

IN THE HIGH COURT OF LESOTHO

In the matter of :

RAPOU RAPOU

Plaintiff

v

NTSOKOANE NTSOKOANE

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 3rd day of June, 1991

The plaintiff claims against the defendant a sum of M18,000 being damages alleged to have arisen from an incident which occurred at Likomiking in Thaba Tseka district where it is claimed that the defendant's herdboys acting during the course of their employment assaulted the plaintiff and broke his left leg.

The plaintiff's counsel sought to persuade the Court to the view that the defendant's plea is a bare denial. The defendant's counsel denies that the defendant's plea is a bare denial and buttresses his contention by submitting that there wouldn't seem to be anything more to the point than for the defendant denying that the herdboys were his. Reacting to this contention Mr. Ramodibedi for the plaintiff submitted that indeed the defendant was required to do more than contenting himself with saying the herdboys were not his. The learned counsel submitted that it was incumbent upon the defendant to state what facts he relied on - such as for instance say perhaps to whom the herdboys belonged.

It should not be overlooked that the defendant is a

/chief

chief who in that capacity has greater influence than the plaintiff who is a peasant.

In his evidence the plaintiff stated that before the incident the defendant had issued threats against him pressurising him to remove his livestock from the cattle post where the plaintiff suffered the assaults.

The plaintiff stated that on the day of the incident, i.e. 19 March 1986, while he was at his cattle post the herdboys of the defendant arrived. The plaintiff's dogs attacked these herdboys before the plaintiff saw them come. When he went to check he saw that these herdboys were throwing stones at the dogs. No sooner had the plaintiff gone to check what was going on than he discovered that the defendant's herdboys had made a determined set-to at him pelting him with stones. It was during this process that he says he sustained an injury of the left leg just above the foot joint.

The plaintiff told the Court that when he issued summons on 14 May 1987 his leg was still in plaster of Paris cast.

The plaintiff stated that he is 64 years old. His main occupation before he sustained the injury that kept him in hospital for four months was herding after his stock. He spent a further two months attending check-ups at Queen Elizabeth II Hospital in Maseru. He stated that he also did some ploughing. But because of his condition which rendered it impossible to live as he used to live and do things that he used to do prior to the condition he is now in he had to employ a herdboy whom he pays M400 per year.

He stated that his life expectancy is 94 years meaning that he hopes to remain alive 30 more years from the date of the incident. His counsel made merit of the fact that despite this position the plaintiff is claiming only 20 years' support amounting to M8000-00.

/For

For pain and suffering the plaintiff claims M10,000-00. With regard to the amenities of life that the plaintiff stated he has had to forego he mentioned horseriding which causes him cramps since he sustained the injury.

The plaintiff handed in evidence Exhibit "A" being a medical form showing that he suffered compound multiple fracture inflicted with a blunt instrument on the left leg. The medical form also shows that the degree of disability would be difficult to assess as of 27th November 1986 (as reflected on the date stamp) because that would depend on the healing capacity of the patient.

It is significant that even as late as 23rd November 1989 according to the medical form filled at St James Mission Hospital at Mantsonyane the doctor who examined the plaintiff showed that the plaintiff "has undergone intensive treatment at several hospitals and almost lost part of his leg" and with regard to the disability indicated/^{it is}filled in the form "still difficulties in walking, has to use stick".

The plaintiff also relied in evidence on Exhibit "B" which is a charge sheet in respect of a charge preferred against the defendant's herdboys in the Subordinate Court for the assault meted out by them on him. The herdboys named in the charge sheet with the exception of accused 5 were convicted and sentenced to pay each a fine of M100 or serve a six months' prison term.

The plaintiff contends that the defendant paid the fines imposed on these herdboys and relies on this factor as a further support/^{for the fact}that the herdboys belonged to the defendant. The defendant denies that he paid any fines for the herdboys.

Mr. Ramodibedi observed that the plaintiff had been taxed for not including in his pleadings that he had been

/pressurised

pressurised by the defendant to remove his stock from the cattle post in question. He submitted that pleadings are not meant to include matters which can properly be canvassed in evidence. He accordingly submitted that the Court should take cognizance of the fact that the motive for the assault was that the plaintiff should remove his cattle from that cattle post. He further sought to highlight the fact that under cross-examination it was elicited from the defendant that

"the owner would protect what he regards as his grazing pasture by expelling whomsoever he regards as a competitor for grazing rights in the area".

Indeed the plaintiff called two witnesses to substantiate the fact that those who attacked him were the defendant's herdboys.

The other witness for the plaintiff was a police sergeant Sekantšî who was a policeman at Marakabei police post. He testified under oath that he met the defendant several times during one of which the defendant told him that the herdboys who had attacked the plaintiff were his. This is the witness who testified that the defendant paid for all of these herdboys.

Mr. Ramodibedi invited the Court to take special note of the fact that the defendant admitted that he was on friendly terms with Sgt. Sekantšî thus no reason could be advanced why despite these two being on friendly terms the defendant could be heard to say the other had falsely implicated him on this issue.

Mr. Ramodibedi submitted that the probability is that P.W.3 was telling the truth, the denial of which by the defendant should be rejected as false.

It was contended for the plaintiff that the defendant was evasive. It was pointed out that at one

/stage

stage he sought to shield his untruths behind some deliberate pretence that he did not know the plaintiff. Mr. Ramodibedi invited the court to take account of the fact that the defendant had initially said he did not know the plaintiff yet when pressed on to doff his mask of pretence he owned up that he was not telling the truth when he said he did not know the plaintiff. It was further stressed that the defendant conceded in several other instances that he had not told his lawyer what appeared to be new brands of invention of the evidence that he proffered as he went along.

Mr. Nathane for the defendant submitted that the herdboys were not the defendant's and that even assuming that they were, it was denied that they embarked on the conduct complained of during the course and within the scope of their employment.

He submitted that plaintiff bears the onus to show on a balance of probabilities that the herdboys were the defendant's and that in assaulting the plaintiff they were acting within the scope and course of their employment.

Mr. Nathane pointed out that the plaintiff conceded that he did not know the earmarks of the defendant's stock even though he claimed it is the herdboys employed to look after that stock by the defendant that he claimed assaulted him.

On this score Mr. Nathane submitted that the plaintiff merely presumed that these herdboys belonged to defendant for the plaintiff had failed to show what earmarks belonging to the defendant these animals under the care of the herdboys bore.

He also stated that the plaintiff conceded that the area where the defendant's stock are said to have been grazing is not used for stock solely belonging to the defendant.

/He

He attacked P.W.2's evidence on the ground that even though P.W.2 claimed that the herdboys belonged to the defendant he was not in a position to differentiate between animals belonging to the defendant and those belonging to some other people else which nonetheless were herded by these herdboys.

But the primary reason for ear-marking stock is not so much for the determination of whose herdboys look after whose stock as for identifying to whom such stock belongs in the event of competing claims for ownership of such stock between the parties.

It has not been suggested nor am I aware that anybody's claim to such and such stock is adversely affected.

It would be applying fallacious logic if when two people dispute over whether a third party has been employed by me as a driver for my vehicle that because the disputant asserting that the third party is my driver has not said what the registration number of the vehicle is then it cannot be true that the third party is my driver. Likewise a herdboy need not provide proof of his knowledge of the party's earmarks to establish his knowledge which is independent of such earmarks that the stock belongs to that party. It is important to note that this Court has herded after stock and at no stage did it have to identify anybody's herdboy by the earmarks of the stock belonging to that herdboy's Master.

Mr. Nathane also sought to cast an aura of suspicion around P.W.3's story that the defendant could at all have been seen paying the fines in the public prosecutor's office instead of in the Clerk of Court's office.

He also sought to water down the observation that the defendant did not gainsay the allegation that when approached by P.W.3 during investigations the defendant

/did

did not disown these herdboys by pointing out to the court that it should be borne in mind that the defendant is a chief and has many subjects including among them some of the herdboys' parents and that in saying the herdboys were his he ^{didn't} mean that they were his herdboys but that they were his in the sense of being his subjects. This may be a good argument but it distinctly lacked support in evidence where it should have been canvassed fully.

I have no doubt that the plaintiff who struck me as truthful as against the defendant who was prevaricating and down right bent on telling me untruths has made out his case on a balance of probabilities.

The defendant is held liable to him in my judgment.

Even though it was contended by the plaintiff's counsel that it was not gainsaid that the plaintiff pays his employee who carries out duties which were the plaintiff's lot before the assault I feel that M400 is rather far on the high side. I would reduce the amount claimed under that head to M240 per annum for ten years. For pain and suffering then I would award M7,000 damages. In respect of future damages based on the plaintiff's life expectancy the amount awarded is M2,400-00 plus costs and interest calculable from date of taxation of costs.

-
J U D G E
3rd June, 1991

For Plaintiff: Mr. Ramodibedi
For Defendant : Mr. Mathane