and he gives their names. They again repeated that they had come to apologise on behalf of the plaintiff for having committed theft. According to defendant the apology was accepted. He stated that he finally obtained a removal permit for the beasts.

Under cross-examination he outlined the procedures followed where a person who owes another a beast/s and confirmed that the procedure to be followed is a legal requirement before anyone claiming beasts can take possession of such beasts. He admitted that it was unlawful to remove cattle without a removal permit and that it was against the law.

He said he had reported the loss of his beasts to the police and that they had said he must go and search for them. He said after the discovery that one of his cattle is lost he went back to the police and reported that he had found one of his missing beasts. He said he told them he had removed the beast/ s and that he had done so without a removal permit. He further said he told the police that the plaintiff did consent that he removes the cattle.

In re-examination he said the name of the policeman he contacted was Mathokoza.

Asked by the court why he took other beasts belonging to the plaintiff and his answer was that he did that because when he missed his beast it was with others and that plaintiff consented to the taking of the beasts.

10

As DW2 defendant called Patrick Hlangabeza Dlamini. He is a resident and a farmer at Hlatikulu. He said plaintiff had alleged that he had obtained the beasts from him and he said this was untrue.

He said defendant then took the beasts away. He said the beasts which defendant took from the herd of plaintiff was a hornless one red in colour with a white colour on its belly. He denied that he had bartered the beasts, he said defendant took away. He said the one he bartered was red in colour and had horns.

In cross-examination he told the court that he had never been charged with stock theft. He said he had plus minus 45 beasts on the farm and was in the business of bartering for plus minus 20 years.

He said he cannot remember all the beasts he bartered in the past but he remembers that he had not bartered the one in question' because it was a recent transaction. By recent he meant plus minus 5 years he said. Before this recent case of bartering he had last bartered beasts with plaintiff plus minus 15 years ago. He said he had sised six herd of cattle with plaintiff less than 15 years ago but more than 5 years ago.

Defendant also called one Florah Motsa as PW3, the wife of defendant. She also knew plaintiff. She had last seen plaintiff when he and others had come to apologise for beasts belonging to her husband which her husband lost. She confirmed her husband's evidence about the names of the people who accompanied plaintiff when he came to apologise.

Under cross-examination by Ms. Mabuza she said there were two beasts paid by the family of the one who deflowered her daughter. She said this happened in the winter of 1991 and the beasts went missing in winter of 1992.

11

She described the beast as being both dark brown.' One had horns facing downwards and the other was a male also with horns.

Asked by the court if the beasts brought by her husband are the one, she said the female beast had horns which had grown longer than when it went missing. The male one had no horns at all when it disappeared. The defendant then rested its case.

The two counsel handed from the bar their respective heads of argument. Having read and considered the heads of argument it remains for me to decide very crucial legal issues arising from the evidence as whole.

It is common cause that the witness Agrippa Motsa, the defendant received information about where he would possible trace his missing beasts. The beasts in question was properly registered in the name of the plaintiff. For all intents and purposes the beast belonged to the plaintiff. The plaintiff has given evidence how he obtained the beast. He bartered it in exchange for certain male beasts from DW2 Patrick Hlangaluza Dlamini popularly known as "Gigi". Although DW2 denied in evidence before court that the beast was the one he had exchanged with plaintiff the probability cannot be excluded that he could very well be mistaken when he says it was not the beast. He admitted in evidence that he is in the business of exchanging beasts with other people and that he has been doing so for plus minus 15 years. In the court's view it is possible therefore that he could have exchanged the beast in question with plaintiff. DW2 would in the circumstances be apprehensive and felt it would be safer for him to distance himself from having bartered the beast in question.

This approach by this court is further reinforced by the fact that defendant's wife who gave evidence as DW3 Florah Motsa. DW3 gave

12

a totally different description of the beast paid by the person who had deflowered defendant's daughter. The evidence speaks for itself.

Further factor which militates against finding for defendant by this Court is the fact that he handled the matter in a very high handed and, I would say in an unlawful manner, Here, I mean the way he went about taking possession of his lost beasts and further fining plaintiff for according to him, having stolen his beasts by taking further beasts belonging to the plaintiff. Defendant did all this without the necessary documentation for stock removal. Defendant is now asking this court to endorse his unlawful actions. This, the court is not disposed to do.

The court is also not convinced that plaintiff will, of his own accord consent to the taking of the beat defendant alleges was stolen from him and that plaintiff would further consent that he be fined further beasts and even go to the extent of asking a host of witnesses to accompany him to defendant's homestead to apologise and thereafter immediately decides to institute proceedings to recover the said beasts he willingly volunteered to be taken by defendant. This story of an apology by the plaintiff to defendant the court rejects.

It follows that the court finds that the plaintiff has proved its case on a balance of probabilities and grants the prayers in his favour. The prayers are granted as amended.

J.M. MATSEBULA.