

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 179/2015

In the matter between:

SAUL MBAISA

PLAINTIFF

and

**THE MINISTER OF SAFETY AND SECURITY
TJINGA'S GOLD FARMING**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral Citation: *Mbaisa vs Minister of Safety and Security* (I 179/2015) [2019] NAHCMD 240 (16 July 2019)

CORAM: UNENGU, AJ

Heard: 07 March 2019

Delivered: 16 July 2019

Flynote: Civil – Practice – Plaintiff instituting action for return of cattle alleging belonging to him – Plaintiff to prove that such cattle belong to him – Mere say so not sufficient to satisfy proof thereof.

Summary: The parties to this matter have been involved in litigation way back as 2009 in a stock theft trial in the Gobabis Magistrate's court. The second defendant laid criminal charges of stock theft with the first defendant against the plaintiff and removed 9 heads of cattle from Farm AKN in the Aminuis district, claiming that they were stolen by the plaintiff from the second defendant's farm. These cattle, forming the primary dispute parties then and now, were then given to the second defendant as the police did not have a place to keep the cattle. Trial in the criminal case proceeded to which the plaintiff was eventually acquitted of the charges against him on 01 March 2013. The State appealed the decision and was struck from the roll on 30 June 2017. However, the court never made an order with respect to the 9 heads of cattle and the parties never raised the issue with the court as well. The plaintiff has now instituted proceedings against the defendants, seeking the return or the amount equivalent of the 9 heads of cattle.

Held – the plaintiff failed to discharge the burden of proof resting on him on a balance of probabilities. With respect to the 9 heads of cattle, he has not produced documentary evidence suggesting that the cattle belong to him. What the plaintiff has done is merely proving ownership by his say so and alluding to the position that the magistrate court found him not guilty for the charges of stock theft as raised against him by the defendants.

Held – the document the defendants rely on proving the registered brand on the 9 cattle is a document issued seemingly by Meatco and not the offices of the Veterinary Services as the Act requires in s 18 of the Stock Brands Act. I also do not accept the evidence of witnesses of the second defendant to identify cattle on the colour of the hairs of its skin. In particular, if such evidence is coming from a person who does not work with the herd daily – a herd of 500 cattle.

Held further – With respect to the defendants, their testimonies are infested with inadmissible hearsay stories from people who did not come to testify to support the evidence from the brothers, and they also contradicted each other with regard to the supplier of the so-called special pliers they use on the farm to mark the cattle with.

Held further – I must point out that the failure of the plaintiff to prove his claim against the second defendant should not be regarded as and is not a ground for the defendants to regard themselves as the owners of the 9 cattle, the subject matter of this case. The cattle were merely placed in their care by the Gobabis Police. In this matter with the evidence at hand, ownership of the 9 cattle involved has not been resolved.

ORDER

- a) The plaintiff's claim is dismissed.
- b) Each party to pay its own costs.

RULING

UNENGU, AJ

Introduction

[1] Before me is a matter finding its origins way back as 2009 when the parties were involved in a stock theft trial in the Gobabis Magistrate's court. The second defendant laid criminal charges of stock theft with the first defendant against the plaintiff and removed 9 heads of cattle from Farm AKN in the Aminuis district, claiming that they were stolen by the plaintiff from the second defendant's farm. These cattle were then given to the second defendant as the police did not have a place to keep the cattle. Trial in the criminal case proceeded to which the plaintiff was eventually acquitted of the charges against him on 01 March 2013. The State appealed the decision but was struck

from the roll on 30 June 2017. However, the court never made an order with respect to the 9 heads of cattle and the parties never raised the issue with the court as well.

[2] Primarily, after a period of 6 years, the plaintiff decided to institute legal proceedings against the first and second defendant with the following demands sought:

- a. The return of the cattle and their offsprings;
ALTERNATIVELY
- b. Payment in the amount of N\$226 000.00;
- c. Interest a tempore morae at the rate of 20% per annum;
- d. Costs of suit.

[3] From this point hereon, it must be noted that the plaintiff is in-person and in the result, had no legal assistance in drafting his papers and making preparations for this matter to reach its conclusion. This is a rather unfortunate scenario as the plaintiff failed or omitted to file any discovery of documents he intended using during the trial.

[4] Even during trial, it was evident that the plaintiff was not well versed with the rules of court and required guidance to which this court could only provide to an extent. The evidence that came out during trial was of a limited nature from the plaintiff's side and relied heavily on his heads of argument. Be that as it may, this court will now proceed to deal with the evidence adduced during trial.

Plaintiff's case

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[5] The plaintiff testified in person and had no other witnesses to take the stand. It should be noted that the plaintiff filed no witness statement and the court allowed the plaintiff to state his case *viva voce*. In his testimony, the plaintiff stood firm on his heads of arguments filed for submissions and held the strong view that the 9 cattle that were confiscated belonged to him.

[6] The plaintiff further suggested to court that it must approach the DNA test with great course¹ that the DNA test has to be considered inadmissible based on the procedural process. The plaintiff further highlighted this point by stating that:

- a. The defendants said that they had sent blood sample to South Africa for testing but the expert office received hair sample.
- b. The plaintiff was not present when the sample was drawn which make him unaware if the sample sent was from the disputed cattle.
- c. The expert witness did not mention to the court how many years of experience he is having.
- d. The sample was received by the clerk at the expert's office but not the expert himself who opened the parcel that was received.
- e. The person who drawn hair from the cattle was not before court to testify on how she/he took the sample and how she/he packed the sample to see that the parcel was also not tempered with in the process.

[7] The plaintiff submitted further that the defendant has indeed failed and has also ignored obvious clues that there is no request made as an application in the criminal case against the plaintiff for a DNA test to be obtained/conducted on the 9 heads of cattle. The plaintiff further states that there is no order from the court which authorized for the DNA test to be conducted on the 9 heads of cattle, to which were also not under the protection of the Namibian Police or court of law. Further on this point, the plaintiff submitted that the court did not direct or instruct that the 9 heads of cattle be handed over to the defendant. The plaintiff is thus of the view that the 9 heads of cattle were with the rightful owner, being the plaintiff, before they were removed from him.

[8] The plaintiff further highlights the point that he won cases against the defendants, being the criminal case wherein he was found not guilty of stock theft and further appeal which was brought by the State against his acquittal.

¹ Presumably meant to say "caution" instead of "course".

[9] The plaintiff also submits that as a lay litigant, this court should overlook the rules which are designed to control the procedures of the court by assisting where it is possible – to ensure the fairness and expeditious resolution of the disputes in the interest of all litigants before the court. The plaintiff further submitted that he is entitled in law to any relief claimed by him against the defendant.

[10] To conclude, the plaintiff prays that the court considers all the factors surrounding the matter and accord the benefit of the doubt to the unrepresented plaintiff and grant the matter with costs.

Defendant's case

[11] The second defendant called four witnesses and their evidence is as follows.

Mr Boas Tjingaete

[12] Boas testified that on 08 January 2009 at about 18h30 he was with his brothers Eben, Arnold and Mclenn busy looking for their stolen cattle at their Farm Ada. They decided to visit the Agra auction pen in Gobabis.

[13] When they inspected the cattle kept at auction pen, they recognized one heifer that belonged to them by her breed being a Brahman – Simmentaler cross breed. They then informed Deputy Sergeant Shilongo of their discovery and then returned to the pen the next day as it was already late. Upon their return on 09 January 2009 at about 08h00, they proceeded to again inspect the cattle. They then recognized three more cattle by way of their earmarks. He testified that the cattle also had a brand mark on it that he did not recognize. They were later told that the brand mark belonged to the plaintiff. He testified that he was able to identify the cattle by their breed, being a cross breed between Brahman and Simmentaler, as the second defendant bought their mothers from their brother, Fanuel Tjingaete. The earmarks of their cattle were not tampered with nor were the tattoo marks in their ears tampered with. The tattoo marks

in the ears of the cattle and the ear mark corresponded with the second defendant's mark. This helped them to identify the cattle.

[14] They then recovered the four cattle which belonged to them from the auction pen. Thereafter they drove to Corridor no.1 where the plaintiff resided. On their way to Mr. Utapi Katjingsiua's farm, he called Mr. Kutaa Katuuu who was on his way to the auction pen. When he arrived at the auction pen, he asked Mr Katuuu where he got the cattle which he brought to the auction.

[15] They then went to Mr. Utapi Katjingsiua. While they were driving to Mr. Utapi Katjingsiua's farm, Boas saw cattle grazing in the field next to the road. Among the cattle grazing, he recognized four of their cattle. He was a passenger in the police vehicle at the time and his brothers were travelling behind him in their vehicle. He told the police officer that he sees their cattle and they then stopped the vehicle next to the road. When his brothers climbed out of their vehicle, they also immediately said that the four cattle were cattle which belonged to the second defendant. The cattle had the earmark with which they mark all of their cattle and also had a tattoo mark inside their ears. They then chased the cattle to the homestead of Mr. Utapi Katjingsiua. When they arrived at the homestead of Mr. Utapi Katjingsiua, they chased the cattle into the pen and found the younger brother of Mr. Utapi Katjingsiua and two of his workers.

[16] They then asked Mr. Utapi Katjingsiua's workers about the four cattle which belonged to the second defendant and further asked Mr. Utapi Katjingsiua's younger brother why he was at the farm, because they knew that he did not stay there.

[17] The workers of Mr. Utapi Katjingsiua thereafter took them into the field where the skin of the slaughtered heifer was hidden. When they came back to the house, they also showed them in the yard of the farmhouse where the skin of the slaughtered bull was burnt. While they were still at the farm, Mr. Utapi Katjingsiua arrived. They questioned him about the cattle. They also asked him why he sold and slaughtered some of those cattle if they belonged to the plaintiff. Whilst on Mr. Utapi Katjingsiua's farm, he offered to pay for the second defendant's cattle which they found on his farm, but asked that the

second defendant must then not involve the police in the matter. They were not willing to agree to this.

[18] In total, during or about November 2008, Boas testified that the plaintiff allegedly stole 57 heads of cattle from the second defendant, of which 28 were weanlings.

[19] They laid criminal charges of stock theft against the plaintiff. Only 9 of the 57 cattle were returned to the second defendant by the Namibian Police in January 2009, all of which were weaners. At the time when the cattle were returned to the second defendant, the Namibian Police branded each of the cattle with their brand mark on the neck of the cattle. The police gave the cattle to the second defendant and said that they do not have a place to keep them.

[20] Boas further went to testify that on 01 March 2013, the plaintiff was found not guilty of the criminal charges of stock theft. However, at no point in time did the magistrate who presided over the criminal proceedings find that the plaintiff was the owner of the cattle which were returned to the second defendant. I must add to this that the magistrate did also not order the cattle to be the property of the second defendant. The police gave the cattle to the defendants to keep and look after them, not as owners of the cattle. He further testified that the plaintiff thereafter instituted proceedings against the second defendant and during October 2015, after an agreement was reached between the parties to this matter, the second defendant made arrangements with a private veterinarian from Gobabis to obtain DNA monsters from the defendants' cattle and from the cattle returned to the second defendant by the Namibian Police to determine whether their DNA matched.

[21] On November 2015, Boas together with his brother, Mclenn, the legal representative for the second defendant, the legal representative of the first defendant and two Namibia Police officials met at Farm Ada in order for the DNA monsters to be obtained by the veterinarian, Dr Nel. He further testified that the erstwhile legal representative of the plaintiff and the plaintiff himself were invited to attend the said meeting on Farm Ada, however, they failed to attend.

[22] He went on further and testified that in their presence and in the presence of the Namibian Police officials, who identified the cattle returned to the second defendant by way of the POL brand marks on the neck of the cattle, Dr Nel took DNA monsters from the cattle returned to the second defendant by the Namibian Police and various other cattle from the second defendant's herd of cattle, which the second defendant identified could possibly be their mothers. The DNA samples consisted of blood and hair.

[23] Boas continued testifying that the DNA monsters were sealed in their presence and sent to the Unistel Medical Laboratory for analysis. Upon completion of the analysis, it was found that the DNA of 3 cattle returned to the second defendant matched the DNA of cattle identified by the second defendant as being their mothers.

[24] He further testified that with reference to exhibit "B",² at least certain of the confiscated cattle on Farm Ada are registered in the name of the second defendant. He proceeded in stating that animals with tag numbers 1399 7374, 3197 9818, 3198 2390, 3198 2549 and 3293 4614 are registered in his name on Farm Ada. He went on stating that in view of the results of the test being done, number 3293 4614 corresponded with number 3197 9818, number 3198 2549 with 3198 2390 and 1399 7374 with tag BLOU 3. He explained that the animal with tag BLOU 3 might have not been registered due to an oversight.

[25] With the above, Boas states that it is therefore evident that the cattle which the plaintiff claims should be returned to him were born from certain cows which belonged to the second defendant and are still in the possession of the second defendant.

[26] He continued to state that the cattle which were placed in the care of the second defendant by the Namibian Police and of which the DNA monsters were taken which matched those of the cows were never sold by the second defendant to the plaintiff. He further highlights this point by stating that the second defendant never sold any cattle to the plaintiff.

² A printout list from the Meatco Board of Namibia.

[27] Addressing the condition of the 9 cattle placed in the possession of the second defendant by the Namibian Police, he states that whilst the cattle were in the possession of the plaintiff and prior to the cattle being given to the second defendant in January 2009, the plaintiff severely mistreated the cattle. This resulted in the cattle being in a very poor condition when they were given to the second defendant.

[28] Boas continued to state that as a result of the poor condition of the cattle and the fact that they were weanlings at the time they were not pregnant when they were given to the second defendant. He further stated that it was also not possible for the second defendant to have a bull mounting the cows for a considerable period of time due to the fact that the poor condition of the cows first had to improve. Therefore no calves were born of the cattle given to the second defendant.

Mr Eben Tjingaete

[29] Eben testified that on Thursday, 11 December 2008 at about 11h00 whilst he was at work in Windhoek, he received information from his younger brother Mclenn that their worker at Farm Ada, namely Mathew Mandjoro, phoned him and informed him that he wanted to go home to the Kavango as his mother was sick and he wanted to take her to a witch doctor.

[30] When he received the information, he phoned Mathew and asked him if he could wait until 16 December 2008, when he will be at the farm before he leaves so they could count the cattle together just to avoid blaming one another if any cattle are missing. Mathew promised him that everything was okay and that all the cattle were present at the farm.

[31] On Saturday, 13 December 2008 at about 07h00, his brother, Frans Murangi called him while he (Eben) was still in Windhoek and asked him if it was possible to get the pipe wrench which he borrowed from him as he wanted to use it. He told Frans to go to the farm and get it from Mathew.

[32] At about 08h15, Frans called him again and informed him that there was nobody at the farm and he instructed Frans to go and search for Mathew at the neighbouring Farm Okaruako. After a while, Frans called him and thereafter, he called Mclenn and told him to go to the farm as Mathew was not at the farm.

[33] On Tuesday 16 December 2008, the witness went to the farm and stayed there until Thursday. He then left for Rietfontein on the Thursday and returned to the farm on Sunday. They closed all the gates on the farm and on Monday, he counted all the cattle. According to his count, there were 94 heads of cattle missing.

[34] When Eben noticed that the cattle were missing, he tried to contact Mathew, but his phone was off. He then contacted his two other brothers, Arnold and Boas, who were still in Windhoek, to go and get a print out from MTC of Mathew phone records. Eben testified further that whilst at MTC, his brothers found out that Mathew had a new cellphone number.

[35] After getting the print out from MTC, they managed to find out that Mathew was in Rehoboth. On 29 December 2008, they drove to Rehoboth and when they arrived there, they went to the police station where a police officer phoned Mathew, who told him that he was at Okahandja Park in Windhoek. They then drove to Windhoek but could not find Mathew. On Tuesday 30 December 2009, early in the morning, they again left for Rehoboth to trace Mathew. They found Mathew in a bar and they informed him that they just wanted the missing cattle.

[36] Further, with the leave of the court, Eben supplemented his witness statement with the following testimony:

- a. He only has a trailer measuring 3 meters by 1.5 meters and a trailer of that size will never carry 9 cattle. The cattle were never transported by him to Farm Ada. Instead, they were transported in the little truck of Mrs Mungunda, who Eben paid N\$700 to transport the cattle.

- b. The plaintiff was not in Gobabis at the time the cattle were transported. The first time he met the plaintiff was at the border post with Botswana at 11h00. By that time, the cattle were already gone.
- c. The cattle that they got at the auction pen had their earmarks, a tattoo mark and a brand mark which was freshly made.
- d. In cross examination, he informed the court that he has special pliers that creates the earmark, and that he knows the earmark does not belong to him alone and that there is the possibility that someone else might have a similar earmark.
- e. He further testified that he recognized the cattle by their breed being a Brahman – Simmentaler breed, and that he understands that he is not the only person with that type of breed.

Mr Arnold Tjingaete

[37] Arnold testified that during the afternoon of Monday, 29 December 2008, he and his brothers went to Rehoboth to trace Mathew, the farm worker, as they found out that he was in Rehoboth. When they arrived in Rehoboth they went to the police station and a police officer phoned Mathew. Mathew told him that he was in Okahandja Park in Windhoek.

[38] He further testified that when they heard that they drove back to Windhoek and went to Okahandja Park, but did not find Mathew there. On 30 December 2008, they drove back to Rehoboth and went to the police station and phoned Mathew's cellphone, but someone else answered the phone and directed them to where Mathew was staying. When they arrived at the house, a person told them that he exchanged phones with Mathew and that Mathew was in town.

[39] They were taken to a bar where Mathew was. Arnold further testified that he entered the bar with Eben and found Mathew sitting at the counter. When Mathew saw them, he said "please do not beat me or kill me I will tell you where your cattle are".

[40] They then took Mathew to the police station and the police officer told them to take Mathew to Du Plessis Police station where the cattle were stolen. When they arrived in Windhoek, Mathew phoned the plaintiff and asked him about the monies which the plaintiff apparently was supposed to deposit into his bank account.

[41] From there, Arnold testified that they drove to Du Plessis Police station and opened a case of stock theft and handed Mathew over to the police. From thereon, they took Mathew with them to help trace the cattle. They visited the Agra auction pen in Gobabis on the Thursday, 08 January 2009 and recognized one of the cattle and informed the police officer who accompanied them.

[42] On Friday, 09 January 2009 at about 08h00, the police officer, Deputy Sergeant Shilongo, came to the Agra auction pen and they brought Mathew along. Mathew pointed out three other cattle in the same pen which belonged to the defendants. They thereafter went to the plaintiff's farm at Corridor no.1.

[43] Arnold further testified that from the plaintiff's farm, they went to Mr. Katjingisua's farm. Arnold testified that he was driving in a vehicle with his brothers and Boas was driving with the police in the vehicle in front of them. The police vehicle stopped next to the road and he noticed cattle grazing in the field next to the road. He testified that he immediately recognized four of the cattle. They then chased them back to Mr. Katjingisua's pen near his farmhouse.

[44] Arnold testified that when they arrived at the pen, a small boy recognized the cattle. Whilst at Mr. Katjingisua's farm, they spoke to two of his workers. The workers thereafter took them into the field and showed them where the skin of a slaughtered heifer was hidden and also where the skin of a slaughtered bull was burnt in the yard of the farmhouse.

[45] During cross examination, Arnold indicated that he identified the cattle at the auction pen by way of the earmark and breed. He testified that the earmark is a special

mark made by his brother, Eben, and that they only had one set of pliers to make the earmarks. He further testified that the cattle are a Brahman – Simmentaler breed.

Dr Munro Pieter Marx

[46] The defendant further called Dr. Marx who testified as an expert witness. He testified that he has the requisite expertise to assist the court to determine the maternal connection between DNA samples provided to him and that in his expert opinion there is a maternal connection between:

- a. Dam 300741 (3197 9818) and calf 300690 (3293 4614)
- b. Dam 300713 (3198 2390) and calf 300691 (3198 2549)
- c. Dam 300696 (1399 7374) and calf 300694 (BLOU 3)

[47] The expert further went on to testify that all data was examined and validated by himself after which results were approved and signed. Further, the expert witness testified that he has no interest in this matter and the outcome thereof. He testified to the process that the laboratory has to follow in order to maintain their credibility as an institution which conducts DNA analysis. However, the physical analyses of the sample were conducted by other staff members of the laboratory, nor did he personally receive and opened the parcel which contained the sample.

Applicable law

[48] With the plaintiff indicating the 9 heads of cattle in actual fact belonged to him, this brings about the action of *rei vindicatio*. Schimming-Chase AJ said the following in *Tjamuaha and another v Master of the High Court and others*:³

‘The *rei vindicatio* is available to an owner for the recovery of his or her movable or immovable thing from whomsoever is in possession or has detention of the thing, irrespective of whether the possession or detention is *bona fide* or *mala fide*. The owner

³ 2016 (1) NR 186 (HC).

instituting the rei vindicatio must on the balance of probabilities prove that he/she is the owner of the thing, that the thing is still in existence and clearly identifiable, and that the defendant has possession or detention of the thing at that moment the action is instituted. It therefore requires the plaintiff to establish their ownership in the goods.'

[49] Badenhorst et al in *Silberberg and Schoeman's Law of Property 5 ed* at pg. 241 make the following argument regarding the action of rei vindication as follows:

"An owner who institutes a rei vindicatio to recover his or her property is required to allege and prove:

- (a) that he or she is the owner of the thing;
- (b) that the thing was in the possession of the defendant at the commencement of the action; and
- (c) that the thing which is vindicated is still in existence and clearly identifiable."

[50] In *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*, Van der Westhuizen AJ said:⁴

'The plaintiff's claim is — in the first place — based upon the rei vindicatio, which is the applicable action available to an owner, who has been deprived of his or her property against his or her will and who wishes to recover the property from any person who retain possession of it without the owner's consent. . . The plaintiff in order to succeed is required to allege and prove:

- (a) that he is the owner of the thing or items in issue; and
- (b) that the items were in the possession of the defendant at the commencement of the action. . . .'

[51] In *Chetty v Naidoo*, Jansen JA said:⁵

'It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner,

⁴ 1999 (2) SA 986 (T) at 996.

⁵ 1974 (3) SA 13 (A) at 20B – D.

unless he is vested with some right enforceable against the owner (e g, a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res — the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at 382E, 383).'

Conclusion

[52] It is rather unfortunate that the plaintiff had no legal representation in this matter till it became ripe for trial and eventually came for submissions before judgment. The plaintiff would have benefitted greatly with the services of a legal practitioner, especially in a case like the present one where the onus of proof on a balance of probabilities required in this matter requires proper argument and evidentiary proof, as in all other civil cases that come before court.

[53] I cannot agree more with Prinsloo J when she made the following remarks in *Garoos vs Beukes* regarding the position of lay litigants before this court:⁶

'The argument that lay litigants are not legally trained only obtains leniency from this court to a certain point, but this court, as any other court, must be guided by the rules of court and law and cannot by its own undertaking, do and allow whatever it pleases without checks and balances. A court does not make law by itself but merely implements it as the law provides.'

[54] Furthermore, with respect to the issue surrounding the cattle in question, what renders the determination of this issue is the fact that even though the plaintiff claims that the 9 cattle belong to him, he has not produced documentary evidence suggesting that the cattle belong to him. What the plaintiff has done is merely proving ownership by his say so and alluding to the position that the magistrate's court found him not guilty for

⁶ (HC-MD-CIV-ACT-OTH-2018/00470) [2019] NAHCMD 63 (22 March 2019).

the charges of stock theft as raised against him by the defendants. Ueitele J in *Tjipepa v Minister of Safety and Security and others* made the following remarks:⁷

'Secondly the 'say so' of the plaintiff or any other person for that matter would never be proof of the fact that the cattle belonged to the plaintiff. The fact that the plaintiff was issued with a brand mark could also not dispel the suspicion that the cattle may have been stolen. The only valid prove of ownership of the cattle is a herd statement drawn from the veterinary offices in the district concerned.'

[55] Furthermore, looking s 18 of the Stock Brands Act 24 of 1995, it provides as follows:

'In any legal proceedings a certificate purporting to have been issued by the Registrar regarding the registration or the transfer or cancellation of the registration of a brand in terms of this Act, or the ownership of a registered brand, shall upon production in such proceedings be prima facie proof of the facts certified therein.'

[56] The defendants place reliance on the remarks of Ueitele J as cited above together with the s 18 of the Stock Brands Act to prove ownership of the 9 cattle held in their possession, however this reliance is misplaced. Section 18 requires the certificate to be issued by the Registrar and the Stock Brands Act defines the Registrar in s 3 to be as follows:

'The Director: Veterinary Services in the Ministry shall be the Registrar of Brands, and shall, subject to the control of the Minister, exercise or perform the powers, duties and functions conferred upon or assigned to the Registrar by or under this Act.'

[57] The document the defendants rely on proving the registered brand on the 9 cattle is a document issued seemingly by Meatco and not the offices of the Veterinary Services as the Act requires in s 18. I also do not accept the evidence of witnesses of the second defendant to identify cattle on the colour of the hairs of their skin. In particular, if such evidence is coming from persons who do not work with the herd daily – a herd of 500 cattle.

⁷ 2015 (4) NR 1133 (HC).

[58] Furthermore, this court also takes issue with the fact that the expert witness called by the defendants to explain the DNA test results to this court was not the individual that initially took the samples from the 9 cattle in dispute and samples from the defendants herd. This court would have been in a better position to obtain explanations of the procedures taken and the formula used to extract the samples as opposed to an expert's opinion of the procedure and common practice of an institution. In *Wright v Wright*, the Supreme Court of Appeal of South Africa in that respect stated the following at para 14:⁸

'Mr Theron (assisted by Ms Schmidt) prepared his report and reached his conclusion solely on the basis of the books of account and other source documentation provided by his client, the appellant. A glaring omission from the appellant's papers is a confirmatory affidavit from his spouse who, as stated, wrote up the books of account of the business. The absence of such an affidavit confirming the correctness of the information furnished to Mr Theron to enable him to prepare his report is fatal. Without that affidavit Mr Theron's report constitutes inadmissible hearsay.' (Own emphasis)

[59] Consequently, this court is placed in an awkward position to make a determination between the parties wherein the evidence adduced have been far from solving the dispute.

[60] On the position that the plaintiff refused to be present at the time when the samples were taken on the defendants' farm, knowing that the cattle were mixed with those of the defendants, indicating that it would be difficult for him to conclusively identify his alleged cattle, seemingly suggests that the plaintiff does not have a clear and conclusive manner of identifying the cattle and the fact that he indicated during his testimony that he sells cows and not buys, suggests that the plaintiff didn't have the proper means of identifying the 9 cattle at all. Therefore, the plaintiff failed to discharge the burden of proof resting on him on a balance of probabilities.

[61] With respect to the defendants, their testimonies are infested with inadmissible hearsay stories from people who did not come to testify to support the evidence from

⁸ 2015 (1) SA 262.

the brothers, and they also contradicted each other with regard to the supplier of the so-called special pliers they use on the farm to mark the cattle with.

[62] I must point out that the failure of the plaintiff to prove his claim against the second defendant should not be regarded as and is not a ground for the defendants to claim the ownership of the 9 cattle, the subject matter of this case. The cattle were merely placed in their care by the Gobabis Police. In this matter with the evidence at hand, ownership of the 9 cattle involved has not been resolved.

Costs

[63] I have not been persuaded by any of the litigants in the matter to be awarded costs. That being the case, an order for each party to pay own costs is in my view the appropriate order to make in the circumstances.

[64] In the result, the following order is made:

- a. The plaintiff's claim is dismissed.
- b. Each party to pay its own costs.

E P UNENGU

Acting Judge

APPEARANCES:

For the Plaintiff:

In-person

For the Second Defendant:

F Pretorius
Francois Erasmus