

DISTRIBUTABLE (12)

Judgment No S.C. 17\2002
Civil Appeal No 327\2000

NELSON PADZINORIMA v CHARLES NZUMA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & SANDURA JA
HARARE JANUARY 31 & APRIL 19, 2002

L. Mazonde, for the appellant

I.E.G. Musimbe, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's action in which he claimed thirteen head of cattle or their value of \$65 000.00, and the sum of \$5 000.00.

The background facts are as follows. At the relevant time the appellant and the respondent were good friends and lived in Chivhu district. The appellant was a transport operator and the respondent was a farmer.

In October 1998 they concluded an agreement in terms of which the appellant was allowed to keep his cattle on the respondent's farm free of charge. The cattle were to be looked after by the appellant's herdsman.

Shortly thereafter, the appellant took eighteen head of cattle to the respondent's farm and left them there under the care of his herdsman. The cattle were the Brahman type, and were a mixture of steers and heifers.

Subsequently, according to the appellant, the respondent approached him with the request that he be permitted to sell the appellant's cattle and later replace them with what he called Shona cattle, which were supposed to be cheaper than the appellant's cattle. As the appellant had bought the cattle not for resale, but for some traditional purposes concerning the appeasement of evil spirits at some time in the future, it did not matter whether the cattle later returned to him were of the same breed as those he had handed over to the respondent. Accordingly, he authorised the respondent to sell his cattle and replace them later. However, this was denied by the respondent.

According to the appellant, the reason why the respondent made the request was that the appellant's cattle, being Brahman, fetched higher prices at cattle sales than the respondent's own cattle, which were the Shona type.

In addition, the appellant alleged that the respondent had, on two occasions, borrowed sums totalling \$5 000.00 which he had not paid back. Again, this was denied by the respondent who said he never borrowed any money from the appellant.

Subsequently, two of the appellant's cattle died, and the appellant later discovered that only three of his cattle remained on the respondent's farm. He took away one of these and at a later stage took the remaining two to another farm.

Thereafter, when the appellant asked the respondent to replace the balance of his cattle, i.e. 13 of them, believing that they had been sold by the respondent as previously agreed, the respondent refused to do so and denied having sold the cattle. Instead, he alleged that the appellant had removed all his cattle from the farm. He also denied having borrowed the sum of \$5 000.00.

The appellant, therefore, instituted a civil action in the High Court claiming thirteen head of cattle or their value of \$65 000. 00 and the sum of \$5 000.00.

The learned judge who heard the matter was satisfied that the evidence led at the trial established that the respondent had sold the thirteen head of cattle belonging to the appellant. However, as the learned judge was of the view that the appellant had not led evidence as to the value of the cheaper Shona cattle which he was prepared to accept in return for the original Brahman cattle, he dismissed the appellant's claim with costs. However, in his judgment, he overlooked the claim in respect of the sum of \$5 000.00 and did not deal with it at all.

Aggrieved by the learned judge's decision, the appellant appealed to this Court.

At the pre-trial conference, the parties agreed that the issues to be determined at the trial were the following:

- “(i) Whether or not Plaintiff repossessed his 13 head of cattle?
- (ii) What is the value of the said cattle?
- (iii) Is the Defendant liable to pay \$5 000.00 in respect of a loan advanced to him by Plaintiff?”

The parties also agreed that the *onus* in respect of the first issue was on the respondent, and that the *onus* on the second and third issues rested on the appellant.

After hearing the parties and their witnesses, the trial judge concluded, correctly in my view, that the appellant’s thirteen head of cattle had been sold by the respondent, and that the respondent had lied when he alleged that the cattle had been repossessed by the appellant.

However, with regard to the loan of \$5 000.00 the learned judge made no decision. Nevertheless, in his evidence the appellant said that in January 1999 the respondent, who had about two thousand chickens on his farm, approached him and indicated that he wanted to buy chicken feed but was short of money. Accordingly, he asked for a loan of \$5 000.00. As the relationship between the parties was then very friendly, the appellant first lent him \$2 000.00 and about a week later advanced the balance of \$3 000.00.

Whilst it is true that in his evidence-in-chief the respondent denied having borrowed the money, it is significant that the appellant was not cross-examined on this issue.

In the circumstances, bearing in mind the trial court's favourable conclusion in respect of the appellant's credibility on the issue concerning the thirteen head of cattle, and the respondent's failure to cross-examine the appellant on the loan, I am satisfied that on a balance of probability the appellant proved that he had advanced the money to the respondent. The claim was a very small one, and it is unlikely that the appellant made up such a story.

I now come to the real issue in this appeal, which is whether the learned judge was correct in concluding that the appellant had not led evidence on the value of the cheaper Shona cattle which he was prepared to accept in return for the Brahman cattle.

It seems to me that by concentrating on the alternative claim of \$65 000.00 in respect of which he encountered some difficulty in determining whether that sum represented the value of thirteen Shona cattle, the learned judge overlooked the appellant's main claim and fell into error. As stated earlier in this judgment, the appellant claimed thirteen head of cattle or \$65 000.00.

In his evidence he made it clear that he was prepared to accept thirteen Shona cattle or thirteen cattle of any breed. He stated that although he preferred receiving thirteen head of cattle, he was prepared to accept the sum of \$65 000.00

instead, although he doubted whether he could purchase thirteen head of cattle with that sum.

Having concluded that the respondent sold the appellant's thirteen head of cattle and had not replaced them, the learned judge should have ordered the respondent to deliver to the appellant thirteen head of cattle of any breed or their value.

In my view, the fact that the learned judge found it difficult to assess the appellant's loss in money should not have been the end of the matter. He knew that the appellant had lost thirteen head of Shona cattle, and should, therefore, have done his best to estimate their value on the basis of the evidence before him.

Commenting on a similar issue in *Esso Standard SA (Pty) Ltd v Katz*

1981 (1) SA 964 (A) at 970D-G DIEMONT JA said:-

“Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial and is a problem which has engaged the attention of the Courts from time to time. Thus in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 STRATFORD J is reported as stating:

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best

evidence available, the court must use it and arrive at a conclusion based upon it.”

I am in complete agreement with the comments made by the learned Judge of Appeal. Accordingly I shall apply those principles in determining the present issue. With those principles in mind, I now wish to examine the evidence led by the appellant on the *quantum* of his loss.

As already stated, the parties agreed that the respondent could sell the appellant's cattle and replace them with Shona cattle. Since the respondent sold thirteen of the appellant's cattle and did not replace them with thirteen Shona cattle as agreed, the appellant's loss in terms of the agreement was thirteen Shona cattle. That is why the appellant claimed thirteen head of cattle from the respondent.

Alternatively, the appellant claimed the sum of \$65 000.00, being the estimated value of the thirteen Shona cattle. The question is whether the appellant led the best evidence available on the value of thirteen Shona cattle.

In his evidence the appellant stated that he bought the Brahman cattle in 1998 at a price of \$3 000 each, and that he considered that price to have been a special one. He added that at the time of the trial (i.e. October 2000) the prices of Brahman cattle were in the region of \$6 000 to \$7 000 each because they had escalated since 1998. In the circumstances, he estimated the price of Shona cattle to be \$5 000 each, as the assumption was that Shona cattle were cheaper than Brahman cattle.

It is significant that the appellant's evidence on the prices of cattle, whether Brahman or Shona, was not challenged by the respondent in cross-examination. His evidence on the purchase price of the Brahman cattle bought by him in 1998 and his assertion that he bought them at a special price were not challenged under cross-examination. The same applies to the estimated price of the Shona cattle. It was not challenged.

That being the case, the respondent must have accepted the prices as reasonable. He and the appellant had attended the local cattle sales on a number of occasions and must have been familiar with the prices of cattle, both Brahman and Shona, as the appellant asserted.

In the circumstances, I am satisfied that the appellant led the best evidence available on the prices of Shona cattle. That evidence was not challenged in cross-examination, nor was it challenged by the respondent when he gave his evidence.

It follows that the learned judge should have given judgment in favour of the appellant.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted:

- “1. The defendant shall deliver to the plaintiff thirteen head of cattle of any breed, failing which he shall pay to the plaintiff the sum of \$65 000.00

together with interest at the prescribed rate from the date of service of the summons to the date of payment in full.

2. The defendant shall pay to the plaintiff the sum of \$5 000.00, together with interest at the prescribed rate from the date of service of the summons to the date of payment in full.
3. The costs of suit shall be borne by the defendant.”

CHIDYAUSIKU CJ: I agree

EBRAHIM JA: I agree

Honey & Blanckenberg, appellant's legal practitioners

Musimbe & Associates, respondent's legal practitioners