



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No. 1177/2016

In the matter between:

FERNANDO ROCHA

Plaintiff

And

SIMANGA MAKHUBU

Defendant

Neutral citation : ***Fernando Rocha v Simanga Makhubu (1177/2016)
[2020] SZHC 91 (8th May, 2020)***

Coram : **M. Dlamini J**

Heard : **30th April, 2020**

Delivered : **08th May, 2020**

Documentary evidence : ***no probative value – of no relevancy –***

Inconsistent evidence : ***witness demeanor at stake- evidence is an
afterthought – must be rejected by court***

Summary: The Plaintiff alleged that his motor-vehicle collided with defendant's cow. He demanded the sum of E95 5000.00 as the value of the motor-vehicle. The defendant disputed liability on the basis that he was not the owner of the said cow.

The Parties

[1] The plaintiff is an adult male. He is a resident of Malkerns, Manzini region. The defendant is an adult male. He resides at Manyeveni Luyengo area, Manzini region.

The plaintiff's claim

[2] The plaintiff alleged that on 2nd July 2015 at about 2215 hours while driving along the MR 18 public road at Takitsi area, his motor-vehicle collided with a black and white cow. As a result, his motor-vehicle was damaged. Costs of repairs were assessed to be higher than the market value of the motor-vehicle. He then claimed E95 500.00. He stated the ground for the claim:

“14. Three weeks after the Plaintiff and Defendant concluded the verbal agreement, the Plaintiff did not hear from the Defendant again. The Plaintiff eventually got hold of the Defendant who had then decided to deny ownership of the cow and stated that he is not going to pay for the repairs to the Plaintiff's motor-vehicle. The Defendant

has repudiated the verbal agreement by his actions and denial of ownership of the cow.

15. *Furthermore, the Defendant stated that the cow belonged to his brother and gave the Plaintiff his brother's phone number, whom the plaintiff after investigation discovered is deceased.*
16. *The plaintiff then contacted **Mr. Dlamini** and **Mr. Msibi**, two police officers stationed at Malkerns Police Station to ascertain whether the cow belonged to the Defendant or Defendant's deceased brother, **Mr. Msibi** went to the Government Vet and found that the cow was in fact registered to the Defendant.*
17. *As a result of the collision aforesaid, the plaintiff suffered damages in the sum of **E95 500.00(Ninety Five Thousand Five Hundred Emalangeni)**, being the fair, reasonable and necessary trade value of the defendant.*
18. *Since the negligence of the Defendant's cow is imputable to its owner, the Defendant is liable to compensate the Plaintiff in the amount of **E95 500.00 (Ninety Five Thousand Five Hundred Emalangeni)**.*
9. *In the circumstances, the Plaintiff has sustained loss and damage in the aforesaid amount of **E95 500.00 (Ninety Five thousand five Hundred Emalangeni)** which is the trade value of the motor-vehicle as prescribed in the Auto*

dealers guide. (Attached hereto marked “FR4” the Auto dealers guide reflecting the value of the motor-vehicle)

Plaintiff’s claim against the Defendant

- 1. Payment of the total sum of E95 500.00 (Ninety Five thousand five Hundred Emalangeni) being the trade value of the motor-vehicle.*
- 2. Interest thereon at the rate of 9% per annum from the date of issue of summons to date of final payment;*
- 3. Costs of on attorney and own client scale;*
- 4. Further and /or alternative relief.*

Defendant’s plea

[3] The defendant stated that the said cow did not belong to him but to **Benson Makhubu**. In the result, he disputed negligence.

Oral evidence

[4] The plaintiff testified under oath. He is a resident of Mabhelengwane, Malkerns area and holds a mechanical engineer degree. He works in the family business, P & F Motors. On 22nd July 2015 at about 10:00pm while driving towards home, just before Takitsi area, he spotted a black cow in the middle of the road. He tried to swerve in order to avoid knocking it. His attempts failed and he knocked it.

[5] His motor-vehicle sustained severe damages in various parts. These were the fender, bonnet, grill, bumper, cradle, radiator, intercooler, air conditioning fan, condenser, filter box and the steering wheel. He survived injuries. He called the police and members of his family. The police attended to the scene of the accident. They recorded a statement from him. They also removed the ear tag from the cow. The police investigated who the owner of the cow was by enquiring from the veterinary offices. They identified the owner as defendant. They gave him a report to that effect. This witness handed to court the said report. No objection was taken and the report was admitted as part of his evidence. The plaintiff referred also the court to photographs of his motor-vehicle.

[6] Having discovered the owner of the cow, he then called him and advised him of the accident involving his cow. He also informed him of the estimated costs of repairs for his motor-vehicle. He indicated though that he would still make a quotation. Indeed, a quotation was sourced. He referred the court to pages 4-9 of the book of pleadings.

[7] Defendant came to his work place. He undertook to pay the sum of **E65 000** for the motor-vehicle. His offer was accepted. However, defendant remained silent for about three weeks. He then called defendant enquiring on the way forward. Defendant denied ownership and the agreement they had reached. He testified that on the basis that the costs of repairs exceeded the value of the motor-

vehicle, he was praying that the court grant him judgement for the value of the motor-vehicle set at **E95 500**.

[8] PW1 was cross-examined at great lengths. The main gripe was that the said motor-vehicle did not belong to the defendant but to his deceased father. It was demonstrated to him that he was wrong to rely on the police report to conclude that the defendant was the owner of the cow. He was referred to two correspondences authored by veterinary officers as evidence that the defendant was not the owner of the cow. This witness testified that he did not only rely on the police report on who the owner of the cow was but also the fact that defendant pleaded guilty to the offence which led his motor-vehicle to collide with the cow.

[9] It was further denied that the defendant made an offer to purchase the damaged motor-vehicle for **E65 000**. It was however, admitted on behalf of defendant that he visited PW1's work place to inspect the said motor-vehicle. The reason for the visit was that the police had threatened him.

[10] PW2 was **Madelina Rocha** who testified that PW1 was his son. She corroborated PW1's evidence that defendant came to PW1's place of employment. He was presented with the quotation of the motor-vehicle. Defendant said that the costs of repairs were high. He could

not afford then. He then offered to purchase the motor-vehicle at **E65 000**. They agreed to his proposal. He undertook to return later to pay and take the motor-vehicle. He however never returned.

[11] Under cross-examination, it was denied that the defendant ever met with PW2. Like PW1, she was questioned at length on the ownership. She maintained her evidence in chief. She testified that **Makhubu** was the owner of the cow. She could not remember the first name. Under re-examination she pointed at the defendant who was seated in the court's gallery as the **Makhubu** she referred to in her evidence in chief. The plaintiff closed his case.

Application for absolution from the instance

[12] The defendant applied for an absolution from the instance. The application was dismissed. Reasons are inextricably intertwined with the judgement.

Adjudication

[13] Is the defendant the owner of the black cow which was knocked down by plaintiff while lying in the middle of the road near Takitsi area?

Defendant's testimony

[14] The defendant testified that he was a resident of Luyengo area. He ceased his employment in 2007. The cow in issue was not his. Police officers arrived to his homestead. They said that they were looking for **Benson Makhubu** who is deceased and my father. They said that they went to the veterinary office carrying the cow's tag to verify the owner of the cow. He told them that **Benson** died ten years ago. He said that the police said that since they found him, they would for record's sake, record a statement from him. They explained that following that the cow had been involved in an accident, they needed to advise the owner of the motor-vehicle in the event he enquired that they had been to his (PW1's) home.

[15] The police also advised him to go and inspect the motor-vehicle. They did not say why he had to do the inspection. He proceeded to PW1's garage where he found a number of motor-vehicles parked outside. He found an elderly male who was short in height. He inspected the motor-vehicle and left. It was his first time to see PW1 and PW2 in court.

[16] He testified in relation to the cow that his father had four homesteads. He resided in one of his father's homestead. There were no cattle in the said homestead. He was born out of wedlock. He was not responsible for his father's affairs as he was born out of wedlock. He heard of the agreement that he would purchase the damaged motor-vehicle for **E65 000.00** for the first time in court. He had never

accepted liability. Explaining his conviction for allowing a cow into a public road, he denied ever allowing a cow into a public road. He told the court that the Magistrate asked him if he knew the said cow of which he replied in the positive. The Magistrate then pronounced him guilty and gave him a fine. The Magistrate asked him if he wanted to say something. It is then that he explained that the said cow belonged to his deceased father. The Magistrate told him that his explanation was too late. Had he explained earlier, he would not have convicted him. He referred the court to the two letters written by the Lobamba veterinary officer, reflecting **Benson Makhubu**.

Determination

[17] In asserting that the cow belonged to the defendant. The plaintiff relied on a police report which when read revealed two-fold information. The first information from the police report reflected:

“A docket was opened and the owner of the cow Simanga Makhubu. SMA. 68 years of Manyeveni area was charged for allowing animal on the public road.”

[18] From the above, plaintiff testified that defendant was the owner of the black cow as the police took the ear tag of the cow to investigate from the veterinary offices the owner. They then handed him the said report. From this report, as clearly outlined, the defendant is identified as the owner of the cow.

[19] The second information relied upon by plaintiff to assert that defendant was the owner, emanated again from the police report. The police report further revealed:

*“He (**Simanga Makhubu**) appeared before Manzini Magistrate court on 24th August 2016 where he was found guilty and was sentenced to 5 months imprisonment with an option of a fine of E500.00 which he paid.”*

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[20] The plaintiff testified under cross-examination that the defendant conviction reaffirmed the police investigation that he was the owner of the cow. Further that he paid the fine of **E500.00** gave more credence that he was the owner of the cow under issue. The plaintiff also testified that subsequent to the police investigation, defendant arrived at his work place. He inspected the motor-vehicle. When shown the quotation, defendant offered to purchase the motor-vehicle for the sum of **E65 000.00**. He undertook to return with the purchase price and to tow the motor-vehicle to his possession.

[21] On the other hand, defendant ferociously denied that the cow belonged to him. He stated in chief and under cross-examination that the cow belonged to his deceased father who passed on ten years ago. He was adamant throughout the entire trial that the cow belonged to his deceased father. He reasoned that the police made an error to advise the plaintiff that the cow belonged to him. He referred the

court to the two correspondences authored by Lobamba veterinary office.

Assessment of the evidence

[22] The first port of call is to examine the two correspondences relied upon by the defendant to ascertain whether his say so could be verified as he submitted the same as evidence of his testimony that the black cow neither belonged to him nor was he in control of it.

[23] It is not in issue that the police removed the ear tag and used the number thereto to investigate the owner of the cow. It is with almost certain that the ear tag provides the correct information on the registered owner of a cow and the court takes judicial notice of the same. Now turning to the two correspondences marked Exhibit 1 and 2, they read:

“Government of the Swaziland

Ministry of Agriculture-VET Department

Tell: (268) 24161231 P. O. Box 10

15th July 15,2016

RE: Confirmation of livestock ownership

*I do hereby confirm and swore under oath that kraal **number 22 at LuyengoTA 488**under **Lobamba Vet Office** is registered under the deceased name, Benson **Makhubu** ID Number **N/A**, with (7) seven herd of cattle.*

I therefore have no objection for any help towards the animals of the deceased.

Your usual cooperation is highly appreciated.

Nathi Hlophe

Animal Health Inspector (AHI) 76806986

Veterinary Offices

P. O. Box 10

Mbabane

14th July 2016

To whom it may concern

I do confirm that Benson Makhubu – the late under chief Lembelele is still the owner of the cattle under kraal number 22 T/A 488 Luyengo. Simanga Makhubu is not the rightful owner of the cattle.

Yours faithfully

Clement Mthethwa. The Veterinary Assistant”¹

[24] Glaring from the above quoted correspondences is that they both do not mention the black cow’s ear tag number. They only refer to the kraal’s number. In brief, without the ear tag’s number of the cow which was used by the police to investigate the owner of the black cow, it cannot be said with certainty that the black cow which was involved in the collision with plaintiff’s motor-vehicle belongs to **Benson Makhubu**. The two correspondences at the instance of defendant are therefore not relevant to the enquiry at hand. The author ought to have paid attention not to the kraal’s number but to the number depicted on the cow’s ear tag in order to inform the reader of who exactly the owner of the black cow was.

¹ Page 23 & 24 of the book of pleadings

[25] Worse still both correspondences are completely silent on whose kraal was the black cow kept. This is more so as the defendant testified in chief:

Counsel Ms Dlamini : “In whose kraal is the cow kept?”

Mr. Simanga Makhubu : “At the time of the accident they were kept at my cousin’s place as there was a family dispute.”

[26] Now clearly the veterinary officer should have given us information about a black cow kept at defendant’s cousin’s kraal and not at **Benson Makhubu’s** kraal as the said cow was not kept there.

[27] In the analysis, the two correspondences i.e. Exhibit 1 and 2 are found to be of no relevancy to the question for determination as they do not support or bolster the defendant’s defence. This is more so when juxtaposed with the evidence as adduced by PW1 that the police used the cow’s ear tag to trace the owner of the cow. The scales of justice that was at equilibrium now tilts in favour of plaintiff.

[28] Defendant has denied the sale agreement of E65 000.00 for the damaged motor-vehicle. He however admits inspecting the said motor-vehicle at the plaintiff’s garage. He revealed under cross-examination of PW1 that he did so because he had been threatened by the police to go and inspect the said motor-vehicle.

[29] However, when the defendant took the witness stand, he testified in this regard:

Mr. Simanga Makhubu : *“The police also said I should go and have an inspection of the car which was involved in the collision. They did not tell me why I had to do the inspection. I did that.”*

[30] No further evidence was either put to PW1 of the nature of the threats by the police nor did defendant mention any threats forthcoming from the police in his evidence in chief. He obviously was not consistent in his evidence. In law, his demeanor is at stake and the court must consider such piece of evidence as an afterthought. It has no probative value for it to be put on the scales of justice. This again tilts the scales of justice further in favour of plaintiff. The evidence by plaintiff that he went to inspect the motor-vehicle because he was the owner of the cow that was involved lends credence in the circumstances therefore.

[31] Defendant also testified that even though he found a short man at PW1’s garage where there were many motor-vehicles parked, he did not speak to anyone. He merely inspected the motor-vehicle and left. The question is, how did he know which motor-vehicle to inspect if he did not speak to anyone? The answer is only privy to him. In the

court's eye, the evidence by PW1 and PW2 that defendant spoke with them on the day he came to inspect the motor-vehicle must be accepted therefore.

[32] Defendant further disputed his conviction at the Magistrate court. He explained that he only answered that he knew the cow in issue and not the offence. The Magistrate was mistaken. The Magistrate appeared to appreciate his or her error later when he was asked to say something. This was after he was convicted. It is however, common cause that the defendant did not challenge the magistrate either by review or appeal. He paid his fine. The combined summons in this case were instituted on 5th July 2016. Defendant filed his notice of intention to defend on 15th July 2016. At paragraph 8 the plaintiff alleged:

“8. The Defendant was charged at the Malkerns Police Station for allowing a cow to be on a public road. The Defendant appeared in the Manzini Magistrate Court on the 24 August 2015 where he was found guilty and was sentenced to a fine which he paid.”²

[33] The trial was set down on 29th January 2020 for 30th March 2020. In other words since 15th July 2016, defendant knew that the plaintiff was relying on his conviction as part of his assertion that he was the owner of the cow. He did nothing in law to reverse the Magistrate “*wrong*”

² Page 5 paragraph 8

conviction and sentence. He pleaded that he appeared in person as he was not represented. It is not clear why, having sourced an attorney since 15th July 2016 to date of hearing of this matter, he did nothing to reverse such conviction. Obvious, his conduct is inconsistent with his say so. The only plausible inference therefore is that his evidence that the magistrate was wrong in convicting him is an imagination of his mind. It cannot stand in a court of law. It must be rejected.

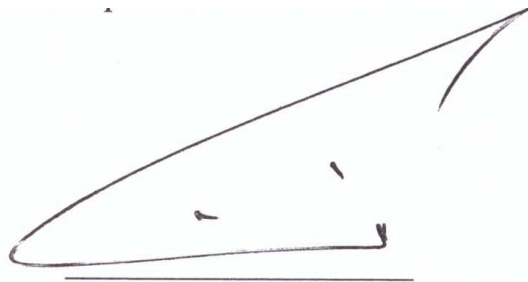
[34] In the above, I find that the defendant is liable. No evidence was adduced to contest the sum claimed. In the result, I enter the following orders:

34.1 Plaintiff's cause of action succeeds;

34.2 Defendant is ordered to pay plaintiff the following;

2.1 E95 500.00;

2.2 Costs of suit, including costs of application for absolution from the instance.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that curves upwards and then downwards to the right, ending in a sharp point. There are a few small, scattered ink marks below the main signature.

M. DLAMINI J

For the Plaintiff : P.S. Dlamini of Boxshall-Smith Associates

For the Defendant : M.S. Dlamini of M.S. Dlamini Legal

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