



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3265/2010

In the matter between:

ZUKA CHAKHACHAKA NGOZO

Applicant

And

MAKWAYANE NGOZO

1st Respondent

SABELO MASEKO

2nd Respondent

JAMES MNYANI NGOZO

3rd Respondent

TOBHILE NGOZO

4th Respondent

MARIA MASEKO

5th Respondent

Neutral citation: *Zuka Chakachaka Ngozo v Makwayane Ngozo & 4Others*
(3265/2010) [2013] SZHC 110 (11th June, 2013)

Coram: **M. Dlamini J.**

Heard: **22nd November 2012**

Delivered: **11th June, 2013**

– Application for interdict– clear right essential prerequisite – in trial proceedings court to consider facta probanda to the issue at hand.

Summary: The applicant has approached this court seeking for an interdict against respondents from threats of violence and taking into possession certain herd of cattle belonging to him. The respondents contest applicant's application on the basis that the herd of cattle belongs to 5th respondent who is applicant's wife. These cattle were given to 5th respondent by applicant, according to respondents. A *rule nisi* was granted on 26th August 2010.

[1] Owing to the nature of dispute, the matter was referred to trial. Trial commenced on 19th September 2012 after a protracted delay partly at the instance of either party.

[2] Applicant gave evidence in his own case. Under oath he informed the court that he was married to the 5th respondent in terms of Swazi law and custom. He had two wives. 5th respondent was the senior wife. On a particular day, he noticed 5th respondent having hung her clothing at a line which was at his brother's homestead. He queried from the brother as to the reason his senior wife would decide to use a line in his homestead as he (the brother) had no wife. The response from his brother was whether he (applicant) ever found the two together.

[3] Thereafter, he was approached by 5th respondent who was in the company of a number of people. They informed him of a charge against him for accusing his brother of having an illicit affair with his wife, 5th respondent. They further told him that the owners of the children wanted them. On enquiry as to the children, he learnt that they were referring to his twins. It was his evidence that this threw him into total confusion.

- [4] While pondering on the issue of the twins, an emissary, one Dede Maseko came to summon him to appear before the 5th respondent's family. He declined. However, he agreed on the third occasion.
- [5] He proceeded to 5th respondent's homestead where he found many people including 1st and 3rd respondents. The group demanded him to produce evidence of his wife, 5th respondent having an affair with his brother. He informed the group that all he enquired upon was for the reason 5th respondent was hanging her clothing on his brother's homestead when his brother had no wife. The group persisted on its enquiry. A series of argument went to and fro. The applicant was finally fined a cow failing which a cash amount of E2,500.00 for accusing his brother one Maphongo of having an illicit affair with 5th respondent. The meeting was dispersed and applicant warned that more charges would be forthcoming against him the following week.
- [6] The following week, a Saturday, the same group came to his homestead and called for him. They held a meeting a few distance from his homestead. The charge was the same. He was fined a cow and two goats by 1st respondent.
- [7] 3rd respondent's rose and claimed that applicant was divorcing his wife in front of the group. He said the group would proceed to the Chief's kraal where all his (applicant's) herd of cattle would be seized as they were pastured by 5th respondent over the years. At that juncture, a messenger was dispatched to the veld to collect his cattle.
- [8] Upon return of the messenger with his cattle, 1st and 3rd respondents selected six herd of cattle and drove them away with them.

- [9] On the day of cattle dipping, 2nd respondent emerged carrying stock removal permit and insisted on having the said herd of cattle deregistered from that dipping tank. He refused to countersign for their removal. He then solicited assistance from an attorney.
- [10] He was summoned to the Chief's kraal where again he was threatened with a fine for accusing his wife of having an affair. He protested and one member of the inner council advised that they should leave him alone as he had hired the services of an attorney on the matter. He left under protest to the dipping tank where again he found 1st to 4th respondents carrying stock removal permit to deregister his herd of cattle. The veterinary officer threatened respondents with arrest if they persisted in removing the cattle against applicant's will. Having finished dipping the cattle, applicant drove them into the bush and went home.
- [11] While at home 1st, 2nd, 3rd and 4th respondents approached in a red motor vehicle. Upon alighting, they went straight to his cattle which were grazing nearby and drove them into his kraal. 2nd respondent then called him into the kraal. He refused. They however, selected six herd of cattle and drove away with them. His second wife went to call the police.
- [12] The police advised him to approach the court for a remedy. He told them that he would solicit the assistance of an attorney. They advised him that an attorney will keep on saying his matter was pending at the High Court endlessly. He should go straight to the Magistrates Court and explain his story. He obliged. He was however, turned away at the Magistrate (Circuit) Court for arriving late. At the end he sought for the attorney's help.

[13] Days went by without his six herd of cattle, until one day a certain boy reported that he saw his cattle at Mangcongco area. He went there and found his five herd of cattle. He drove them home. It was his evidence that he was pleading for the return of the missing cow and the sum of E2,500 he paid as fine from respondents. He did pay the dowry prize for his wife, 5th respondent. It was further his evidence that as of today 5th respondent was residing with his brother, Maphongo, the very brother who sparked the action before court.

[14] He was cross-examined on the meetings held. It was put to him that he was the one who went to the veld, drove the cattle and selected the six herd of cattle. That the respondent could not take them on that date as there was no stock removal permit. However, when the stock removal permit was available, applicant refused to release the herd of cattle. The applicant denied these allegations. It was further put to him that at the meeting, applicant took off his jacket indicating that he no longer wanted 5th respondent. He denied all this and maintained his evidence in chief. He further pointed out that when he said he was taking off his jacket it was in relation to the fine that was imposed on him. He meant that he could not bear such fine. On cross examination further he was reminded that he refused to bind as per traditional practice in such cases, his wife's clothing as he no longer wanted her but undertook to give her six herd of cattle. He denied ever rejecting his senior wife.

[15] It was put to him that he actually removed the six herd of cattle from the kraal after sending a certain boy to do so who could not identify the herd of cattle to be removed.

- [16] The amount of E2,500 was disputed. It was said that applicant was caused to pay E1,500 which he paid. Applicant stood his ground.
- [17] That second witness on behalf of applicant was **Ambrose Mandlakhe Ginindza** who gave evidence under oath.
- [18] He is the father of applicant's second wife. He responded to her daughter's invitation to attend at her marital homestead on the basis that he has been accused of practicing witchcraft. He found that the issue was pertaining to accusation against applicant for alleging that his senior wife had an affair with his brother. He had been made to pay a fine of E2,600.
- [19] While they were discussing the matter with applicant, a group of people came to applicant's home. They sent a boy to the veld to collect cattle. They allege that these cattle would be seized in order to maintain applicant's first wife. They informed applicant they were proceeding to the dipping tank to deregister the cattle. He decided to accompany Applicant to an attorney.
- [20] The third witness on behalf of applicant was **Ndoda Sibanyoni**. He accompanied applicant to the dipping tank to dip applicant's cattle. When they had finished dipping applicant's cattl, a group of people, inclusive of 1st, 2nd, 3rd and 4th respondents, approached and grabbed applicant's cattle. Applicant protested. The veterinary officer refused to deregister the applicant's cattle upon request by respondents and company. He, together with applicant, drove applicant's cattle towards home. They decided to enter applicant's homestead. While they were having food, a red motor vehicle approached. The same group that was at the dipping tank was again seen driving applicant's cattle into applicant's kraal. 1st respondent called

upon applicant to come and show them the cattle. Applicant refused. 1st respondent responded that they will remove the cattle themselves. They entered the applicant's kraal and took six herd of cattle consisting of three bulls and three cows. They were all carrying sticks and drove away with the six herd of cattle.

[21] This witness maintained his evidence under cross examination. Applicant closed his case.

[22] The 3rd respondent gave evidence in rebuttal. He confirmed applicant as his brother's son. He informed the court that on 1st March 2008, they as respondent's, were summoned to 5th respondent's parental home to deliberate on a charge against applicant for having disowned 5th respondent in the presence of her relatives. They were a group of fifteen in number. They learnt that applicant had been fined three herd of cattle. They then embarked on negotiations on behalf of applicant to have the fine reduced. It was eventually reduced to E1,500.00. Applicant duly paid the fine.

[23] The following month, 5th April 2008, another meeting took place where applicant informed them that he no longer wanted his wife. Applicant took off his coat demonstrating that he was tired of 5th respondent. They reasoned with applicant as an attempt to persuade him to change his mind. Applicant insisted. They eventually suggested that applicant should find a person who would pack 5th respondent clothing and that he (applicant) should send her away with six herd of cattle as her inheritance. On that note, applicant rushed out, came back driving his cattle into the kraal. He then selected six herd of cattle. 5th respondent's family indicated that they could not take the cattle on that day because they did not have a stock removal permit.

[24] Subsequently, at the dipping tank on the second occasion, when the 5th respondent family requested that the cattle be deregistered, applicant refused saying they should proceed home where he would give them the cattle. At home, 1st respondent removed the cattle and were driven away.

[25] He maintained his evidence under cross examination. It was put to this witness that when applicant took off his jacket he meant that he was refusing to pay the fine imposed upon him not that he no longer wanted his wife. He maintained his evidence in chief. It was further put to him that at the dipping tank, the veterinary officer advised them to go home as they were fighting with applicant. He was asked further whether the cattle were ever deregistered. This witness confirmed that the six herd of cattle were not deregistered.

[26] **Mkhulunyelwa Elliot Maseko** was respondents' next witness. He was 5th respondent's father. His evidence was very brief. He informed the court that he attended one of the meetings where applicant was present, having failed to heed to a summon for a meeting previously. He confirmed applicant having been fined E2,000.00 but was made to pay E1,500.00.

[27] Under cross examination, he denied that the purpose of the meeting was to deliberate on 5th respondent having an affair with one Maphongo Ngozo. He divulged that applicant informed the meeting that he no longer wanted his wife – 5th respondent. This was disputed on behalf of applicant.

[28] The third witness was one **Mabhala Absalom Dlamini**. He represented the royal kraal during the meetings held between applicant and respondents. He stated that in the first meeting, applicant's family had gone to 5th

respondent's family to ask for forgiveness on behalf of applicant. 5th respondent's family imposed a fine of about five herd of cattle. The applicant's family pleaded for leniency. The fine was reduced to E1,500.00 which was paid by applicant.

[29] After the fine was paid, the meeting proceeded although on another day, where applicant was persuaded not to send away 5th respondent and his children. Applicant however, took off his coat saying he does not need his wife. The meeting enquired on the reason for applicant to denounce his wife. Applicant said that he will not pursue the matter any further and offered 5th respondent herd of cattle. They enquired as to what the herd of cattle were. Applicant said that it was in respect of one cow that he had given to 5th respondent for her to enjoy sour milk from it, in accordance with our custom. 1st respondent requested to see the cattle. Applicant rushed out to the veld and drove all his cattle into the kraal. He then removed six herd of cattle. They requested that he should keep them for a while. Applicant insisted that they should collect them at earliest possible. The reason the cattle could not be collected is that it was late on that day.

[30] Under cross examination it was denied that applicant ever said he no longer wanted his wife, the 5th respondent. It was further put to this witness that applicant was fined E2,500 and he subsequently paid the said amount. It was further denied on behalf of applicant that he pointed out six herd of cattle and further removed them from the kraal. This witness stood his ground.

[31] The next witness was **2nd respondent**. He is a brother to 5th respondent. This witness gave evidence along similar lines as 3rd respondent. He is the one who requested applicant to keep the herd of cattle as it was a Saturday

and that they had no stock removal permit. On Tuesday, he proceeded to the dipping tank to collect the cattle but applicant refused. He went back to 5th respondent's family to report that applicant was now refusing with the cattle. It was his evidence that 5th respondent decided to strategise on how to get the said cattle. They went back to the dipping tank for the second time. Again applicant refused to release the cattle. Applicant's family advised him to get the cattle. He went to applicant again to request for the cattle. Applicant refused. He again went to the dipping tank to get the cattle. Applicant refused again. By this time pressure from applicant's family was mounting against him to ensure that he takes away the cattle from applicant. On this day, in the company of 1st, 2nd, and 4th respondents they went to applicant and saw cattle by the field nearby. Applicant was seated outside his rondavel house. They drove the cattle into the kraal. 1st respondent called upon applicant to come and select the herd of cattle they had come to collect. Applicant refused. 1st respondent asked this witness to enter into the kraal and drive the six herd of cattle out. He could not spot the herd of cattle applicant had pointed them the other day. 1st respondent informed him to drive any six herd out. He obliged.

[32] He met the police along the way who enquired on the cattle. He explained the circumstances and the police allowed him to proceed with his ways.

[33] These cattle went missing after five weeks. They searched for them but in vain.

[34] Under cross examination, it turned out that although 3rd respondent was aware of stock removal permit, he did not have it on the date of removal of the cattle.

[35] He divulged that applicant was summoned to the Chief's kraal to explain as to why he was refusing with the six herd of cattle. He informed the Chief's kraal that he never at any time gave the said cattle to respondent. There was no final verdict on this matter by the Chief's kraal. It was further pointed out that the cattle were still registered in applicant's name.

[36] The last witness was 5th **respondent**. She confirmed that applicant was her husband and that he chased her away. She was residing next to the main homestead. Her evidence was that applicant complained in a meeting that she was having an affair. He produced underwear from the hut as evidence. She said applicant then removed his jacket, as a signal that he was denouncing her. The meeting asked as to where the cattle were that applicant had given her. Applicant went away to collect them. Applicant had given her a cow which multiplied to be six. He however, refused to register the same into her name.

[37] The Masekos had come to thank him for the cow and a celebration was held for the same. He had already paid bride prize and a traditional wedding was celebrated also on that occasion.

[38] It was her evidence further that at the meeting applicant was ordered to prepare her clothing for taking away. He refused.

[39] Under cross examination, she confirmed hanging clothing at Maphongo's homestead and that she was residing there. It was disputed that the cow was for her to enjoy sour milk but stated that it was part of the celebration of bride prize. She confirmed that it was given to her during that occasion of thanking the bride prize.

[40] My duty at this juncture is to sift the evidence presented with a view to determining material and relevant evidence called *facta probanda*. It is only this evidence that I am called upon to put to the imaginary scales of justice. Evidence not relevant to the issue at hand, *facta probacta* is to be rejected as irrelevant. I refer in this regard to **Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 28 SZSC**. In **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] 65** more particularly at page 29 where her **Ladyship Ota J. A.** with admirable clarity states:

“This is because although Civil cases are won on preponderance of evidence, yet it has to be preponderance of admissible, relevant and credible evidence that is conclusive and that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before the court however must be considered to determine which has weight and which has no weight.”

[41] I say this much aware that the applicant bears the onus of establishing his claim. This onus remains with him throughout the trial, although the evidential burden may shift from applicant to respondent or *vice versa* as the case may be.

[42] My first port of call is to ascertain whether applicant has established a *prima facie* case.

[43] The applicant claims for an interdict, preventing respondent from perpetrating any acts of violence or threats of violence and restraining them from removing his herd of cattle.

[44] It was his evidence that the respondents came to his home in a larger group than cited. They were carrying sticks. They drove his herd of cattle that were at the veld nearby grazing into his kraal and removed six herd of cattle. These cattle were registered in his name. The cattle taken by respondents were never deregistered.

[45] The evidence by applicant should be considered in the light of the prayers he seeks this court to grant. I have already demonstrated applicant prays for an interdict against the respondents.

[46] Their Lordships in **Maziya Ntombi v Ndzimandze Thembinkosi (02/2012) [2012] SZSC 23** at page 14 laid the down requirements for an interdict viz.:

“The requirements for the right to claim an interdict are well known: a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.

[47] Does the evidence of applicant as summarized above *prima facie* establishes a clear right?

[48] During cross examination of the applicant and his witnesses, it became clear that the six herd of cattle driven away by respondents were registered in the name of applicant. In that way it is my considered finding that applicant has established a clear right. I need not take the enquiry further.

[49] On the basis of the above finding, applicant has established a *prima facie* case.

[50] I now resort to the wise words of **Davis J. in Friedlander v Hodes Brothers 1944 CPD 69** at 173 where he states

“Notwithstanding the prima facie case established by [defendant], plaintiff can succeed not merely if he establishes upon the whole case that the balance of probabilities is in his favour, but if he so far disturbs the balance previously established by his opponent so that there is no longer a balance either way, or even if he disturbs it only so far that the balance established by the plaintiff has now become too slight to justify the court in acting upon it.”

[51] Put differently, has the respondents discharged the evidential burden by adducing evidence on rebuttal?

[52] It is common cause that:

- the cattle taken were registered in applicant’s name as already alluded to;
- on the date of removal from applicant’s kraal, applicant resisted their removal;
- the cattle were at all material times never deregistered;

[53] The question is whether in the face of the evidence adduced, applicant ever gave respondents permission to remove them.

[54] Applicant had informed the court that respondents stated that as he was denouncing his wife, he would lose all his cattle as his wife had pastured

them for all the years they were together. The respondent then dispatched a boy to collect his cattle. They then proceeded to select six herd of cattle and drove them away. His evidence was corroborated by his two witnesses on the forceful removal of the herd of cattle.

[55] The 3rd respondent who was the 1st witness on behalf of respondents stated that at the meeting, applicant having denounced his wife, the meeting suggested that 5th respondent be sent away with six herd of cattle as her inheritance. However, Mabhala Absalom Dlamini, the representative from the Chief's kraal informed the court that applicant having taken off his coat indicating that he no longer wanted 5th respondent, offered to send respondent away with six herd of cattle.

[56] 2nd respondent on the other hand stated that at the meeting where the herd of cattle were pointed out, applicant denounced his wife. The elders then reminded applicant that 5th respondent had to go away with cattle.

[57] From the evidence of respondents, viz. 3rd and 2nd respondents, it turns out that it is the meeting that suggested that should 5th respondent leave, she should do so with herd of cattle. The evidence by the Chief's kraal representative stands to be rejected in light of the evidence by 2nd and 3rd respondents.

[58] This, therefore leads the court to conclude that at no stage did applicant voluntarily surrender his six herd of cattle.

[59] 2nd respondent fortified this position when he informed the court that he was later forced by applicant's family to remove the herd of cattle. They, as

respondents then strategised on how to remove the cattle from applicant who was refusing to release the same.

[60] It would appear to me that respondents failed even to convince the veterinary officer to have the cattle as he refused to deregister the them. What is worse, even the Chief's kraal decided not to entertain respondents' claim over the cattle as evidence from respondents is that the Chief's kraal did not come up with a verdict on whether applicant should release the cattle to respondents despite a complaint lodged by them.

[61] It is further not clear as to the reason respondent insisted on dispossessing applicant of the six herd of cattle as applicant retrieved five of the cattle without respondents' knowledge. These cattle, it appears to me, were left unattended at the area where applicant later found them. Respondents stated that the cattle were reported missing. They did not bother to search for them. Logic dictates that if these cattle belonged to 5th respondent as they claim, they would have attended to them and searched for them on being informed that they were missing. In the absence of such, one is left to infer that respondents were just settling a score on applicant for rejecting their sister if the story on denouncing of 5th respondent is anything to go by. On this note, one may end by citing the renowned Poet **John Dryden** who once dramatised:

“Kings fight for empires, mad man for applause”.

[62] I am alive to the viva voce application by applicant for an order against respondents for the return of E2,500 which was imposed upon him as a fine. However, I cannot consider directing the respondents to pay the said amount for reason that it was not prayed by applicant in his pleadings. It

would greatly prejudice the respondents as they came to court not prepared to answer to such prayer by applicant. In other words for reason that respondents were not given notice for such prayer, the order sought is declined.

[63] In the totality of the above, the scales of justice tilt in favour of applicant and I enter the following orders:

1. The *rule nisi* granted on 26th October 2008 is hereby confirmed;
2. Respondents are ordered to:
 - 2.1 return the one (1) cow or bull which could not be retrieved by applicant to applicant forthwith, failing:
 - 2.2 pay applicant the value of the said cow or bull as the case may be;
3. Should there be any dispute on the value of the said cow or bull, the veterinary officer of the parties' herein dipping tank is hereby ordered to arbitrate on the value and decide the amount and his decision shall be final.
4. Respondents are ordered to pay costs of suit.

M. DLAMINI
JUDGE

For Applicant : Mr. M. Mzizi

For Respondents : C. Motsa