

**PHILLIP SIHUBE MPOFU**

**Versus**

**JOSEPH NGWENYA**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 10, 11 SEPTEMBER 2002 AND 27 NOVEMBER 2003

*N Mathonsi* for the plaintiff

*C T Hikwa* for the defendant

Civil Trial

**NDOU J:** The plaintiff is a businessman and a farmer owning Ascort Farm. The defendant owns a homestead at village I resettlement area of Norwood. It is beyond dispute that the plaintiff's ten head of cattle went missing. Plaintiff's employees Smart Ngwenya and Rueben Ncube went looking for the missing cattle. They proceeded to village I resettlement area and found four of the plaintiff's missing cattle in the herd of cattle belonging to the defendant. Ngwenya and Ncube tried to recover the cattle from the defendant but the latter refused. They made a report to the plaintiff. They led the plaintiff to the defendant and the plaintiff saw his cattle grazing amongst those of the defendant.

The cattle in question were a dark greyish brahman ox, a dark cow with stripes, a brown cow and a light brown cow. The three identified these cattle as those belonging to the plaintiff and confirmed this by the fact that they all bore plaintiff's earmarks and his brand mark "J9" on the thighs and zone mark "W" on the fore legs. The earmark is a cut which is usually referred to in cattle business as a "skeyi".

Still the defendant refused to release the cattle. The plaintiff's legal practitioners addressed a letter to the defendant to release the cattle but the latter still

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refused. After these attempts there were steps taken, presumably by the defendant to superimpose a “V” brand mark on the plaintiff’s “J9” brand mark although the latter remained visible. At the commencement of the trial Mr *Mathonsi*, for the plaintiff, placed on record the fact that two of the four head of cattle had since been recovered by the plaintiff. The trial proceeded on the basis of two outstanding beasts i.e. the ox, whose value was amended to \$120 000,00 and one cow to \$70 000,00. The plaintiff accordingly seeks payment of the said value of \$120 000,00 and \$70 000,00 respectively.

### **Plaintiff’s case**

#### **Phillip Sihube Mpofu**

He testified that after his cattle went missing he received a report from his employees Ngwenya and Ncube. He went and saw his four cattle in the defendant’s herd. He identified the cattle by the features outlined above. He testified that the defendant’s area is in “V” zone i.e. the red zone and his own farm is in the “W” zone, which is a buffer zone. By the time he traced his four head of cattle they had already been branded “V” which meant that they could not be returned to his farm which is in the buffer zone. These veterinary legal requirements prevented him from immediately taking back his cattle.

He sought and obtained a provisional order of this court. He went to execute the judgment and managed to recover two of his four beasts. He placed the value of his missing ox at \$120 000,00 and the cow between \$70 000,00 and \$80 000,00.

I find that this witness is truthful and his testimony is overall credible. His evidence was confirmed in a material way by that of his employee, Smart Ngwenya whom I also find to be credible. The latter witness knew the cattle well as he was

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employed by the plaintiff specifically to look after the cattle. There is no doubt in mind that this credible evidence established that the plaintiff's four head of cattle were traced in the defendant's herd. The latter refused to release the beasts and retained custody. When the plaintiff subsequently obtained a court order the ox and once cow had gone missing.

### **Kindman Ndlovu**

He bought three head of cattle from the defendant between 15 and 19 July 1999. Amongst them was a dark grey brahman ox with horns. The ox had a "J" brand mark and another part of the brand mark was no longer clearly visible. The ox also had a "V" and a "W" zone marks. He slaughtered the said ox and sold the meat. This evidence is consistent with the probability that he was talking about the plaintiff's brahman ox that was seen at the defendant's pen. The plaintiff said the ox was the brahman type and this witness also bought a brahman ox. The similarities do not end there. The colour is the same i.e. greyish. The ox had brand mark "J". The ox was from the plaintiff's "W" zone which explains the presence of the "W" imposed by the veterinary officials. The ox ended in the "V" zone at the time it was traced by the plaintiff. This explains the presence of the "V" zone mark imposed by the veterinary officials. The latter witness is credible. There is no suggestion from the defendant that he is not.

### **Defendant's case**

#### **Joseph Ngwenya**

He bought five head of cattle from Rosebank Farm between late 1995 and early 1996. Some weeks later he was approached by a police detail from the stock theft section. He was ordered to keep the said cattle and look after them pending

police investigations. He did as directed by the police. The cattle were one greyish brahman ox, one red ox, two brown cows and one cow brown in colour with stripes. He kept the cattle for some time until upon his enquiry, the police told him they no longer had interest in the matter and their instruction to keep the cattle was no longer necessary. He conceded that he sold the brahman ox after receiving the letter from the plaintiff's legal practitioner about the disputed bovine. His explanation was that the letter was neither a court order nor did it specify which of the two oxen that he had bought from Rosebank Farm was being claimed by the plaintiff. He disputed the Deputy Sheriff's return which showed that he recovered a cow with "J9" brand mark and "M" zone mark. I find that the defendant is being dishonesty in this regard. The return of the Deputy Sheriff was never an issue until under cross-examination it dawned to him that by accepting the findings of the Deputy Sheriff he would be agreeing with the evidence of identification of the cattle by the plaintiff and Smart Ngwenya. Overall I was not impressed by the demeanour of the defendant. He was not being truthful and deliberately tried to confuse this matter with the criminal case.

**Jonathan Ndowane**

He is the defendant's neighbour and also the local dip tank attendant. He says in January 1996 the defendant brought five head of cattle which he alleged to have purchased at Rosebank Farm. He could not recall how these beasts looked like except the whitish going toward grey ox with horns. He said he cannot dispute that the cattle had the plaintiff's brand mark. This evidence does not take the case any further. In any event the witness was not even on the defendant's list of witnesses and said he was only called on the day he testified. He had destroyed dip tank records relating to these cattle as he keeps his records for two years before destruction.

**Saijeni Ndlovu**

He is the defendant's erstwhile employee. He also talked about the criminal trial in which the trial magistrate carried out an inspection *in loco*, and the plaintiff failed to identify his beasts amongst those gathered. He stated that the plaintiff and his employees went away but later returned on another date and identified the cattle forming subject matter of these proceedings. From his testimony it is clear that the criminal case is irrelevant to these proceedings as the disputed cattle were only traced in the defendant's pen after the incidence involving the inspection *in loco* by the magistrate in the criminal matter.

I am satisfied that the plaintiff's evidence has established on a balance of probability, that the four head missing from the farm were traced to the defendant's herd. Steps were taken to recover them and the defendant resisted claiming, *inter alia* that he bought them from Rosebank Farm. Two disappeared while the bovine were in his custody and he was preventing the plaintiff from retrieving them. He sold the disputed brahman ox when the dispute was already on over its ownership. Two cows were subsequently recovered by the plaintiff. I am satisfied that the plaintiff is entitled to compensation for the brahman ox that the defendant sold and the other cow that he failed to account for.

I am further satisfied that the value of \$120 000,00 for the brahman ox and \$70 000,00 for the cow is fair. The plaintiff is a cattle farmer and his assessment appears fair. My general knowledge based on cases involving cattle in both criminal and civil matters entitles me to agree with the said valuation – *Muzondo v Muzondo* 1985(2) ZLR 240 at 245D and *Esso Standard SA (Pty) v Katz* 1981(1) SA 964 (AD) at 969 H.

I, accordingly, make a final order in the following terms:

1. That the plaintiff be and is hereby declared the owner of the dark greyish brahman ox, one dark cow with stripes, one brown cow and one light brown cow all bearing a “skeyi” ear mark and a brand mark comprising a “J9” on thighs and a “W” on the shoulders found at the defendant’s cattle pen.
2. That the defendant be and is hereby ordered to pay the plaintiff the sums of \$120 000,00 and \$70 000,00 for the ox and the cow that were not recovered respectively together with interest thereon at the prescribed rate from the date of judgment to date of payment in full.
3. That the defendant bears the costs of suit.

*Webb, Low & Barry* plaintiff’s legal practitioners

*Mabhikwa, Hikwa & Nyathi* defendant’s legal practitioners