

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 3903/2007

In the matter between:

PETROS MLAHLEKI

APPLICANT

And

THOKO MAGAGULA

1st RESPONDENT

WISEMAN DLAMINI N.O.

2nd RESPONDENT

CORAM

ANNANDALE-J

FOR THE APPLICANT
FOR THE RESPONDENTS

MR. B.J. SIMELANE
MR. S.C. DLAMINI

JUDGMENT
24TH NOVEMBER 2009

[1] The applicant commenced legal proceedings late in the year 2007 by way of motion. He prays for an order to "(d)irect (the) Respondents jointly and severally, one paying the other to be absolved, to return three cattle to Applicant failing which to reimburse Applicant in the sum of E 10 500.00 being the value of the cattle". He also wants costs, on the same basis.

[2] The basis of his claim is set out on affidavit to the effect that in December 2006, the 2nd Respondent ("the sheriff") acted on instructions of the 1st Respondent ("Magagula") and unlawfully loaded three of his cattle onto a truck which transported cattle belonging to Magagula. He values the cattle at E10 500 and says that nobody was entitled to remove or attach them. He reported the matter to the Police who in turn advised him to institute the present proceedings.

[3] In support of his application, veterinary assistant Musa Magagula says that at the time of removal of the stock, he was in charge of the Lubisane dipping tank where the applicant's cattle were registered. On the 5th December 2006 he noticed that three of the applicant's cattle were missing, leaving him with a remaining total of 22. On enquiry, he was told by the Applicant that his cattle were stolen.

[4] The Applicant also filed an affidavit by Mandla Maseko, who says that the three cattle of the applicant were loaded onto a truck by the 2nd

Respondent assisted by the Police, in his presence. He adds that the police assaulted them during this process and that both the Sheriff and the Police were told that the three cattle belong to the Applicant. Being a local of the area, he was familiar with the cattle and knew them to belong to the Applicant.

[5] The 1st Respondent denies involvement in the matter as described above, and challenges him to "strike proof" (sic) of his ownership at Sihhoye and registration at the Lubisane dipping tank. Instead of dealing with her alleged instructions to the sheriff to also load his three cattle on a truck said to transport her own cattle, which receives but a bare denial, she puts it across that it is "inconceivable that had the Applicant's property been unlawfully taken away, he would have waited eleven months before bringing these proceedings". What she does raise as defence is that is that all of the cattle seized by the Sheriff belonged to the estate of the late Zachariah Mkhabela. To rub salt into the wound, she adds as afterthought that the cattle no longer exist as they were sold to butcheries.

[6] The 1st Respondent further denies the averred value of the cattle to be E10 500.00, but does not offer an own estimation of value. As to the alleged absence of authority or consent to remove the cattle, she tenders a counter version, namely that the Sheriff executed an order of the High Court by taking possession of cattle that belonged to the estate of the late Zachariah Mkhabela. The order she refers to reads that three other Mkhabelas were interdicted and restrained from dealing with or alienating property belonging to the deceased pending the decision of the Master. They were further

ordered to restore possession to Thoko Ivy Mkhabela (nee Magagula), (the then Applicant and present 1st Respondent) of various listed vehicles, a shop, and other property, including a herd of 105 cattle.

[7] The present Applicant then replied by affidavit, offering an explanation as to why he took some time to come to court. He says that he reported the matter to the Police at Mliba, that it was investigated, but that he was later on advised to institute civil proceedings. Meanwhile, he harboured hopes that the Police were going to solve his problem and restore the cattle to him. He also reiterated his claim of ownership. Instead of deciding the matter on the papers as set out above, a different court ordered that oral evidence be heard in order to determine ownership of the relevant cattle. This was done as long ago as December 2008, more than one year after the matter first came before the High Court. It took the better part of the following year to actually present such evidence.

[8] Although no issue was taken with the further protraction, the Applicant's attorney does make mention of the *dictum* by Corbett JA (as he then was) in *Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 - H where he said that:-

"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order whether interdict or some other form of relief may be granted if those facts averred in the Applicant's affidavit which have been admitted by the Respondent, together with those facts alleged by the Respondent justify an order. In certain instances the denial by the Respondent of a fact alleged by the

Applicant may not be such as to raise a real genuine or bona fide dispute".

[9] Had the matter been before this court at the time when oral evidence was ordered to determine a factual dispute as to ownership of the cattle, the subsequent course of events *possibly* could have been otherwise. It is immaterial what this court might have decided at that particular time, nor is it proper to pass any comment on the merits of referring the matter for oral evidence. Nevertheless, evidence *viva voce* was adduced by both parties, which now requires consideration, in the main to determine whether in fact the attached cattle belong to the

Applicant, or whether they were in the estate of the late Zachariah Mkhabela.

[10] Each of the parties called three witnesses who gave their diametrically opposed versions.

[11] Petros Mlahleni, the Applicant, reiterated the contents of his affidavits, adding some flesh. He has his livestock registered at Lubisane dip tank as kraal number 129. The cattle taken on the 1st December 2006 were described as two red and one brown Brahman - like heifers. Value wise, he would have sold each for E3500.00.

[12] After having found his cattle to be gone and searching for them in vain, including a search at the first Respondent's homestead, he reported his loss as the Mliba Police station.

[13] He related in court as to how he acquired the cattle in question. Two young heifers were an exchange for two oxen with one Bonginkhosi Mkhabela, unrelated to the 1st Respondent. The oxen were to be slaughtered at a cleansing ceremony after a funeral. I think and agree that when cattle are slaughtered for their meat, it is practical and sensible to rather exchange two young heifers for two bigger oxen, of the same value, in order to have more meat for consumption at a cleansing ceremony. The third heifer was from progeny of his own cattle.

[14] He vigorously denied that the three heifers were from the Mkhabela estate, as averred by the 1st Respondent.

[15] The Respondent's attorney solicited hearsay evidence from him to the effect that one Pat Magagula would have told him that his cattle were at a Dlamini farm, which statement was challenged and it was put to him that it would be denied by Magagula. He stuck to his version and added that the cattle were kept there for a while after being taken away from his possession.

[16] What did emerge as new evidence under cross-examination is that he did not immediately receive the two heifers exchanged for his oxen, but that they were pointed out to him as his, at the time of the exchange of his oxen for the heifers. Delivery was only effected late in 2006 and the two heifers received from Bonginkosi Magagula bore Magagula's brandmark. The third heifer, progeny of his own herd, was said to be unbranded.

[17] He remained adamant and quite clear that the cattle were removed in his absence and that they all three belong to him, registered in his name. He has no contest with the first Respondent, whether or not she was questioned by the Police. He seemed quite unwilling to speculate as to matters which he has no personal knowledge of, save to repeat what he has been told. He made a positive impression as witness, readily offering explanations that seem quite plausible and which were later on verified by the other relevant witnesses.

[18] The only criticisms that really could be leveled against him is his concept as to the definition of a heifer, at what age and when she becomes a cow. In his own understanding of the concept, it ties in with his description of the cattle, even though it might differ from the definition that would be given by a veterinarian. Certainly, it does not detract from his veracity by having a somewhat odd concept of how a heifer is defined. To him, the two cattle he eventually received from Magagula were heifers, which he first saw as sucking calves at the time he gave two oxen for slaughtering, in exchange.

[19] Importantly, no qualms about the credibility of the Applicant *qua* witness came to the fore during his evidence. No alarm bells were activated and no big question marks were scored across his evidence.

[20] The Applicant called the son of the 1st Respondent as witness to testify as to the events when the Sheriff, accompanied by the Police, came to attach cattle belonging to the estate of the late Zachariah Mkhabela, his father.

[21] He said that the Sheriff was told that no cattle belonging to Bonginkhosi Mkhabela were there. What they saw at the Sihhoye area were *sisaed* cattle which fell outside the estate of the deceased.

[22] His reward for doing so was to be beaten by the Police and some Magagula boys. He related how the beating resulted in the *sisaed* cattle being let loose, without control, and how they then ran into the veld, intermingling with other cattle. From a safe vantage point within a forest, he saw a "Central Meat Wholesale" truck arrive onto which cattle were loaded. Amongst these were beasts which did not belong to Bonginkhosi Mkhabela, i.e. that more than only his cattle were loaded onto the truck.

[23] The following day, the Applicant came looking for his three missing heifers, the same three which were loaded onto a truck the previous day by the Sheriff, Wiseman Dlamini. He says that he knew the Applicant's cattle as he used to see them at the dipping tank and also at his home.

[24] According to his own estimation, he also placed a value of E3500.00 on each of the heifers, E10 500.00 in all for the three of them.

[25] Mkhabela confirms the acquisition of the Applicant's cattle, having been involved in the exchange transaction. When his father died, he said, only female cattle were available from his kraal. To have beasts to slaughter for the cleansing ceremony, they spoke to Petros Mlahleki and arranged a deal whereby he would give them two oxen in exchange for two heifers which were pointed out to him, from Bonginkhosi's kraal. Though unsure of exactly when, he has it that the heifers which were exchanged for the oxen were only collected in 2005 or 2006, from the kraal of Bonginkhosi Mkhabela.

[26] This unsophisticated man made a very positive impression as witness. Especially his descriptive manner of speaking created vivid imagery as to the scene when he narrated how the *sisaed* cattle ran into the fields, mixing with other cattle, when an insensitive Sheriff harassed them while trying to load them onto a truck. His manner of relating events and creating a vivid picture thereof in the mind of the court is a typically rural African experience. The imagery of what he related will continue to occupy a part of my memory for some time to come - a picture created in a few but most descriptive words to re-create a scene which he observed.

[27] Cross-examination served the purpose of confirming what he said, not to indicate any second thoughts or to highlight uncertainties. He not only stood his ground but expanded positively on his evidence, offering details which he was not asked about before. His evidence under cross-examination also confirmed various aspects of the Applicant's own evidence, such as the time taken to collect the exchanged heifers and the rationale behind the exchange, as well as their source.

[28] An effort to discredit him because of prior imprisonment due to a problem with cattle in his father's estate dismally failed because of his forthright admission of it.

[29] He also offered a plausible explanation for the ignorance of the first Respondent as to the ownership of the Applicant's heifers, saying that at the time of attachment, she had been absent from the area for some eight years, whereas he had been there all along and knowledgeable about the

cattle of the area. He also verified the estimated ages of the relevant heifers, their branding and to some extent, he shares the views of the Applicant as to when heifers become cows.

[30] Yet again, the emphasis does not fall upon definitions, but on recollections of events. *Webster's Dictionary* defines a heifer as a young cow, one that is less than three years old and has freshened only once; one that has never borne young or developed the proportions of a mature cow. A cow is defined as the mature female of the *genus Bos* (or other related species). It is common cause with the Applicant's witnesses that the two animals are about double the age of three, but it remains unresolved whether they had calved or not, or whether they could indeed properly be referred to as "heifers" or not. Be that as it may, that is the term each referred to and whether technically correct or not, it does not detract from their recollection and testimony insofar as the specific individual female cattle are concerned.

[31] Also, both are *ad idem* insofar as branding is concerned, having it that the exchanged cattle were branded with the mark of the late Zachariah's family.

[32] Evidence of a more formal nature came from one Musa Magagula, the relevant dipping tank Assistant, employed by the Ministry of Agriculture, stationed at Nkambeni and in charge of the Mabiya dip tank. Under dip tank number 30, the kraal of Petros Mlahleki was registered as number 129.

[33] He testified that on the 26th July 2006, two cattle were added to his 24 head, after receiving transfer. He referred to and handed in a copy of the relevant transfer permit, number 43159, which reflects that Bonginkhosi Mkhabela of dip rank 49, kraal 86 transferred the two cattle to Petros Mlahleki, the Applicant. He said that the cattle thereafter were lost. He also referred to them as being heifers.

[34] His further evidence is that on the 9th January 2007 at dipping time, three cattle of the Applicant were not presented to him. It was reported to him that they were lost, taken in by the Deputy Sheriff together with the Police. (See exhibit "A1" and "A2" in this regard, a reflection of his formal evidence).

[35] Again, cross-examination focussed on the aspect of when a heifer ceases to be properly referred to as such. It certainly could be crucial if relevant, but in the present matter, it misses the point. It does not really matter whether the cattle in issue were bulls, oxen cows or heifers. Nuances like that would be most important in some matters, but not here. Ages, sexes and descriptions are secondary to the issue at stake, namely whether three cattle were attached and removed by the Sheriff, being either the property of the Applicant or from a deceased estate, numbering 105 in all, none of them described in any detail at all.

[36] The only other material aspects of cross-examination established that his official records are not all encompassing and interpretable by uniformed readers. His own personal explanations as by his entries, recorded dates

and numbering are required in order to make full sense of his registers. Even so, his oral evidence sufficiently ties this in with his affidavit. He does establish that the two heifers, or possibly formerly known as such, were registered under the name of the Applicant on the 25th July 2006, increasing his stock to 26. The transfer was properly authorized from the kraal of Bonginkhosi, as testified by Bonginkhosi himself.

[37] What the evidence of Musa Magagula proves, and which I so accept, is that it corroborates the version of the Applicant, further corroborated by Bongani Oscar Mkhabela, as to how he obtained two of the three cattle which he complains of having been taken from him under the misapprehension that they fell within the estate of their deceased former owner. There is no gainsay against his supported version that the two heifers (or cows) came to him as a result of an exchange for two oxen. It also makes sense to rather slaughter oxen for a cleansing ceremony than heifers, which normally would produce offspring.

[38] His second witness, Bongani Oscar Mkhabela, added valueable input insofar as the *contrectatio* goes, as well as the filling in of relevant details. It is he who reported the events to the Applicant and on whose information the Applicant became able to not only report the matter to the police, but eventually institute the present proceedings against the Respondents.

[39] His case is essentially that the Sheriff mistakenly attached his own three cattle under the misapprehension that they were part of a deceased estate which armed the first Respondent with a writ of attachment. In the mayhem that followed when the cattle of *inter alia* the Applicant were disturbed by a

commotion of same proportions, three cattle of the Applicant got intermingled with other cattle which were indeed liable to be attached. The evidence does not go so far as to establish deliberate malice on the part of the Sheriff, but the Applicant's version does point to at least some insensitivity and an attitude of *laissez faire* by the Sheriff.

[40] In stark contrast to the plausible version of the Applicant, evidence from the Respondents was also heard.

[41] The Respondent's Attorney called three witnesses in an effort to rebut the well established case of the Applicant, namely the first two Respondents and one Pat Magagula.

[42] The Deputy Sheriff stated in his brief evidence that he attached 21 head of cattle in December 2005, in enforcement of a court order in the matter of Thoko Ivy Magagula versus Bonginkhosi Magagula. He said that each of the cattle had the branding of Thoko Ivy Mkhabela (sic).

[43] He denies that Bongani Oscar Mkhabela saw them loading the cattle, and moreso that they did not each have the branding of the Respondent or that Mkhabela told him that three of the cattle belong to the Applicant.

[44]

He obviously did not know that after Bongani Mkhabela took a beating, he hid in some nearby bushes and continued to

observe the mayhem as cattle were being rounded up and loaded onto a truck by people who do not work with livestock on a regular basis.

[45] He also could not give an acceptable explanation as to why he was unable to produce an inventory of the cattle he attached, nor could he recall descriptions of the cattle. From his evidence, it is quite evident that he attached the cattle while under a good deal of pressure and that the Police had their hands quite full.

[46] He says that instead of leaving an inventory of what he attached with the kraal owners, he requested the Police to do so on his behalf, but he does not know which Police Officer was so tasked to do. Even if it is to be so accepted, and even if it could be regarded as only formalistic, it is obvious that he did not properly check each and every beast for branding marks. More importantly, he did not care to listen to the likes of Bongani Mkhabela who tried to tell him that three of the cattle which were chased onto the veld and loaded onto a truck, belonged to the Applicant.

[47] The reward for endeavoring to do so resulted in a beating of Bongani and caused him to run for safety, from where he continued to observe the events.

[48] The Deputy Sheriff did not make any kind of favourable impression as witness. He displayed a stance of annoyance and a *l'aissez faire* attitude. He came across as a man on a mission with only one goal - to load the required number of cattle onto his truck and get away as quickly as

possible. That, his task was not easy is readily accepted. The locals were perceived as antagonists and the Police had to constrain them. Nevertheless, he does not convince this court that he properly and diligently ensured that cattle of the Applicant were not indeed property of the deceased estate.

[49] Had the deputy Sheriff acted properly and in accordance with the dictates of his profession, he would have refrained from removing the three cattle in dispute, reported it to the 1st Respondent's Attorney and caused interpleader proceedings to be instituted. That would have been an opportune and prudent exercise to have disputed ownership determined expeditiously. Instead, it seems that he chose to ignore what he was informed of and by turning a deaf ear, he negated the duty entrusted upon him.

[50] In my view, even disregarding evidence to the contrary, it would be most risky to rely upon the evidence of the second Respondent and find that indeed each and every animal which he attached on strength of a writ or order, belonged to the estate and was properly due to be handed over to his corespondent.

[51] The commotions of the day and the milling cattle, dispersed onto a field, coupled with the stress under which the Sheriff tried to do his job, simply proved to be too much for him, thereby giving rise to a strong caution against accepting his evidence at face value.

[52] The first Respondent testified about the order she obtained, namely to attach various items and cattle from Bongani Magagula and some others. She said that she was not present when the cattle were taken by the Sheriff. Her evidence is that all of the attached cattle used to belong to the late Zachariah Mkhabela, that she saw them all and that she also saw the brand marks. She has it that, none of the Applicant's cattle were attached and that none bore his brand mark.

[53] She did not elaborate on her observations and her evidence in chief on this aspect is as bald as can be. She did not lay any foundation for her stated belief. Her evidence in this regard is not convincing at all.

[54] Needless to say, the aim and purpose of cross-examination proved its mettle and necessity yet again. She could not come quite clear as to the number of cattle attached, without being prompted. Her sums as to how many cattle Zachariah had, taking into account their progeny and factoring in the number of attached cattle, does not quite tally. If her evidence was to be accepted insofar as numbers go, there should have been four, and not three, disputed cattle.

[55] Because of the inherent and obvious danger of testing her evidence on the basis of numbers, one has to look further. When her knowledge of the Applicant's position is factored into the equation, more disquiet creeps in. Not only did she not scrutinize any return from the Sheriff, she also has no knowledge or inkling about the transaction through which the Applicant acquired two young heifers in exchange for two oxen which were

slaughtered for a cleansing ceremony. If she did have knowledge about the absence of such transaction, or of the untruthfulness of it, she most certainly would have testified about it. She did not.

[56] Her evidence, bald and generalizing as it is, devoid of any persuasive value or first hand knowledge and observations, certainly does not lead to a ready acceptance of it. Just as with her affidavit, it lacks in any power of persuasion. When her version, even when coupled to that of her co-respondent, the

Sheriff, is compared to the evidence of the Applicant and his witnesses, it fades into a foggy and insignificant shade of pale.

[57] I fail to properly comprehend why the Respondents called a third witness, Petros Matsela Magagula. In our legal system, it is not the number of witnesses called by a litigant which is of significance, but the nature and quality of believable evidence which is adduced.

[58] Magagula was not called upon to corroborate any aspect which is not common cause, such as that Zachariah died, that his wife was evicted, that she obtained an order of court to attach cattle within the estate which was with her children, and so forth. He adduced no new evidence, or evidence which could impugn that of the Applicant and his witnesses.

[59] From all of the foregoing, I have no hesitation at all to conclude and accept the version of the Applicant to have served its purpose. The balance or preponderance of propabilities far favour the Applicant and the version of

the insignificance when comparisons are drawn. In my considered view, it would be extremely risky to accept the version of the Respondents as being even remotely on par with that of the Applicant, on the other end of the balancing scale.

[60] Holding and finding, as I do, that the Applicant has fully, justifiably and acceptably having discharged his burden of proof, and rejecting the version of the Respondents as being incapable of even reasonably possibly counteracting it, this court finds in favour of the Applicant. He has established ownership of the three cattle in question sufficiently for such a factual finding to be properly made.

[61] In the result and in consideration of the evidence by the Respondents that the cattle cannot be physically returned since they have long ago been slaughtered by some butchery, the Applicant must be awarded his alternative prayer namely payment *in lieu* of restoration of possession. No challenge has been laid against his valuation, which was supported by his witness.

been laid against his valuation, which was supported by his witness. It also does not readily seem to be over - inflated.

[62] It is thus ordered that the Respondents, jointly and severally one paying the other to be absolved, pay the sum of E10 500.00 to the Applicant, *in lieu* of his three cattle, with costs on the same basis.

JACOBUS P. ANNANDALE
JUDGE OF THE HIGH COURT OF SWAZILAND

