

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

*(Appellant)*

Provincial Division).  
Provinciale Afdeling).

Appeal in Civil Case.  
Appèl in Siviele Saak.

*John Marking*

Appellant,

versus

*Moses Tshabangu*

Respondent.

Appellant's Attorney  
Prokureur vir Appellant

*K. Meltz*

Respondent's Attorney

Prokureur vir Respondent

*J. J. J. J.*

Appellant's Advocate

Advokaat vir Appellant

*H. Bolman*

Respondent's Advocate

Advokaat vir Respondent

*Mrs L. v.d. Heever*

Set down for hearing on

Op die rol geplaas vir verhoor op

*Friday, 2<sup>nd</sup> Nov, 1956.*

*N/A. Ct.*

*35, 11, 11*

*(9.45 - 12.45)*  
*(2.15 - 4.7)*

C.A.V.

POSTEA 30/11/56

The appeal is accordingly dismissed with costs.

*J. J. J. J.*

J U D G M E N T .

During 1947 when this action arose Defendant, Moses Tshabangu, and his wife were on friendly terms with George and Ellen Sibanyane and lived a short distance from them at Evaton.

One afternoon Ellen received a message to the effect that her husband who was working in Johannesburg, had died. She handed her bedroom key to Defendant's wife with the request that she prepare the room to receive the corpse, and left the same afternoon by bus. On her arrival at Johannesburg she found her husband alive and well, so she remained with him overnight and returned home early the next morning.

Upon her return she was met by Defendant's wife who reported that the room had been broken into. She entered her room and found that her box containing her money and other valuables, was missing. A search revealed the missing box in the veld nearby, but her money (£28.) and Title Deed of the property were not in the box.

Defendant is alleged to have known of the existence of the box because Ellen states he came into the house on an occasion when the box was open.

The matter was duly reported to the Police but nothing came of the investigation apart from the fact that defendant was subsequently arrested and discharged.

Sometime after the burglary a native approached John Mekaqa, Plaintiff with an offer of land for sale. An agreement was reached (verbally) £215. in cash was paid over, in the presence of one Samuel Lekhoaba, Plaintiff's nephew, a receipt obtained and a Title Deed handed over to Plaintiff. This Title Deed on closer examination and by comparison with a certified copy thereof,

/reveals...

reveals that it is the very one that had been stolen from Sibanyane the ~~name~~ SIBANYANE having been erased and KUMALO substituted therefor.

Plaintiff saw the man on two occasions, when he first introduced himself in Plaintiff's shop, as George Kumalo, and again the following morning when they spent several hours together until 10 a.m. inspecting the property and closing the deal.

"Kumalo" stated after receiving the money, that he was in a hurry but would return the following day to attend on the Native Commissioner as requested by Plaintiff. He was however not seen again and Plaintiff realising later that he had been defrauded, went to the Police and to an Attorney..

Subsequently defendant was arrested but at an identification parade attended by Samuel (in the absence of Plaintiff who was away at the time) he was not identified. Upon Plaintiff's return from the Free State he reported to the Police. Defendant was asked to attend another parade but he refused to do so.

Plaintiff says that some time after this he was accompanying one Mulo and they arrived at a certain house where he found defendant living. The latter asked him in an angry tone "What do you want". He thereupon left but enquired from Mulo who the occupant was and was told MOSES TSHABANGU (defendant). Defendant denied Plaintiff had called in Mulo's company. The question arises why was Mulo not called by either party. Plaintiff's reason is that Mulo is defendant's friend and does not wish to give evidence against him. The fact that Mulo would not be a favourable witness to Plaintiff is borne out by what transpired in the Supreme Court (See page 46 of the Supreme Court proceedings). But the Court is led to ask why did defendant, not call Mulo a man who if he followed his behaviour in the Supreme Court would testify against Plaintiff and remove one of the main props from his case.

All of Plaintiff's witnesses say that defendant wore a beard. These statements were not challenged under cross-examination although an ideal opportunity presented itself to ask the witnesses in turn "Describe defendant's beard, was it pointed, long scraggy or what did it look like?".

/Sgt. Jacob's...

Sgt. Jacob's evidence on the point is not in consistent as he only assumed duty in 1948 at Evaton.

Ellen Sibanyane said Defendant left the neighbourhood about a month after the burglary. Again she was not challenged although defendant's evidence was that he stayed on for about 9 months and remained on good terms with the Sibanyanes.

Defendant's Attorney in his address to Court submitted that there was no connection between the burglary at Sibanyane's and the sale of property to Plaintiff. With this submission the Court cannot agree.

Let us examine the facts again. Firstly the Tshabangus and the Sibanyanes are very friendly, their wives especially so. So much so that when Ellen Sibanyane received the false report about her husband she entrusted the key of her room to defendant's wife whom she also requested to prepare the room for the "corpse". Defendant's wife did not prepare the room, the reason given being that she was told to wait until a message was sent to her by Ellen. But if she was to wait then the Court sees no reason why the key should have been given to her. The Messenger could have brought the key. The Court is satisfied that when Ellen left she was in a hurry to catch the last bus and she very definitely wanted the room prepared.

Secondly there is the unchallenged statement by Ellen that both Defendant and his wife knew that there had been a sale of cattle. Ellen says defendant knew of the existence of the box. Defendant denies this but his subsequent behaviour when she reported that it was missing is unusual. It follows almost naturally if someone reports an article lost, that an interested friend would ask for a description thereof as well (in the case of a receptacle) as details of the contents. So then if defendant did not know the article at all he would have asked what it looked like. He was sufficiently concerned about it to go with Ellen to the Police Station, and yet on his own admission he expressed no concern whatever as to the contents of the box.

/Defendant...

Defendant had every opportunity of entering the room while Ellen was away, and of faking a burglary after having removed the box. The message concerning George Sibanyane was obviously designed for the sole purpose of removing Ellen temporarily from the scene.

By a seemingly remarkable coincidence Plaintiff recognised in defendant (whom he did not know before the event) the man who sold to him the property and handed him the stolen Title Deed. Now Plaintiff had ample opportunity of studying the features of defendant, as he was with him not only on the first occasion in the Evening but for several hours the following morning. He was denied the opportunity of attending an identification parade because of defendant's refusal to submit to a second parade.

Not much weight can be attached to Samuel's evidence of identification. He was unable positively to identify defendant a short while after the event, so it is difficult to appreciate how he can be so sure seven years afterwards.

Moses Tshabangu (Defendant) did not impress the Court as a truthful witness. On a number of occasions he contradicted himself. For example, right at the commencement of his examination in chief he says "I am not known by the name of George Kumalo or any other name apart from Moses Tshabangu. My other name is Philemon Tshabangu". Notice also the following contradiction. During cross-examination in the application before this Court on 27th February, 1952, defendant said:

"I know him, Charlie Dube. He brought me up and that is how I know him - he brought me up from a little boy", and then a little further on "By bringing up by Charlie Dube I mean that I came to his kraal while still a little boy." Under cross-examination in the present hearing, however, he says: My father and mother brought me up. Charlie Dube never brought me up. I remember telling the Magistrate that Charlie Dube brought me up. I mean that I was a little boy and he was grown up and used to send me on messages."

See also Defendant's evidence as recorded on page 30 (of the typed record of this case) last paragraph and on page 31 dealing with the wedding where he alleges that he met Plaintiff. This portion of evidence is full of inconsistencies and contradictions..

The Court is led to wonder why defendant took such pains to prove that he had met Plaintiff at a wedding. Such proof was not necessary to establish his case, and Plaintiff himself denies ever having been to such a wedding and meeting defendant there.

As to Plaintiff it must be borne in mind that he was defrauded of £215 and several criminal actions against theft, had resulted in the latter's acquittal as his guilt could not be established beyond reasonable doubt. It is natural that Plaintiff should add a bit here and there in an endeavour to strengthen his case. Any discrepancies in his evidence were not material and can be accounted for by the lapse of time since the cause of action arose, and by the resultant litigation. The identification parade took place within a year of the event, but it was only in April 1950 that Sgt., Jacobs arrested defendant. So it is possible that some action was taken by the police during 1948 and that Plaintiff did not accompany any police, least of all Sgt. Jacobs, at that time.

After seven years there is plenty of scope or confusion in the mind of the uneducated native. On the other hand there can be no such excuse for the discrepancies in defendant's evidence mentioned above, as the facts concerning his name and his relationship to Dube are within his personal knowledge.

In all the circumstances the Court is satisfied that the balance of probabilities favours the Plaintiff, and accordingly finds for Plaintiff as prayed, with costs.

/(SGD). D.A. SCHNETLER.

(Sgd) D.A. SCHNETLER.

10th January, 1955.

ASSISTANT NATIVE COMMISSIONER.

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JUDGMENT DELIVERED ON 28.1.55.