

SILETHEMBA MSIMANGA  
**versus**  
MCAZULULO NDLOVU

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 2 AND 3 MARCH 2017 AND 16 MARCH 2017

### **Civil Trial**

*B Masamvu* for the plaintiff  
*V J Mpofo* for the defendant

**MOYO J:** The parties in this matter lived as husband and wife in a customary law union for a period of 4 years. They then separated. Upon separation, the plaintiff did not take any of the assets they had amassed together. She now seeks an order that she be awarded a half share of 35 cattle, half of 35 goats and half of 7 donkeys. This is the only issue that was referred to trial after the parties had agreed on the rest of the issues.

The issues for determination before this court are whether the parties did own 35 cattle, 35 goats and 7 donkeys in their partnership which lasted 4 years.

The second issue is how the livestock and the donkeys found to be owned if any, on issue number one should then be shared between the parties.

The burden of proof on the quantity of the animals is obviously on the plaintiff who is claiming same.

The plaintiff's case was as follows:

Plaintiff herself gave evidence. She told the court that she was in court to lay a claim on beasts she bought between 2005 and 2008. She said she was a cross border trader, although under cross-examination she told the court that she only went to the Republic of South Africa once. She said that defendant would bring stock for her to resell and that defendant did this on her instructions and that she would give the defendant some money to do so. She said after

selling she would buy cattle. She said by 2008 when she left, there were 35 cattle which included hers and the defendant's. She said there were 35 goats and 7 donkeys. She then produced a letter from the veterinary officer as evidence on the number of cattle. She said she is claiming 50% of the animals. She could not tell the court how much she realized in her purported business at a time. She said she bought some beasts but when asked to describe just one beast that she bought she said she could not remember as it had been a long time. Pressed further on how many beasts precisely she bought, she said she bought 8 goats. She said she bought 1 goat from a neighbour Mr Antony Sibanda. She said she exchanged one blanket for the goat. Asked where she bought the other goats, she then said some of the goats were bought through the defendant as he transported people to the Republic of South Africa.

She said she bought one donkey.

I will hasten to point out that the plaintiff did not answer many cross examination questions, one would have expected the plaintiff to give a detailed account on the acquisition of the animals, simply because she was based at the homestead when the defendant travelled between Zimbabwe and Republic of South Africa.

One would have expected the plaintiff not to just generalize on the cattle, she should have told the court clearly on their acquisition even if she could not recall how all of them were acquired it would not have been too much to expect her to tell us how the sizeable number of that herd was acquired. The plaintiff gives an impression that basing on the information from the veterinary officer, she just made a bold assertion that there were 35 beasts. The problem is that the veterinary officer came into the picture a lot later, after plaintiff had left in 2008, so in this case it is plaintiff's own evidence that would assist the court, but the information that she has is very scant. It is almost unconvincing when a litigant, gives a scant testimony before the court and they run the risk of failing to prove their case, as the litigant must provide sound information and a detailed account of what really transpired in the acquisition of the cattle, to formulate the basis for her claim and to allow her to prove on a balance of probabilities, that indeed cattle were acquired of such a number in this manner and therefore she would be entitled to so much share. Plaintiff's father gave evidence for the plaintiff. I will hasten to point out that he was a very bad witness, he did not take the plaintiff's case any further, in fact some of his averments dented the

plaintiff's case in that he could not hide from the court his deep interest in the matter. He made assertions that he could not vouch for in support of the plaintiff, which he had to later disown. What is significant about his testimony is that he said the parties had 67 cattle and that he had known this personally and had in fact countend the beasts while they were inside defendant's kraal. He said when the defendant separated with his daughter they had 35 cattle, 20 something goats and 7 donkeys. He said the defendant had 67 beasts last year in March and he had personally counted them in the defendant's kraal. Pressed further, he then disowned that fact and then told the court that he got the information from the veterinary officer.

He insisted that his daughter left 35 herd of cattle at the defendant's homestead. He told the court, contrary to what the plaintiff had told us, that her daughter made several trips to South Africa using public transport, in her trade and yet the plaintiff herself said she only made one trip. Plaintiff's father also told the court that plaintiff bought 5 goats from him with one blanket. Plaintiff herself told us that she bought one goat from Anthony Sibanda with a blanket and that she could not remember where she bought the rest. I do not believe that plaintiff could forget buying 5 goats from her own father and I am inclined to believe that the father just made this statement up in a bid to assist the plaintiff as he was clearly biased towards the plaintiff. Plaintiff's father was therefore not a credible witness in my view, he was too interested in the outcome of these proceedings so much so that he went an extra mile to fabricate facts in a bid to assist the plaintiff.

The defendant himself said prior to his marriage with plaintiff he had 5 beasts inherited from his father. He said they acquired 3 beasts with plaintiff one cow and two oxen and that the cow they sold leaving two oxen. He said the other beasts belonged to his uncle Dominic as Dominic's homestead fell apart and he had to take over the animals. He explained to the court the four stock cards that he had, that one was for the beasts he acquired after plaintiff had left and that the first one had the inherited cattle and Dominic's cattle. The other two he also said they belonged to two other relatives who had no homesteads but were based in the Republic of South Africa.

He called Lakha Ncube, who despite his truthfulness on the lack of precision on the numbers, he did confirm that defendant did inherit some beasts from his late father. He said he

was personally involved in sharing the animals and the defendant did get a share. He further confirmed that when plaintiff got married to the defendant she did find a number of cattle at the homestead and he confirmed that another relative, one Dominic, owned part of the beasts at defendant's home. He strongly disputed that the plaintiff ever worked or did some form of business travelling to the Republic of South Africa. He confirmed that he did purchase a cow from defendant for a wedding as alleged by the defendant and that when he went to purchase the beast, they told him they had three animals. He could not remember when plaintiff left defendant's homestead but remembered that it was soon after his (Lakha Ncube's) daughter's wedding (the one he bought a beast for). This supports defendant's contention that she left soon after the wedding. I will presume that this wedding should have been around 2008.

Defendant's mother Ellen Sibanda, told the court that before she got married to her current husband, and before she left Lupane for Plumtree, she sold her bed, and bought 10 goats which she left in the custody of the defendant. The defendant has claimed that most of the goats in the kraal belong to his mother and that they (him and plaintiff) only had four goats, three of which they slaughtered, one of which was stolen.

I will now turn to deal with the probabilities of this case.

- 1) I have already found that the information given by the plaintiff is scant, it's a skeleton with no flesh, I do not believe that the plaintiff's evidence on its own makes a case for the relief it seeks.
- 2) I have already found that plaintiff's father did not take plaintiff's case any further, and if any, he dented it.
- 3) The veterinary officer's information does not assist the court in the resolution of the dispute for the following reasons:
  - a) The veterinary officer wrote a letter dated 11 June 2015 wherein he stated as follows:  
"following findings about Mcazimulo Ndlovu's cattle to date, I further enquired to establish the records back dating to 2009 which was not successful."

This court needs to establish the number of cattle that were owned by the parties when they separated in 2008. The veterinary officer admittedly cannot assist in that regard. The letter

goes on to say the records as at February 2012 show 35 herd of cattle. Previous books could not be located.

His opinion that:

“This office is convinced that before the (February 2012) the respondent did own a number of cattle which cannot be ascertained given the circumstances” is a hollow assertion with no probative value at all. This court cannot attach weight to an opinion given by a person who is not aware of the factual position at the given time.

Now the defendant’s case does create problems for the plaintiff in the following respects:

- 1) From the evidence of the three defence witnesses this court cannot dismiss the probability that indeed, when plaintiff got married to the defendant, she did find him with cattle, some of which he had inherited and some of which he cared for on behalf of relatives. That evidence stands out in the court record and remains uncontroverted in any way.
- 2) The defendant’s assertions have not been proven to be false and they also stand out in the court record against a weak case from the plaintiff.

Plaintiff has not given us precise numbers on the acquired cattle, goats and donkeys, on the other hand, the defendant gives a clear account of how the animals are allocated and that he did inherit a certain number. From the look of things plaintiff lived with defendant and left him to be in charge of all of these animals. She did not take an active role so that she could vouch ostensibly for their ownership. On the other hand, the same defendant, that the plaintiff seems to have left to manage the livestock own his own, is coming up with information which the plaintiff has not managed to counter in the court record. It would have been a lot easier for the court, if plaintiff had given a detailed account on the animals she is claiming an account convincing enough for the court to believe that she was indeed involved in their acquisition and that she did acquire some. In that case, the court would be saddled with a strong case from the plaintiff *vis a vis* a strong defence. The court would then seek to weave through the evidence and see what it could make out of it. As matters stand, the plaintiff’s own case is weak in my view, standing on its own, even before one juxtaposes it with the defence case, and yet the defence case is detailed

and more sound. Plaintiff's counsel submitted that his court should find that defendant lied in his plea on the number of cattle and the existence of a stock card prior to 2010, however, this does not take the plaintiff's case any further for the plaintiff herself has failed in my view to discharge the onus on her on proof of acquisition and the quantity. I also do not find that fact material to the two issues I should determine.

I cannot in the circumstances find that the plaintiff has proven her case on a balance of probabilities. Neither can this court dismiss the defence case for the simple reason that it comes from a defendant. A plaintiff must lay a proper foundation for her case and in doing so she must bring evidence that suffices in discharging the onus that she has, that is, to prove what she alleges.

On the other hand, all a defendant needs to do is to come up with a version which upon being tested against the plaintiff's case cannot be found to be without substance. I cannot find that the version by the defence in this matter is without substance.

I am therefore unable to find that the parties did acquire, 35 cattle, 35 goats and 7 donkeys in this matter. What I can find is that the parties owned three herd of cattle as admitted by the defendant and that one was sold leaving two. It is these two oxen which are available to be shared between the two. I cannot find that 35 herd of cattle belonged to the two as there is no such proof. There is a danger that the court will appropriate cattle belonging to other people or to the defendant alone and share them between two people which will result in an injustice.

I will also find that there were no goats as defendant admits only four of which three were slaughtered and one was stolen. (I say so because plaintiff herself could only vouch for one goat).

I will also find that the parties owned one donkey the brownish one that plaintiff says she bought from Ziqalabeni. Plaintiff failed to discharge the onus on her in this matter in my view. Refer to the case of *Nyamukusa v Maswera* HH 35/16 wherein UCHENA J dismissed a claim for livestock wherein the plaintiff claiming entitlement on the basis of a tacit universal partnership, could not give concrete evidence on the acquisition of the cattle and the goats.

I will thus make the following order.

- 1) Each party is awarded 1 ox.

- 2) Each party is awarded half the value of one donkey.
- 3) Each party bears its own costs.

*Dube-Tachiona & Tsvangirai*, plaintiff's legal practitioners  
*Maronedze, Mukuku & Partners*, defendant's legal practitioners