

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 15/2002

In the matter between:

SONTO MILDRED SHIBA

APPLICANT

In Re:

SONTO MILDRED SHIBA

APPLICANT

And

**SANDILE MYENI N.O. MAJAHENI
AARON TSABEDZE EVART TSABEDZE
ESAU TSABEDZE AMBROSE
TSABEDZE**

**1st RESPONDENT 2nd
RESPONDENT 3rd
RESPONDENT 4th
RESPONDENT 5th
RESPONDENT**

In Re:

ENOCK SHIBA

APPLICANT

And

**MAJAHENI AARON TSABEDZE EVART
TSABEDZE ESAU TSABEDZE
AMBROSE TSABEDZE**

**1st RESPONDENT 2nd
RESPONDENT 3rd
RESPONDENT 4th
RESPONDENT**

**CORAM:
FOR THE APPLICANT: FOR
THE RESPONDENTS:**

**ANNANDALE-J.
MR. NGCAMPHALALA
MR. B. J. SIMELANE**

**JUDGMENT
17th DECEMBER 2009**

[1] Disputed ownership of cattle has been central to this protracted litigation which commenced as long ago as 1999. Various legal remedies have been sought and obtained. The matter has also been enrolled as an appeal.

[2] Initially, under civil case No. 516/99, Enock Shiba, the then Applicant, was ordered on the 10th May 2001 to forthwith return 19 head of cattle to Majaheni Aaron Tsabedze, as well some personal belongings, to Rose Tsabedze .

[3] According to the Respondent's learned counsel, the Court of Appeal subsequently confirmed the initial order relating to the return of 19 cattle plus their progeny, which resulted in an attachment by the Deputy Sheriff on the

30th May 2001 of twenty cattle from the kraal of Enock Shiba. No such Appeal Judgment is available for confirmation and elucidation, but Exhibit "H" is an Order of the Appeal Court, reflecting that on the 29th May 2002, the appeal noted by Enock Shiba was withdrawn.

- [4] Evidently, counsel is mistaken to say that the Court Appeal "confirmed" the initial order. In fact, the appeal was withdrawn by Enock Shiba. It would be more correct to say that by a withdrawal of the noted appeal, the challenge against the initial order fell away and that it retained finality.
- [5] The withdrawn appeal follows one year after the attachment of the 19 cattle. Also, the appeal which was withdrawn came with an order against the Appellant, to pay the costs of the appeal. It was followed by a writ of attachment, issued on the 28th November 2006, to recover taxed costs of the Respondents.
- [6] To further complicate the matter, Deputy Sheriff Sabelo Maziya attached 15 cattle from Majaheni Aaron Tsabedze on the 14th February 2007, according to his return, wherein the 1st respondent is cited as such while Sandile Myeni, *nomine officio*, is the 1st respondent in the interlocutory application. Therein, a different attachment of some 17 head of cattle, effected in December 2006, come into play.
- [7] There are thus three different attachments of cattle that feature in this matter: the first attachment of 19 cattle were in respect of the original application, which was taken on appeal but which appeal was withdrawn with a costs order against Enock Shiba. These cattle were taken from Enock Shiba, who was the original Applicant. The second attachment was made in December 2006 by Deputy Sheriff Sandile Myeni, who took 17 cattle from Sonto Mildred Shiba, the present applicant. This was to satisfy taxed costs of E7,123.88 relating to the original application and E17, 567.30 being costs in the withdrawn appeal. It is this attachment which gives rise to the present application. The third attachment, by Deputy Sheriff Maziya on the 14 February, 2007 followed on the heels of a rule *nisi* issued on the 2nd February 2007 wherein restoration of

the 17 cattle under attachment was ordered. Majaheni Aaron Tsabedze, from whose possession they were re-attached, says that he received the cattle from the Deputy Sheriff for safekeeping pending them being sold on an execution sale, as the Sheriff did not have a suitable place to keep them. However, this statement by him refers to the attachment of 19 cattle by Sheriff Myeni and not the 15 cattle taken by Sheriff Maziya. Nevertheless, it seems to me that it is common cause that after Sheriff Myeni attached 17 cattle from Sonto Mildred Shiba, Sheriff Maziya attached 15 cattle from Majaheni Aaron Tsabedze, pending the outcome of the rekindled litigation. It also seems that the discrepancy between 17 and 19 cattle averred are to be in order to leave two cows for milking, but in the final analysis, it is not the cause of the dispute.

[8] The present dispute came before court under the guise of an urgent application.

Therein, by motion proceedings, the present Applicant sought and obtained an interdict with interim and immediate effect, *ex parte* and with waiver of the Rules of Court pertaining to the usual forms and procedures, for relief to "Restore possession *ante omnia* of the herd of 17 cattle taken by the Respondents, to Applicant, forthwith", as well as applicable ancillary relief.

[9] With this relief essentially being spoliation proceedings brought on the 1st February 2007 and granted on the following day, it resulted in yet further protraction of the initial issue. Instead of restoring possession and thereafter ventilating issues in dispute, the Respondents challenged the merits of possession, contrary to the well established principles relating to spoliation proceedings.

[10] With reference to the loose leaf edition (1995) of *Erasmus et al*, Superior Court Practise, appendix E9 (pp 1-14), the legal position is quite settled. The object of a *mandament van spolie* is

"...merely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision is required, it shall be given by a court of law, and not affected by violence. If before

the spoliation either party needed a legal decision to establish his rights, he requires it just as much later, as before, the order. He is in no better, and no worse, position than what he was before the spoliation. There is consequently nothing inherent in a *mandament van spolie* which demands that it should be conditioned as being granted *pendente lite*.' (Mans v Marais 1932 CPD 352 at 356).

The rationale behind a spoliation order is to prevent people from taking the law into their own hands, so to speak, avoiding dispossession of another without lawful authority. If it does so occur, restoration of possession will be ordered summarily by the courts, *status quo ante*, before any inquiry is held into the merits of the dispute, in accordance with the maxim *spoliatus ante omnia restituendus est*. Therefore, and in the ordinary course, the courts will not entertain allegations pertaining to the lawfulness or otherwise of the applicant's possession, nor delve into the question of ownership, or claimed damages or counterclaims or claims for the value of the despoiled property.

[11] A spoliation order normally is final and not contingent on the eventual outcome of litigation or pending anything else. It focuses on the protection of possession and no more, having the character of a possessory remedy, separate from ownership. Thus even an acknowledged thief is entitled to the *mandament van spolie* where his possession has been unlawfully uprived by the real owner of the thing he stole.

[12] All that need to be shown by the applicant for a spoliation order is that he must allege and prove that he was in possession of the property and that the respondent deprived him of possession forcibly or wrongfully, against his consent (see *Nino Bonino v De Lange* 1906 TS 120 at 122 and numerous subsequent authorities to this effect).

[13] The respondent in spoliation proceedings might succeed if he successfully raises a defence of denial, or that restoration is impossible, or by way of counter spoliation which was effected immediately or *instanter*, namely that the deprived

possessor retook possession from his spoliator without first obtaining an order of court to do so, immediately, then and there, following the first act of spoliation.

[14] It became quite apparent during the course of hearing argument in the spoliation application before this court, that there is more than what meets the eye. The background and history of this matter, as briefly sketched above, has been very long winded and was side tracked by unfortunate events and attachments ostensibly sanctioned by orders emanating from legal proceedings in court. One thing lead to the other and each party or grouping of litigants thought that they acted under lawful authority. A marriage ended with a spouse who had an adverse order against him and his estranged wife whose status became clouded because of a bigamous traditional union became embroiled in a battle waged by others.

[15] It thus became necessary to open the door to the litigants to deviate from the legalese path, in accordance with the principles pertaining to spoliation proceedings, to rather look at the possibility of bringing closure to almost a decade of legal proceedings between them. Real and substantial Janice between opponents would not have been achieved if the court had to follow the easier and uncomplicated route of merely dismissing the stated defence which was raised in the spoliation proceedings. No closure could have been obtained and it inevitably would have resulted in yet further legal proceedings, which by this time, resulted in costs which far exceed the initial amount owed by Enock Shiba.

[16] In the event, the legal representatives came to a mutual understanding as to how closure could be obtained. The essence is that ownership of the attached cattle is to be determined by the court and it is set out as follows, in paragraphs 5 to 6 of Exhibit "A", which reads in full:

"Whereas :-

(1) *The Applicant made application to the Honourable Court for an order inter alia for the return of 17 head of cattle that had been attached from her by the Respondents;*

(2) *The Respondents filed opposing affidavits alleging that the cattle attached belong to Enoch Shiba, Applicants husband, against whom an order had been obtained.*

(3) *The Applicant alleges that she was in peaceful possession of the herd of cattle and that in any event they did not belong to the said Enoch Shiba against whom a writ of Execution had been issued by this Honourable Court.*

Now the parties have agreed as follows:-

(4) *Despite the prayers in the Notice of Motion, the main issue to be determined by this Honourable Court (is) whether the cattle attached or sought to be attached by the Deputy Sheriff belong to Enoch Shiba.*

(5) *That in order to determine this issue it is necessary to lead oral evidence*

(6) *The basis for this is that the question of the ownership of the cattle determines whether they are liable to attachment for the debt of Enoch Shiba ".*

[17] For the aforesaid reasons, and because this change in the course of the pending proceedings came about by consent, it is not necessary to delve any further into the merits of doing so. This court then made an appropriate order in accordance with the consented agreement and heard oral evidence as to the ownership of the attached cattle. The determinative issue to decide, namely ownership of the attached cattle, thus overtakes the initial relief that was sought to be obtained. The objective of ownership-determination has the purpose of deciding whether the attachment of 17 cattle by Sheriff Maziya was proper. If so, the cattle may be sold to defray the costs order against the late Enoch Shiba. If not, the attachment must be set aside. The crux of the matter is thus whether the cattle are the property of Shiba, against who

execution may be levied, or whether the cattle belong to the Applicant, Mildred Sonto Shiba, falling outside his estate and hence not liable to satisfy the claims against Enock shiba.

[18] The applicant testified at length. She is the second wife of Enock Shiba, while Rose Tsabedze, a sister of the four Tsabedze Respondents, was his first wife. When Sonto married Shiba in 1997, he had cattle in his kraal, estimated to be around 21. Rose and Enock Shiba separated in 2002. She soon returned with her four brothers and they took her personal items as well as 11 cattle, which cattle were returned after legal proceedings were instituted by Enock.

[19] She says that the Tsabedze also went to court and obtained an order. The Sheriff came to attach 11 cattle, plus 8 of their progeny, and an additional two cattle, also averred to be progeny, 21 cattle in all, which left the kraal empty. This situation, she said, caused her to go to her own relatives where she obtained some cattle in order to plough and for milk. She says that six cattle came from her mother and two from her Aunt and that a further five were born from them, a total of thirteen. In cross-examination, she said that a further five came from her cousin, who asked her to look after them. When re-examined, she said that he is Zakhele Thwala and that the six from her mother were her own *insulamnyembeti* and its progeny.

[20] When she borrowed the cattle from her mother and Aunt, she registered them under the name of her husband at Malindza dip tank before she moved to go and stay at Ndzangu, her husband's parental home. She added that before moving, the cattle were first registered at Mpaka, being the closest dip tank to their home, after building their new home. Having moved with the cattle to Ndzangu, they were then registered at Lugogo dip tank, under her own name, at request of her relatives in order to avoid them being attached as property of her husband, Enock.

[21] It was in December 2006, she said, that Sheriff Myeni came to take cattle and a motor vehicle, but he did not find her as she was at the dip tank. A week later he

returned, finding her at the dip tank and a fracas developed between them. She insisted that the cattle were hers while he insisted on taking them. She says he forcefully held her. After dipping her cattle and while driving them home, with the Sheriff still demanding the cattle, the four Tsabedze Respondents emerged from bushes, armed with bush knives. Being overwhelmed, they then took her cattle and she ran to the police, who in turn referred her to a lawyer. Eventually through legal assistance, she recovered fifteen of the seventeen cattle taken from her, following attachment by sheriff Maziya from Majaheni Tsabedze and his sons, where they were kept for a month and a half. Thereafter, she returned the recovered fifteen cattle to their owners, the people she obtained them from.

[22] In cross-examination, it was put to her that she moved the cattle from Mpaka dip tank to Lubungu on the 4th December 2002, a date she could not verify from memory, and that they moved home from Mpaka to Kandzangu in June 2006. Her cousin's five cattle were received shortly after those from her mother and Aunt and all were moved from Mpaka two weeks later.

[23] Seemingly, she did not fully instruct her attorney about the sources of where the cattle she claims came from, such as that five come from her cousin. She was taken to task as to why she describes the cattle obtained from her mother as "belonging" to her, which is not strictly correct as she held possession on behalf of another. She said that she obtained possession very soon after the 21 cattle were attached from her husband's kraal, within a week or so, before the 21 attached cattle were removed from the dip tank register.

[24] More central to the dispute is the challenge to her evidence that the kraal was empty after the attachment of 21 cattle. It was put to her, and vigorously denied, that 13 cattle still remained thereafter, which she disputes by saying that they would refer to these which she got from her relatives. This is in stark contract to her oral evidence that the kraal was empty after the Sheriff effected the attachment.

[25] Her oral evidence that the kraal was emptied by the attachment also contradicts her evidence on affidavit, where she stated that "two herds (sic) of cattle that were brought by my aunt remained after the 1st Respondent had taken the 21 herd (sic) of

cattle" (para 13.1, page 9 of the record. Emphasis added). In cross-examination she said that those two cattle were brought after the attachment.

[26] This anomaly casts doubt about the veracity of her evidence, similar to her belated revelation about the cousin who would have brought a further 5 cattle, when she found herself in a difficulty to detail the origin of 13 herd of cattle, which later became 17. Her explanation that she told her lawyer about the further five cattle but which fact was not mentioned in her affidavit remains equally unconvincing.

[27] Yet a further source of apprehension arises in relation to the source of where her aunt would have obtained the two cattle lent to her. In her affidavit, she says that they "... were bought by (her) Aunt, (her) mother's sister from (her) husband ..." (para 13, page 9 of the record). In her oral evidence, when cross examined, she had it different. She said that her aunt bought them from one Maziya at Mpaka dip tank.

[28] In all, the Applicant seems to be adamant that the attachment by the Sheriff of 21 cattle from the kraal of her husband left it empty and that the 13 cattle in issue, which number increased to 17 in her application, to take into account their progeny, entered the kraal only after the initial attachment. She wants the 17 cattle returned to her. Her evidence about the acquisition of these, their sources of who they were obtained from and when it happened, is difficult to reconcile with her own evidence. Different versions emerge when regard is given to her affidavit, her evidence in chief and her evidence under cross-examination.

[29] I do bear in mind that as applicant in civil litigation she does not bear an onus of proof beyond reasonable doubt. She only requires to persuade the court that the balance of propabilities favour her case, but as is shown below, the Respondents also have a say in the matter and their version has to be compared with that of the Applicant before a final factual finding can be made.

[30] The Applicant called Enock Shiba as witness to support her version. He is an old man, married to both the Applicant and his first wife, Rose Tsabedze , under Swazi customary law.

[31] While married to Rose, the first wife, he had more than 20 cattle, none of them brought in by her. After he took a second wife, Sonto, his first wife left him and returned to her parental home. His evidence is that Rose thereafter returned with her Tsabedze brothers, Esau, Evert and Ambrose (the initial 2nd, 3rd and 4th Respondents). In addition to removing her belongings, they also took eleven of his cattle, ostensibly as payment for dowry, plus some of his own household goods.

[32] With legal assistance he recovered his cattle but was told to restore 19 cattle after the Tsabedzes noted an appeal. When he did not do so, it resulted in an attachment of 21 cattle by a Sheriff, who told him that it was to pay court costs. The attachment left him with an empty kraal.

[33] He then testified as to how his kraal was re-stocked, with his wife Sonto (the applicant) obtaining 6 cattle from her parents. He seemed to have some difficulty in recalling exact details and numbers, taking his time to think about it and clarifying details.

[34] At first, he said that she obtained "six cattle and one *insulamnyembeti*", thereafter saying that the *insulamnyembeti* was amongst the six, namely the *insulamnyembeti* together with its progeny. Nevertheless, his evidence is that altogether she brought 13 head of cattle: 5 from her cousin Zakhele, 2 from her aunt and 6 from her parental home.

[35] He says that all of these cattle were loaned and not given or bought, since they had none to plough with. The Sheriff depleted his entire stock, he had none of his own cattle remaining. His wife borrowed the 13 cattle within two weeks after his 21 cattle were attached. None of the 13 cattle became his property though they were registered in his name at the Mpaka dip tank, under kraal 42.

[36] Thereafter, he and his wife relocated from Malindza to Ndzangu, where he built a homestead for his second wife. They now use the dip tank at Lubungu,

having also taken the cattle along, with the cattle being registered under the name of his wife, as requested by the owners of the cattle. He says that he still has no cattle of his own.

[37] While at Lubungu, Sheriff Myeni (the present 1st Respondent) found him and said that he came to attach his car and cattle. Despite stating the car to belong to his cousin, it was taken by the Sheriff and left at the Police Station. The following week, despite telling the Sheriff that the cattle also do not belong to him, he was told that the Sheriff attached 17 head of cattle.

[38] They reported the matter to the Police and were referred to an attorney, who had the car returned on production of the registration document to the Sheriff. The cattle were returned to his wife.

The old man was cross examined in detail and at length. Although he persists with his version in the main, doubts crop up when smaller details are pinpointed. His memory seems selective at times such as being unable to give the name of his mother in law. It is understandable that not all men are on good terms with in-laws, but it is exceptional to not know their names. Nothing particular hinges on this, equally so by being unable to recall different years, but it does not favour his evidence with a reassuring ring of reliability.

[39] He could not put a name to the "maternal aunt" of his wife who so kindly would let them have her cattle. His explanation as to how those two cattle came to be with the Aunt, then given to his wife but first kept with one Maziya is not satisfactory, especially so when it was put to him that those transactions would have been recorded in a dip tank register, but that is not so recorded. He also could not say from whose kraal the other cattle came to be transferred to him.

[40] The scepticism which his evidence raises is similar to that of his wife - they have to justify the number of cattle in their kraal in order to let the numbers balance, but do not reassuringly explain their sources. People who are said to have provided the cattle are said to have died recently, and obviously cannot be called to testify. None of the three kind hearted givers of cattle confirmed their gifts or loans, even

by way of affidavit. It must be remembered that the spoliation application first come to court in February 2007, a long time before the alleged death of Maziya.

[41] The problem that I have with the evidence of the Applicant and her husband is this:- although they corroborate each other on the bigger issues, it is their responses as to detail which creates a feeling of unease. If their evidence was all that was to be considered, it might have had a different impact. However, there is also another version which comes to be considered and compared. The two versions are mutually exclusive and at odds with each other, incompatible with any measure of compromise. It is when the two diametrically opposed versions are balanced, one against the other, that the potential distrust alluded to above concretises. The version of the Applicant then becomes implausible and improbable while the Respondents present a far more credible and plausible case, supported and corroborated by factual and independent evidence.

[42] The Respondents rely upon the evidence of Majaheni Tsabedze, father of the first wife and second witness, Rose, supported by an independent dip tank inspector, or assistant veterinary officer, Mr. Motsa.

[43] The 1st Respondent is the father in law of Enock Shiba, who said that when he married his first wife, Rose Tsabedze in 1992, he gave her 19 cattle. These were *sisaed* or loaned to her as Enock Shiba had none of his own cattle. When the marriage came to an end, arguments over the cattle ended up in a court order to recover his 19 cattle plus their progeny.

[44] He contests that he ever demanded *lobola* cattle from Shiba, as was claimed by Shiba, since he well knew that Shiba had no cattle of his own in any event. He stressed that neither the Applicant's mother nor her aunt gave her any cattle, likewise with Zakhele Thwala of Malindza. He disputes the very existence of Zakhele Thwala, late or alive, as is also the position with the other witnesses. If anything was to be gained if it was untrue, dispelled by this denial, it is dispelled by Motsa, the dip tank man, who knew all cattle owners in his area.

[45] He disputes the Applicant's version that Shiba was left with an empty kraal after the attachment of his own cattle, or that the second wife obtained cattle from her relatives and friend. Those which remained still belonged to himself, Tsabedze.

[46] Rose Tsabedze, the first wife, testified that Shiba had no cattle when they were married. She contests his evidence that he worked in the South African mines. After the marriage, she received as a loan all 19 cattle which her father owned, in order to use them to make a living.

[47] The cattle were registered under her name at first, later under the name of Shiba, following their recovery after theft of the stock.

[48] The union between Shiba and his first wife, Rose, came to an end when Sonto, the Applicant, entered the scene. Rose's father wanted to have it verified that the marriage was over, whereafter he demanded the return of his cattle, but which was initially interdicted. Since Shiba did not own any cattle of his own, the remaining 13 cattle in his kraal, after her father removed his 19 (plus an additional two) still belonged to her father, Tsabedze, as they were progeny of the initial 19.

[49] She adamantly explained that Sonto did not bring in the remaining cattle, nor that her relatives supplied them. She said that although the remaining cattle, property of her father, were transferred to another kraal and registered under the name of Sonto, it is not true that they were obtained from her relatives and the late Zakhele Thwala, as claimed. She knows the relatives but the Thwala person, who died shortly before she testified, had no cattle. Also, there was no person called Zakhele Thwala in their area.

[50] Having known Shiba as a local since before they married, she strongly contested his stated employment in the mines of South Africa as source of money to buy cattle of his own.

[51] The assistant veterinary officer in charge of the Mpaka dipping tank provided independent and objective verified evidence in support of the Respondents. Mr. Motsa was responsible for the keeping of stock registers at the dip tank since 1991. He recorded the movement of cattle between different kraals in the area and the number of cattle which their owners had.

[52] He testified to the fact, supported by the registers which he kept, that in 1991, 19 head of cattle were transferred from kraal number 1, belonging to Majaheni Aaron Tsabedze, to kraal number 134 of Rose Tsabedze.

[53] In June 1997, kraal 42 of Enock Shiba did not receive a brown heifer or cow, nor does his records reflect the transfer of such animal to Pauline Sibandze of kraal 91. Pauline is known to him as "Bonane".

[54] On the 30th May 2002, two head of cattle were transferred out of kraal 42 of Enock Shiba.

[55] On the 30 May 2001, 20 head of cattle were removed from kraal 42 of Enock Shiba, out of a total number of 38 at the time. He said that 16 cattle remained, although his register indicates an initial figure of 17, corrected in his register to 18.

[56] On the 20 November 2002, thirteen cattle were transferred from Mpaka dipping tank to Lubungu, from the kraal of Enock Shiba, to be registered under the name of Mildred Shiba. The relevant stock Removal Permit, Exhibit "B", bears this out. A balance of 3 cattle are thereafter reflected in his register, which cattle he says were reported to him as being missing.

[57] He did not record any transfer of cattle from kraal 91 to kraal 42 of Enock Shiba in 1992 and he does not know of a person called Zakhele Thwala at Mpaka who owned any cattle.

[58] He handed in copies of his original records as exhibits.

[59] The evidence of Mr. Motsa emphasizes the difficulty to accept the evidence of the Applicant. She testified that the 13 cattle she claims to be hers were given to her by her mother, her aunt and Zakhele Thwala. The dipping tank register does not support her claims. Mr. Motsa testified that transfer of stock is recorded by the veterinary assistant, such as himself, at Mpaka. He did not

record the claimed transfer from kraal 91 to kraal 42, as he would have done if the Applicant received cattle from her mother.

[60] The registers also do not support her claim of having received two further cattle from her aunt, nor any from Zakhele Thwala. The absence of any reference to Zakhele Thwala in her affidavit, as well as the person being unknown to anyone except the Applicant and her husband, already raises a suspicion. The suspicion is fortified not only by his untimely death, or that it become convenient to refer to him in order to let the numbers balance, but the dip tank register and its keeper do not support her version. On the contrary, Motsa does not know of any such person who had any cattle, let alone that he would have given cattle to the Applicant.

[61] It becomes even more apparent that the Applicant cannot be believed when the Respondent's version is considered. Contrary to the evidence by the Applicant, the records kept by Motsa clearly, independently and convincingly show that 19 cattle were received in the kraal of Enock Shiba, transferred by the father of his first wife, Majaheni Aaron Tsabedze.

[62] This was denied by Enock Shiba and his second wife.

[63] What much rather seems to be the factual position is that Shiba transferred the cattle to the name of his second wife, the Applicant, in order to avoid them being repossessed by the real owner, Majaheni Aaron Tsabedze, to avoid the consequences of adverse orders of the High Court.

[64] It is the latter 17 head of cattle which form the subject matter of the application, progeny of the initial herd of cattle placed under the care of Shiba's first wife, Rose Tsabedze. The kraal of Shiba was not emptied after the initial attachment, which might have prompted the second wife to borrow cattle from her relatives as she claims. After the initial 20 cattle were attached, at least 16 remained, a fact supported by the evidence of Motsa, and his register. He might not be the best of

bookkeepers and might fail a strict audit, but surely at least 16 cattle remained, reflected in his register as 17 after an alteration from 18.

[65] The issue to be decided by this court, as agreed between the parties, is whether the 17 head of cattle which the Sheriff attached, indeed belong to Enock Shiba. If so, they could be sold to liquidate his debts.

[67] In so deciding, I am mindful that the Applicant need only provide proof on a preponderance of probabilities, much less than absolute proof or proof beyond reasonable doubt.

[68] The evidence before court is that of five witnesses, plus documents in the form of dip tank registers and a Stock Removal Permit. When due regard is to be given to the evidence as adumbrated above, the Applicant dismally fails. No cogent and acceptable evidence was adduced in support of a finding in favour of the Applicant. It is riddled with contradictions, doubt and afterthought.

[69] Strongly in contrast is the version of the Respondents. They convincingly support their defence against the contentions of the Applicant. Their joint evidence persuasively tip the evidentiary balance in their favour. They successfully proved ownership, sufficiently so to for a favourable decision.

[70] In the event, the application is dismissed, with costs, and a declaratory order is made that the lawful owner of the 17 attached cattle is Majaheni Aaron Tsabedze, the second Respondent.

JACOBUS P. ANNANDALE

JUDGE OF THE HIGH COURT